

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. 05-205

JOSEPH MURRAY,

Claimant - Petitioner

v.

PAUL BROTHERS, INC. AND SAFE INSURANCE CO. OF AMERICA,

Employer/Carrier - Respondent

Appeal from a Compensation Order of
Administrative Law Judge Jeffrey R. Russell
OHA No. 04-361; OWC No. 264867

Joseph Murray, *pro se* Petitioner

Jeffrey Herwig, Esquire, for the Respondent

Before LINDA F. JORY, SHARMAN J. MONROE, *Administrative Appeals Judges* and FLOYD LEWIS
Acting Administrative Appeals Judge.

LINDA F. JORY, *Administrative Appeals Judge*, on behalf of the 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 D.C. Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, 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 D.C. Workers' Compensation Act of 1979, as amended, D.C. Official Code §32-1501 *et seq.*, and the D.C. Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Official Code §1-623.1 *et seq.*, including responsibility for administrative appeals filed prior to October 1, 2004, the effective

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 January 21, 2005, the Administrative Law Judge (ALJ), granted claimant's claim for permanent partial disability benefits based upon a 60% hearing loss rating to each ear and granted claimant's request for causally related reasonable and necessary medical care for his bilateral hearing loss. The ALJ found Employer was not responsible for temporary total disability or for medical expenses related to claimant's preexisting perforated left eardrum and right sided otitis media (ear infection)².

Claimant-Petitioner's Petition for Review requests the following action be taken in connection with his appeal: that the Compensation Order, denying claimant's medical treatment for right sided otitis media and the remainder of his claim for temporary total disability, be reversed. In support of his request for a reversal, claimant asserts he has had consequential injuries resulting from medical treatment he received, which he describes as pain in his right ear and as hearing noises in his head.

Employer responds asserting that the Office of Hearings and Adjudications properly interpreted the law and correctly applied the law to the facts of this case. Employer further asserts that claimant was attempting to introduce new evidence in the form of testimonial evidence contained in his appeal but that the record contains no medical evidence to link claimant's chronic ear infections or any other condition to the noise exposures at work.

ANALYSIS

As an initial matter, the scope of review by the Compensation Review Board (CRB) and this Review Panel (hereafter, the 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. Official Code §32-1501 *et seq.*, at §32-1522(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 Department of Employment Services* 834 A.2d 882 (D.C. App. 2003). Consistent with this scope of review, the CRB and this panel are bound 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.

date of the D.C. Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004.

² *See* Employer's Exhibit 15.

Turning to the case under review herein, in support of his assertion that he has consequential injuries resulting from medical treatment, Claimant-Petitioner describes a "PT tube" that was put into his right ear by Dr. Joseph Taylor in 1994. He asserted that after he went back to work he had a new insurance company and as a result he could not return to Dr. Taylor. He went to see his HMO doctor Dr. Stephen Epstein. Claimant- Petitioner describes treatment he received from Dr. Epstein in detail in his Petition for Review which primarily involves the PT tube in his right ear. Although Claimant-Petitioner does not state so specifically, it is assumed he is claiming his otitis media is causally related to the 60% permanent partial hearing loss as the only medical care that was denied was for treatment for the otitis media and the perforated left eardrum and a review of the medical evidence reveals Claimant-Petitioner has not received any medical treatment for his left ear drum. Claimant-Petitioner however, does not advise what error the ALJ committed in determining employer should pay for causally related, reasonable and necessary medical care for Claimant's hearing loss but should not pay for care solely related to the treatment of the perforated left eardrum and right sided otitis media. More specifically, claimant has not referred to any evidence in the record which would enable this panel to find the ALJ's determination that medical treatment for otitis media and the pre-existing perforated left eardrum are not reasonably related to claimant's work related hearing loss is not based on substantial evidence.

This panel has reviewed the reports of both physicians Claimant - Petitioner refers to in his Petition for Review -- Dr. Stephen Epstein, otolaryngologist and Dr. Joseph Taylor, otolaryngologist and Ear Nose and Throat surgeon, as well as Claimant-Petitioner's hearing testimony. Both physicians are of the opinion that noise at employer's work site or at the work site of previous employers has contributed to Claimant-Petitioner's hearing loss. The ALJ has concluded Claimant-Petitioner's hearing loss has been caused even if only in part by his noise exposure with the instant employer and that the instant employer is indeed responsible for the full amount of 60% hearing loss in both ears.

Dr. Epstein prepared a report which included his opinion that Claimant-Petitioner's hearing loss is secondary to the continuous loud noise exposure while working in an auto body shop for 45 years. While his office records revealed he has treated Claimant-Petitioner for otitis media, his narrative report does not include otitis media as a work related condition Claimant-Petitioner was suffering from.

Similarly, Dr. Taylor reported on November 6, 1999 that he has treated Claimant-Petitioner for otitis media on December 2, 1994 and on August 24, 1998 and on several visits. Nevertheless in his "final assessment", while he relates claimant's bilateral hearing loss to chronic noise exposure, he does not connect the otitis media or any of claimant's other ailments, i.e., hoarseness, rhinitis, dizziness or vertigo, to noise exposure.

After a review of claimant's testimony at the Formal Hearing, it is noted that the majority of the allotted hearing time was spent by the ALJ attempting to get claimant to relate a history which pertains to his hearing loss claim. In fact, as the ALJ reported at the Formal Hearing, all but nine minutes of the 2 hour Formal Hearing was provided claimant to present his case after the exhibits were accepted into the record. During this time, claimant often rambled about other complaints he had with regard to his work environment and the personnel practices of employer, despite the

ALJ's attempt to learn what conditions of claimant's employment could lead to his hearing loss. *See* HT at 72 to 82. As noted by the ALJ in the Compensation Order, claimant's testimony was frequently disjointed and without focus and provided the ALJ with little insight as to whether he suffered a work related condition or injury. Although claimant conceded that his left "busted" eardrum occurred in 1982, HT at 68-70, he did not agree that he had an infection in his right ear, but he seemed to have changed his mind as he subsequently insisted that if he had an infection in his ear it had to be because he "had a busted ear"³. Claimant's own opinion with regard to the etiology of his ear infection whether provided at the Formal Hearing or in his Petition for Review, absent any supporting medical documentation, is not sufficient to overturn the ALJ's determination that employer is not responsible for the medical expense associated with the otitis media. Moreover, claimant's new argument on appeal that he now has consequential injuries he relates to a "PT tube" he alleges is the result of his noise induced hearing loss was not before the ALJ and cannot be addressed on appeal.

As discussed above, neither of the two physicians' which claimant has relied on in his petition for review, have opined that claimant's otitis media is work related and the record contains no other opinion to this effect.

We now turn to claimant's claim that he has suffered additional wage loss from his hearing loss which was denied by the ALJ. As the ALJ correctly stated, claimant must present substantial credible evidence that he has a disability entitling him to the requested temporary total disability benefits, *citing Dunston v. D.C Dept. of Employment Services*, 509 A.2d 109 (D.C. App. 1986). The ALJ found claimant had presented no evidence concerning having lost any time from work as none of the medical records or reports submitted by either party placed any limits upon Claimant's physical activities or restrict his engaging in employment as an auto body mechanic. Claimant- Petitioner has failed to refer to any evidence in the record which the ALJ did not consider in concluding claimant has failed to meet his burden of establishing entitlement to any such benefits.

Accordingly, Claimant- Petitioner has not supported his argument on appeal that the ALJ has erred as he failed to refer to any evidence in the record which the ALJ did not consider in concluding claimant has failed to meet his burden of establishing entitlement to any wage loss benefits. Claimant has further failed to present any persuasive argument which would allow this panel to reverse the ALJ's determination that any medical treatment for claimant's otitis media should not be the responsibility of the employer-respondent. In that the board's scope of review 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, this panel respectfully must deny claimant's request for a reversal of the Compensation Order.

³ In an effort to not mischaracterize claimant's position, he has argued in his Petition for Review that he also has a perforation of the right eardrum, thus the undersigned assumes that he is asserting any infection he has in his right ear is related to the perforation which is not connected in any way to the 1982 left ear perforation.

CONCLUSION

The Compensation Order of January 21, 2005, which awarded claimant permanent partial disability benefits for 60% loss of hearing in both ears and causally related medical benefits but denied additional temporary total disability and medical expenses related to claimant's pre-existing perforated left eardrum and right sided otitis media is in accordance with the law as it is supported by substantial evidence.

ORDER

The Compensation Order of January 21, 2005 is hereby AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

LINDA F. JORY
Administrative Appeals Judge

April 20, 2005

DATE