

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 (Dir. Dkt.) No. 2-04

LIGIA M. MENDEZ,

Claimant–Petitioner,

v.

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,

Employer/Carrier–Respondent.

Appeal from a Compensation Order of
Administrative Law Judge Fred D. Carney, Jr.
OHA/AHD No. PBL 02-024, DCP No. LTBOEDU001551

David A. Colodny, Esquire, for the Petitioner

Ross Buchholz, 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

¹Pursuant 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 responsibility for administrative appeals filed prior to October 1, 2004, the effective date of the District of Columbia

BACKGROUND

This appeal follows the issuance of a Compensation Order from the Administrative Hearings Division (AHD) of the Office of Hearings and Adjudication (OHA) in the District of Columbia Department of Employment Services (DOES). In that Compensation Order, which was filed on June 26, 2003, was not appealed until a July 10, 2003 Motion for Reconsideration was granted, and an Order on Reconsideration issued, in which the determinations contained in the original Compensation Order were re-affirmed by the Administrative Law Judge (ALJ), said Order on Reconsideration being issued January 30, 2004. In that Compensation Order, the ALJ granted Petitioner's request for reimbursement for 24 hours in personal leave taken between February 2001 and March 2001, and for the provision of medical care obtained between September 2001 and October 2001. The ALJ denied the claim for payment of permanent partial disability benefits based upon a claimed wage loss from and after Petitioner's ceasing to be employed by Respondent commencing June 22, 2001. This denial was based upon two separate findings and conclusions: the first such basis was that the ALJ determined that Petitioner's back injury had resolved completely as of October 15, 2001; the second basis was that the ALJ determined that Petitioner had voluntarily retired from her position with Respondent on June 21, 2001, rendering any wage loss thereafter non-compensable.

As grounds for this appeal, Petitioner alleges as error that the finding that her back injury had resolved as of October 15, 2001 is unsupported by substantial evidence, and that the finding that Petitioner's retirement bars her receipt of disability benefits is contrary to the law, in that the decision to retire, she claims, was due to her inability to perform her pre-injury job because of the work injury. Petitioner also asserts that the ALJ's determination that Respondent had met its burden, under *Chase v. District of Columbia Department of Human Services*, ECAB No. 82-9 (1982), said burden being to demonstrate a change in conditions since the time that voluntary payment of benefits commenced, warranting a discontinuance of those benefits.

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 Compensation Order 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). *See also*, D.C. Official Code § 1-623.28(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. Dist. 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 a Compensation Order that is supported by substantial evidence, even if there is also contained within the record under review substantial evidence to support a contrary

Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004.

conclusion, and even where the reviewing authority might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

Turning to the case under review herein, Petitioner first asserts that the ALJ's determination that Respondent had met its burden, under *Chase, supra*, was erroneous, and was based upon insufficient evidence. We reject this contention, in that in reaching the conclusion that Respondent had met its burden, thereby shifting to Petitioner the burden of establishing entitlement to continuation of benefits, the ALJ relied upon and cited specifically the medical opinion of Respondent's independent medical evaluator (IME), Dr. Robert A. Smith, an orthopaedic surgeon, who examined Petitioner and authored a report on April 29, 2002, in which Dr. Smith concluded, *inter alia*, that Petitioner's work injury consisted of a "minor strain", which was no longer by that time contributing to her inability to perform her pre-injury job; Dr. Smith also opined that, while Petitioner could as of that time perform only modified work, her physical incapacity from performing her pre-injury job was due to pre-existing, unrelated diabetes. Compensation Order, pages 5 – 6; Employer's Exhibit (EE) 5. This evidence is sufficient to meet the *Chase* standard, and the ALJ's conclusion that Respondent had met its burden there under is therefore in accordance with the law.

Petitioner's second assertion is that the ALJ's decision is nonetheless erroneous, because the medical evidence does not support the ultimate conclusion reached by the ALJ to the effect that the work injury had in fact completely resolved. While we disagree that there is no evidence in the record upon which such a conclusion could be based, i.e., Dr. Smith's report could support such a finding, the ALJ, in weighing the competing medical evidence, did not cite or rely upon the opinions of Dr. Smith when considering the question of whether Petitioner was incapable of returning to her pre-injury employment due to the back injury. Rather, the ALJ considered the fact that Petitioner had returned to her pre-injury job and performed it without restriction from March 12, 2001 through June 21, 2001 (a period of approximately 13 weeks) missing approximately 3 work days (18 hours during one pay period, six hours in another) due to back pain during that time. (Compensation Order, page 3), and accepted the opinions of Dr. John Balbus, and Dr. Sylvia Cohen, occupational medicine specialists, as being the most persuasive medical opinions in evidence. Compensation Order, page 8 – 9. In accepting the opinions of Drs. Balbus and Cohen, the ALJ concluded that Petitioner's "difficulty walking and pain radiating down her legs is the result of her congenital diabetes [,] not her February 2001 work injury". Compensation Order, page 9.

We accept that this finding is supported by the evidence cited by the ALJ, namely, the reports of Drs. Balbus and Cohen. However, as pointed out by Petitioner in her brief in support of this appeal, such a conclusion does not end the inquiry, because, although Petitioner acknowledges that her diabetes, and her related problems with ambulation, are unrelated to her work injury (see, Brief in Support of Claimant's Petition for Review, footnote 6), she asserts that she continues to suffer from ongoing low back pain caused by the work injury, and that that ongoing low back pain contributes to her inability to perform her pre-injury job, which, as the ALJ found, involved "cleaning the cafeteria, doing paperwork, cooking, lifting crates of milk, oranges or juices and other items weighing up to 20 lbs." Compensation Order, page 2. Petitioner cites several reports from Dr. Balbus as supporting her argument that, despite suffering from unrelated diabetes and an attendant ambulatory problem, her back injury independently of the diabetes

prevents her from performing the requisite extended standing and lifting required to perform that job. The first citation is:

After examining you and reviewing your history, and neurology and neurological consults, we are unable to support your claim that your current difficulty walking is related to your workplace injury on the above date. *Your chronic back pain related to the injury is now likely to be at the state of maximum medical improvement after eight months and several courses of physical therapy. This means that further treatment is unlikely to lead to significant improvement. You will be entitled to a settlement from workers' compensation for your back injury on the basis of any permanent disability related to your back pain.*

Petitioner's Brief, page 13, quoting Claimant's Exhibit (CE) 6, a report from Dr. Balbus of October 18, 2001 (emphasis in Petitioner's Brief). The second citation is:

Ms. Mendez has experienced a work-related lower back injury, sustained during a fall on February 2, 2001, which resulted in chronic right lumbar pain. ... Her chronic lumbar pain is not related to her diabetic neuropathy.

CE 2, Report dated August 13, 2002 (emphasis removed). On that same date, Dr. Balbus authored a third report to which Petitioner directs our attention:

On the basis of the AMA Guides to the Evaluation of Permanent Impairment, 5th edition, Table 15-3 (p. 384), I place Ms. Mendez in the lumbar spine DRE category II, and assess her permanent whole body impairment at 8%. This is based on the MRI finding of derangement of the lumbar spine, physical examination evidence of lumbar muscle spasm, and worsened pain and disability from her injury associated with her underlying diabetic neuropathy that would not be present were it not for her workplace injury.

Petitioner's Brief, page 14, quoting CE 1, evaluation letter dated August 13, 2002.

This evidence makes apparent that the ALJ's finding that Petitioner's work injury had "resolved completely" by October 15, 2001 is unsupported *by the evidence that the ALJ accepted* as the "most cogent" medical evidence in the record, being accorded "great weight" as being the opinion of Petitioner's treating physician, and there being "no specific articulable reason found" for its rejection. Compensation Order, page 9. Indeed, the Compensation Order contains irreconcilably conflicting findings within two sentences of one another: "Therefore based on the weight of the credible evidence of record, it is ... determined that claimant reached maximum medical improvement of her low back injury as of October 18, 2001 with a *minimal remaining permanent impairment* resulting from the work injury. ... Based upon a review of the record evidence as a whole, I find and conclude claimant has *no remaining permanent impairment* due to her employment." Compensation Order, page 11, final sentence of the "Discussion" section and first sentence of the "Conclusions of Law" section (emphasis supplied).

While it may arguably have been proper for the ALJ to have concluded that despite Petitioner's continuing to suffer from residual pain and discomfort following the work injury, her return to employment for more than 13 weeks evidenced a capacity to perform her pre-injury job despite

the persistent injury,² that is not what he found. Rather, the ALJ's decision appears to be based upon a finding that her work injury had completely resolved, which finding is demonstrably and unequivocally at odds with the opinion of the physicians cited by the ALJ in support of his decision.³

Therefore, because the evidence upon which the ALJ relied in concluding that Petitioner had fully recovered from her work injury does not support such a conclusion, the Compensation Order's finding that Petitioner is not suffering from a work related injury must be reversed. However, because Petitioner did return to work for a substantial period of time following the work injury, and because the Compensation Order does not contain findings of fact concerning what limitations, if any, Petitioner's ongoing chronic low back pain impose upon her capacity to perform her pre-injury job, further findings of fact and conclusions of law addressing these issues are required.

In addition, Petitioner argues that the finding that by retiring, she has "forfeited" her entitlement disability compensation to which she would otherwise be entitled, is not in accordance with the law. Review of the Compensation Order sheds no light upon what the ALJ determined were the motivations or reasons for the decision by the Petitioner to retire. While it is true that in some cases, a decision to retire might sever any causal link between a claimed work injury and a wage loss, such is not always the case. See, *Balilies v. District of Columbia Dep't. of Employment Serv's.*, 728 A.2d 661 (1999), for a discussion of the requirements for finding that retirement decisions may sever a causal relationship between wage loss and work injury. There is insufficient evidence cited or discussion in the Compensation Order for us to determine whether the ALJ has found that the retirement decision constituted a voluntary decision by Petitioner to withdraw from employment generally, or merely represented a decision to retire from this particular position due to work-related incapacity. Accordingly, this matter must be remanded for further findings of fact and conclusions of law relating to the circumstances and reasons for the decision by Petitioner to retire, and application of those findings to the law, as set forth by the Court of Appeals in *Baliles, supra*.

Further, we note that Petitioner has appealed the failure of the ALJ to address the disability status of Petitioner from the date of the retirement on the last day of the school year until October 15, 2001. Depending upon the outcome of the consideration of the issues previously discussed concerning Petitioner's retirement, it may be necessary to determine whether Petitioner would be entitled to benefits during the time when schools were not in session. In that the record is silent as to what wages Petitioner may or may not have earned, in the absence of her retirement or her

² Even this finding would have been problematic. Despite Petitioner's apparent concession that her ambulatory problems are unrelated to the work injury, the quoted portion of CE 1 cited above appears by all reasonable inferences to suggest that the work injury aggravated the diabetic neuropathy and accordingly contributes to Petitioner's walking and standing difficulties.

³ Respondent argues that there is substantial evidence in the record to support the ALJ's decision, and therefore that decision must be affirmed. Employer's Memorandum of Points and Authorities In Opposition to Petition For Review (Respondent's Memorandum) page 6 – 8. While it is technically true that there is evidence cited by Respondent that is consistent with the ALJ's findings, the point is inapposite in this instance, in that the evidence cited by Respondent was not the evidence upon which the ALJ relied, and in the instance of the opinions of Dr. Balbus, Respondent's argument that there is sufficient evidence to rebut those opinions, such evidence was considered and rejected by the ALJ, who, as noted above, specifically embraced Dr. Balbus's opinions.

injury, following the last day of school until resumption of the following school year, further fact finding may be required to establish Petitioner's wage loss, if any, during this gap period.

Lastly, we note that the claim for relief as described in the Compensation Order was for permanent partial disability benefits. On appeal, however, Petitioner appears to be asserting that the claim was "really" for temporary total disability benefits. Through no fault of the ALJ, the denial of benefits in this case was based in part upon the application of the provision of the Act dealing with permanent partial disability benefits, not the separate and distinct provisions governing temporary total disability benefits. While it was not error for the ALJ to have analyzed the claim under the provision governing permanent partial disability, and despite the fact that Petitioner appears to have failed to request the appropriate benefit type below, since the matter is being remanded for other reasons, the claim shall hereafter be deemed to be for the temporary total disability benefits that Petitioner now seeks, rather than the permanent partial disability benefits that were originally sought. Similarly, we note that it is not clear whether Petitioner has sought, on appeal, an award of vocational rehabilitation, or has merely referred to the failure of Respondent to unilaterally institute a vocational rehabilitation process as an argumentative device supporting the claim for temporary total disability benefits. See, Brief in Support of Claimant's Petition for Review, page 22, Request for Relief, numbered paragraph 3. We remind Petitioner and her counsel that it is Petitioner's obligation to properly identify the specific relief that is sought rather than rely upon the ALJ or this body on appeal to make such claims on the party's behalf. Unless requested by Petitioner on remand, we deem there to be no such request for vocational rehabilitation pending at this time.

The ALJ is free to conduct such further evidentiary proceedings as he may deem necessary to carry out the additional consideration required under this order.

CONCLUSION

The findings that Petitioner is not disabled from and after June 22, 2001 contained in the Compensation Order of June 26, 2003 is not supported by substantial evidence in the record and must be reversed. Further, the Compensation Order is not in accordance with the law concerning the effect of Petitioner's entitlement to disability benefits upon retiring from employment.

ORDER

The findings that Petitioner is not disabled from and after June 22, 2001 contained in the Compensation Order of June 26, 2003 is not supported by substantial evidence in the record and is hereby reversed. The matter is REMANDED to AHD for further findings of fact and conclusions of law relating to (1) the nature and extent of Petitioner's disability, if any, and (2) the circumstances surrounding Petitioner's retirement, consistent with the foregoing Decision and Order.

FOR THE COMPENSATION REVIEW BOARD:

JEFFREY P. RUSSELL
Administrative Appeals Judge

November 30, 2005
DATE