

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

Labor Standards Bureau

**Office of Hearings and Adjudication
COMPENSATION REVIEW BOARD**



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CRB No. 05-014

HERMAN McMILLIAN,

Claimant–Petitioner

v.

A. S. JOHNSON COMPANY AND LIBERTY MUTUAL INSURANCE COMPANY,

Employer/Carrier–Respondent

Appeal from an Order of
Administrative Law Judge Fred D. Carney, Jr.
OHA/AHD No. 90-264A; OWC No. 189956

Joan A. Harvill, Esquire, for the Petitioner

Curtis B. Hane, Esquire, for the Respondent

Before JEFFREY P. RUSSELL, LINDA F. JORY and SHARMAN J. MONROE, *Administrative Appeals Judges*.

JEFFREY P. RUSSELL, *Administrative Appeals Judge*, for the Compensation Review Panel:

DECISION AND ORDER

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board pursuant to D.C. Official Code §§ 32-1521.01 and 32-1522 (2004), 7 DCMR § 230, and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005).¹

¹ Pursuant to Administrative Policy Issuance No. 05-01, dated February 5, 2005, the Director of the Department of Employment Services realigned the Office of Hearings and Adjudication to include, *inter alia*, establishment of the Compensation Review Board (CRB) in implementation of the District of Columbia Fiscal Year 2005 Budget Support Act of 2004, Title J, the District of Columbia Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, *codified at* D.C. Official Code § 32-1521.01. In accordance with the Director's Directive, the CRB replaces the Office of the Director in providing administrative appellate review and disposition of workers' and disability compensation claims arising under the District of Columbia Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §§ 32-1501 to 32-1545 (2005), and the District of Columbia Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Code Ann. §§ 1-623.1 to 1-643.7 (2005), including

BACKGROUND

This appeal follows the issuance of an Order from the former Office of Hearings and Adjudication (OHA), currently the Administrative Hearings Division (AHD) of OHA, in the District of Columbia Department of Employment Services (DOES). In that Order, which was filed on October 21, 2004, the Administrative Law Judge (ALJ) denied Petitioner's requests to reopen the record to receive additional evidence alleged to support his claim for relief, which claim for relief had been denied in a Compensation Order issued November 4, 1997. Petitioner now seeks review of the Order denying the request to re-open the record. That Order resulted from an Order for Limited Remand issued by the Director of DOES (the Director) on April 26, 2000. That Order for Limited Remand resulted from Petitioner's earlier appeal of the Compensation Order, in which appeal Petitioner had requested that the Director (1) reverse the denial of a Motion to Re-open the Record that Petitioner had filed in connection with the request to submit (a) a report from an MRI study that had been performed post-hearing on August 4, 1995, (b) a medical report from Dr. Sneziak asserting that Petitioner has a 17.5% permanent partial impairment to his neck, and (c) a Maryland Workers' Compensation Commission order including a finding that Petitioner has sustained a 22.5% permanent partial impairment to his neck, all authored while the Compensation Order was pending issuance, and (2) remand the matter to OHA/AHD to receive both the three listed items plus a report of an x-ray performed September 1998 while the appeal of the Compensation Order was pending. In response to these requests, the Director, in the Order for Limited Remand, remanded the matter to OHA/AHD "for the sole purpose of resolving the issues presently raised by Claimant in his motions. On remand, the Hearing Examiner [subsequently reclassified as an ALJ] should decide whether this additional evidence is material, and whether there were reasonable grounds for the failure to adduce such evidence at the initial hearing", and cited *Georgetown University v. Department of Employment Services*, 659 A.2d 832 (D.C. 1995) in support of that instruction.

As grounds for this appeal, Petitioner alleges as error that the ALJ did not hold a hearing to and consider the additional evidence, and that the additional evidence ought to be admitted because both the MRI and the x-ray were performed post-hearing, that they had not been performed prior to the formal hearing because Petitioner's initial treating physician failed to order them and Petitioner was not able to direct his own medical care due to his being incarcerated for an unspecified time.

Respondent opposes this appeal, arguing that the ALJ properly denied the requests to re-open the record, because it contends that there has been no showing of any "unusual circumstance" that prevented the requested evidence from being introduced at the formal hearing. Respondent's argument relied upon *Charles P. Young Co. v. District of Columbia Department of Employment Services*, 681 A.2d 451 (D.C. 1996).

responsibility for administrative appeals filed prior to October 1, 2004, the effective date of the District of Columbia Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004.

ANALYSIS

As an initial matter, the scope of review by the Compensation Review Board (CRB) and this Review Panel, as established by the Act and as contained in the governing regulations, is limited to making a determination as to whether the factual findings of the order under review are based upon substantial evidence in the record, and whether the legal conclusions drawn from those facts are in accordance with applicable law. *See* D.C. Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §§32-1501 to 32-1545 (2005), at §32-1521.01(d)(2)(A). "Substantial evidence," as defined by the District of Columbia Court of Appeals, is such evidence as a reasonable person might accept to support a particular conclusion. *Marriott Int'l. v. District of Columbia Dep't. of Employment Servs.*, 834 A.2d 882 (D.C. 2003). Consistent with this standard of review, the CRB and this Review Panel are constrained to uphold an order that is supported by substantial evidence, even if there is also contained within the record under review substantial evidence to support a contrary ruling, and even where the reviewing authority might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

In this case, however, we detect error in the procedural resolution of the first appeal and limited remand by the Director to the ALJ, which error requires that we revisit the initial Order of Limited Remand.

The Act provides as follows in connection with requests to adduce additional evidence:

A case [that has been appealed from OHA/AHD] may be remanded for appropriate action. If any party shall apply to the Mayor for leave to adduce additional evidence and shall show to the satisfaction of the Mayor that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the initial hearing before the Mayor, the Mayor may order such additional evidence be taken and to be made part of the record. The Mayor may modify his findings with respect to questions of fact, if supported by substantial evidence on the record considered as a whole. The Mayor may modify or set aside his original order by reason of such new findings of fact.

D.C. Code § 32-1522 (b)(2) (formerly D.C. Code § 36-322 (b)(2)).

In *King v. District of Columbia Department of Employment Services*, 560 A.2d 1067 (D.C. 1989), this provision was interpreted to require that, when a motion is filed with the Director to adduce additional evidence while a Compensation Order is on appeal, "the Director was obligated by statute to consider whether [the] proffered evidence was material and whether 'there were reasonable grounds for the failure to adduce such evidence in the initial hearing....' D.C. Code § 36-322 (b) (2)." *King, supra*, at 1067. In that case, the Court went on to rule that, despite the failure of the Director to undertake the task of such consideration as to materiality and the reasons for the initial failure to produce the evidence, that failure was harmless error, because "we are fully satisfied that even if the Director had added the [new evidence] to the record and *remanded the augmented to the hearing examiner* the ultimate finding ... would have been the same." *King, supra*, at 1073 – 1074 (emphasis added).

This passage is instructive for the fact that, while the language of the statute invokes “the Mayor” in six instances, in the first four instances “the Mayor” refers to the Director (and, now, to the CRB), while in the final two instances, “the Mayor” refers to the hearing examiner (now, the ALJ). In other words, where a motion to adduce additional evidence is made while a Compensation Order is under appeal, the determination as to materiality and reasonable grounds (including the “unusual circumstances” analysis required under *Young, supra*) are the province of the Director (and now, the CRB). This division of responsibility is also evident in *Bennett v. District of Columbia Department of Employment Services*, 629 A.2d 28 (D.C. 1993), where the Court wrote “Once Bennett made this request [to adduce additional evidence while the Compensation Order was on appeal], ‘the Director was *obligated* by statute to consider, whether this proffered evidence was material and whether there were reasonable grounds for the failure to adduce such evidence in the initial hearing.’ *King* [citation omitted] (internal quotations omitted)(emphasis added).” *Bennett, supra*, at 30 (emphasis herein in original quotation in *Bennett, supra*), as well as in *Georgetown University, supra*, where the Court wrote “this procedure is clarified in the regulations, which indicate that the Director (not the Mayor) is responsible for deciding whether, upon application, to remand the case, and that the remand sends the case, once again, to a ‘Hearing or Attorney Examiner.’ *See*, 7 DCMR §§ 230.5 - .7.” *Georgetown University, supra*, at 834 (parentheses and quotes in original).

We therefore determine that it is presently the CRB’s obligation to make a determination as to materiality of the MRI report and the x-ray evidence²; if the request for leave to adduce this additional evidence is granted, the matter is to be remanded to the ALJ to receive the evidence, and to consider whether such evidence warrants a change in the original findings of fact and conclusions of law, considering the record as a whole.

In the initial Compensation Order, following the formal hearing conducted on March 28, 1995, the ALJ denied the claim for additional temporary total disability benefits and medical care, beyond that which had been provided by Respondent voluntarily, because the ALJ found that Petitioner’s work related injury had resolved without residual injury or impairment no later than March 15, 1988.

Petitioner seeks to adduce the following allegedly newly discovered documents: (a) a report from an MRI study that had been performed post-hearing on August 4, 1995, (b) a medical report from Dr. Sneziak asserting that Petitioner has a 17.5% permanent partial impairment to his neck, (c) a Maryland Workers’ Compensation Commission (MWCC) order including a finding that Petitioner has sustained a 22.5% permanent partial impairment to his neck, all authored while the Compensation Order was pending issuance, and (d) a report of an x-ray performed September 1998 while the appeal of the Compensation Order was pending.

² We note that the MRI evidence and the x-ray evidence are both before us, in that the x-ray evidence was the subject of the ALJ’s order denying the Motion to Re-Open the Record, relating to the MRI evidence, filed with the ALJ while the matter was pending without the issuance of a Compensation Order. That denial, being interlocutory, was not appealable until the issuance of the Compensation Order. Petitioner did appeal that denial in the prior appeal, as well as file the new motion with the Director relating to the x-ray evidence. We also point out that the ALJ erroneously determined that only the x-ray evidence was before him on remand. The remand order referred to “the motions” of the Petitioner. The motion filed with the Director requested leave to adduce both the MRI evidence and the x-ray evidence.

As an initial matter, item (c), the MWCC order, is not probative of or material to any issue before this agency. It sheds no light on Petitioner's medical condition or history beyond appearing to establish that some other adjudicatory body in a foreign jurisdiction reached a conclusion, based upon unknown evidence presented by unknown persons for reasons about which we can only speculate, that Petitioner has the claimed disability. While an award from such a foreign jurisdiction may become relevant in some future aspect of this case, it is of no value in determining whether Petitioner sustained an injury to his neck while employed by Respondent which resolved in March 1988.

Regarding the report of Dr. Sneziak, the August 4, 1995 MRI, taken approximately 5 months following the formal hearing and seven years following the work injury, and purporting to show a disc bulge and other abnormalities, and the x-ray report from 1998, more than three years post-hearing and 11 years post-injury, may or may not be material, depending upon the medical significance of these findings. Unfortunately, we have been provided with no additional medical opinion or interpretive information that would permit us to reach any sort of informed conclusion as to whether these documents are indeed relevant or material to the case. It is not possible to determine, by reference to the reports themselves, whether they even constitute evidence of the condition of Petitioner's neck at the time of the formal hearing, or represent evidence of a change in conditions arising subsequent thereto, either by normal aging, subsequent trauma, or some combination of these possibilities. In the absence of narrative interpretive reports describing how such findings could be relevant to this case, Petitioner has not met his burden of establishing materiality.

Further, while it is true that these documents post-date the hearing, and in that sense obviously could not have been presented at the formal hearing, the reasons for their ultimately coming into existence are nowhere to be found in Petitioner's motions. That is, while Petitioner asserts that the unusual circumstance of his being incarcerated effected his ability to obtain either x-rays or MRIs, the fact is that from the motion and from the contents of the report of the x-rays, it appears that they were indeed obtained while he was incarcerated, rendering problematic an argument that that particular circumstance had any bearing on this case. Similarly, there is nothing explaining to us how it is that Petitioner overcame these generalized "unusual circumstances", that is, not being referred by his treating physician for such studies, by August 1995.

While we recognize that in *King, supra*, the Court made a generalized statement to the effect that it is "obvious" that reasonable grounds existed for failure to produce an operative report at the formal hearing because the surgery had not been performed yet, we do not take that language as *carte blanche* for parties in this forum to continue to seek additional medical evidence, either by diagnostic study or seeking additional written reports, after the hearing, with the expectation that if something arguably helpful to their case is created or discovered, that the case will be reconsidered in light of the new material. No specific explanation has been proffered by Petitioner concerning what unusual circumstance caused the inability of Petitioner to obtain the specific medical studies now sought to be introduced, or how those circumstances changed such that these particular studies subsequently were performed.

For these reasons, we conclude that Petitioner has met neither his burden of establishing unusual circumstances preventing him from obtaining an MRI, a neck x-ray, or a permanency evaluation

prior to the formal hearing, nor his burden of establishing that these newly obtained studies and reports have the potential to materially alter the findings of fact and legal conclusions contained in the Compensation Order.

CONCLUSION

Petitioner has not established that the additional evidence sought to be introduced in these proceedings is material, nor has Petitioner established any particular unusual circumstance that prevented obtaining such evidence prior to the formal hearing.

ORDER

The Motion to Re-open the Record to Adduce Additional Evidence is DENIED.

FOR THE COMPENSATION REVIEW BOARD

JEFFREY. P. RUSSELL
Administrative Appeals Judge

June 16, 2005

DATE