

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. 07-002

MIGUEL VENTURA,

Claimant-Petitioner,

v.

MARYLAND APPLICATORS, INC. AND THE HARTFORD INSURANCE COMPANY,

Employer/Carrier-Respondent.

Appeal from a Compensation Order of
Administrative Law Judge Anand K. Verma
AHD No. 03-525A, OWC No. 554171

Richard S. Basile, Esquire, for the Petitioner

Francis S. Foley, 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

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 September 6, 2006, the Administrative Law Judge (ALJ) denied Petitioner's claim for temporary total disability benefits from and after September 14, 2001. Petitioner now seeks review of that Compensation Order.

As grounds for this appeal, Petitioner alleges as error that the decision of the ALJ was contrary to "the great weight of the evidence". Respondent opposes this appeal, asserting that the decision of the ALJ is supported by substantial evidence and is in accordance with the law.

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). "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 International v. District of Columbia Department of Employment Services*, 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 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 alleges that the "great weight of the evidence was in favor of the Claimant and was erroneously ignored by the judge" in the decision to deny the claimed benefits. Petitioner's "Memorandum of Points and Authorities", page 1.

As an initial matter, we note that the phraseology employed by Petitioner in his Memorandum of Points and Authorities misstates the standard of review that is to be employed by this Board. We are not charged with the responsibility, nor are we empowered by statute, to weigh the evidence, an undertaking that Petitioner's characterization of the ALJ's supposed error might suggest is our task. Rather, our role is to determine whether the ALJ made factual findings that are supported by substantial evidence, and if so, whether those factual findings support the ALJ's legal determination to deny benefits.

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.

The discussion of supposed error contained in the Memorandum of Points and Authorities appears to us to consist almost entirely of the argument that the ALJ accepted the opinion of an independent medical examiner (IME) in preference to the opinions of Petitioner's treating physicians, and that the ALJ was in error to do so because the evidence was insufficient to overcome the treating physician preference long in effect in this jurisdiction.

First, Petitioner fails to identify specific record evidence upon which he relies in support of the predicate to this argument, that being an expression of opinion by any or all of the three physicians asserting that Petitioner was medically unable to perform his pre-injury job during the period in question. In connection with this, Petitioner argues that it is sufficient to infer from the fact that some or all of the physicians he asserts as treating physicians provided medical care at various points within the claimed period of disability, that those physicians, or some of them held the opinion that Petitioner was unable to perform his pre-injury job². We respectfully disagree, and point out that, in cases dealing with the nature and extent of disability, claimants are not entitled to any presumptions, but rather must prove their entitlement by a preponderance of evidence. *Dunston v. District of Columbia Dep't of Employment Serv's*, 509 A.2d 109 (D.C. 1986). While the ALJ may well have made such an inference, particularly if the inference was supported by other credible evidence, he was not compelled to do so.

Related to this, Petitioner argues that the ALJ was bound to accept Petitioner's testimonial explanation for the gaps in medical treatment cited by the ALJ as evidence of capacity to work. However, the ALJ expressly found that Petitioner was not a credible witness, in part due to the lack of any objective medical evidence supporting his ongoing pain complaints. While Petitioner asserts that such objective evidence did in fact exist, Petitioner does not identify that evidence for us in this appeal. We note, however, that the ALJ accurately recounts the fact that one of Petitioner's treating physicians, Dr. Wasserman, reviewed the MRI studies and found them to be "inconclusive" with respect to Petitioner's claims of low back pain. Compensation Order, page 4.

Second, as Respondent correctly notes in its opposition to this appeal, an ALJ is free to accept such evidence as the ALJ finds compelling, and reject such evidence as the ALJ does not, with the caveat that a rejection of treating physician opinion must be accompanied by a discussion of the persuasive reasons for such rejection. *Short v. District of Columbia Dep't of Employment Serv's*, 723 A.2d 845 (D.C. 1998). In this case, to the extent that there is conflict between the views, directly stated or arrived at by inference, of the treating physicians upon which Petitioner relies, the ALJ has explained that he accepted the IME opinion because (1) it was congruent with the opinion of

² The only evidence that we have seen in the record that could be viewed as a treating physician's specific opinion on the subject of capacity to return to work during the period in question is discussed by the ALJ on page 5 of the Compensation Order. The ALJ recognized that Dr. Siekanowicz listed Petitioner as being "disabled" on a note of July 28, 2004, but determined that that note contained no specific physical restrictions on activity. Coupled with the other discussion in the Compensation Order, including the findings relating to Petitioner's credibility, the IME opinion of Dr. Levitt, the July 18, 2001 opinion of Dr. Wasserman, and the lack of objective tests demonstrating a debilitating condition, the ALJ's conclusion that this note is not controlling *vis a vis* Petitioner's capacity to return to work is supported by substantial evidence. See also, *Darden v. District of Columbia Dep't. of Employment Serv's.*, ___ A.2d ___, DCCA No. 05-AA-365, 2006 D.C. App. LEXIS 624 (2006), where the Court of Appeals wrote "Whether a claimant is disabled from doing any work is a legal or vocational issue, not a medical issue. *Cf. Frank v Barnhart*, 326 F.3d 618, 620 (5th Cir. 2003) (holding that under the Social Security disability laws, a determination that an applicant is disabled or unable to work is a legal conclusion)".

treating physician Dr. Wasserman as expressed by Dr. Wasserman in his report of July 18, 2001, (2) Petitioner's objective diagnostic studies failed to disclose an anatomical cause of his subjective ongoing complaints, (3) Petitioner's subjective ongoing complaints were questionable in light of a spotty treatment history and a general lack of testimonial credibility, and (4) the lack of specific opinion evidence from Petitioner's physicians concerning his physical capacity. On this record, the ALJ had adequate reason for accepting the IME opinion, and he provided reasonable grounds for such acceptance and for rejection of contrary views expressed by the treating physicians or implied from their treatment notes. We hasten to repeat that, while we might have reached a contrary conclusion on the same evidence, we are constrained to affirm the ALJ where there is substantial evidence to support his factual findings, and the denial of benefits is proper based upon those findings.

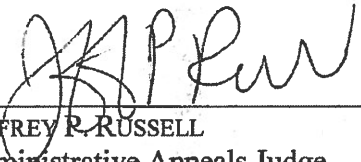
CONCLUSION

The Compensation Order of September 6, 2006 is supported by substantial evidence in the record and is in accordance with the law.

ORDER

The Compensation Order of September 6, 2006 is affirmed.

FOR THE COMPENSATION REVIEW BOARD:



JEFFREY P. RUSSELL
Administrative Appeals Judge

November 29, 2006
DATE