

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

**Department of Employment Services**

**Labor Standards Bureau**

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



**(202) 671-1394-Voice**

**(202) 673-6402 - Fax**

**CRB (Dir.Dkt.) No. 05-34**

**ISMAILA NGOM,**

Claimant – Petitioner,

**v.**

**STARBUCKS COFFEE,**

Self-Insured Employer-Respondent.

Appeal from a Compensation Order of  
Administrative Law Judge Anand K. Verma  
OHA No. 02-487A; OWC No. 560737

Matthew Peffer, Esquire, for the Petitioner

Stephanie S. Ryan, Esquire, for the Respondent

Before: LINDA F. JORY, FLOYD LEWIS and JEFFREY P. RUSSELL, *Administrative Appeals Judges*

FLOYD LEWIS, *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).<sup>1</sup>

---

<sup>1</sup>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 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.

## 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 December 28, 2004, the Administrative Law Judge (ALJ) denied the request by Claimant-Petitioner (Petitioner) for temporary total disability benefits from October 20, 2003 to the present and continuing. Petitioner now seeks review of that Compensation Order.

As grounds for this appeal, Petitioner alleges as error that the Compensation Order is unsupported by substantial evidence in the record and is not 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. Official Code §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. Dist. of Columbia Dep't. of Employment Servs.*, 834 A.2d 882 (D.C. App. 2003). Consistent with this scope 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 specifically alleges that the ALJ's decision is at direct odds with the evidence by concluding that Petitioner voluntarily quit a job that was a modified position in June of 2004 and went to Senegal. In addition, Petitioner claims that the ALJ failed to give the opinion of the treating physician, Dr. Allan Lippitt, significant weight. Employer-Respondent (Respondent) counters by arguing that despite Petitioner's allegations that the ALJ committed errors of both law and fact, the evidence of record clearly reveals that the Compensation Order is supported by substantial evidence and is in accordance with the law, as Petitioner was not totally disabled and did not suffer a wage loss.

The record reveals that Petitioner sustained injuries to his back, neck, arm and leg on September 14, 2000, while employed with Respondent. He returned to work in January of 2001 and worked until sometime later that year. Petitioner moved to Atlanta, Georgia and worked for Cracker Barrel Restaurant from the summer of 2003 until June of 2004, when Petitioner alleges that he ceased working for Cracker Barrel because of a herniated disc and an annular bulge with radiculopathy due to the earlier workers' compensation claim with Respondent.

Petitioner testified that he left his employment in June of 2004 on the advice of his physician, Dr. Lippitt, however, the ALJ found that the evidence of record did not support this contention, as there was no contemporaneous medical opinion from Dr. Lippitt supporting Petitioner's testimony. In addition, the ALJ noted that the record revealed that Petitioner traveled to Senegal during this period for personal reasons and that Petitioner did not present any evidence that he left and went to Senegal because of an economic hardship. After carefully reviewing the evidence of record, we conclude that there is no reason to disturb these findings by the ALJ.

Petitioner further contends that the ALJ erred by not giving more weight to Dr. Lippitt's opinion of October 19, 2003, which violates the treating physician preference in workers' compensation cases. *Harris v. Dist. of Columbia Dep't. of Employment Servs.*, 746 A.2d 297, 302 (D.C. 2000); *Stewart v. Dist. of Columbia Dep't. of Employment Servs.*, 606 A.2d 1350, 1353 (D.C. 1992). However, the ALJ specifically rejected Dr. Lippitt's October 19, 2003 opinion (the last date he examined Petitioner) that Petitioner was totally disabled, finding that Dr. Lippitt did not articulate any physical restrictions Petitioner had which would prevent him from working.

Moreover, the ALJ stressed that as to the subsequent letters sent by Dr. Lippitt to Petitioner's counsel in 2004, "Dr. Lippitt merely expressed his opinion based solely on his review of claimant's January 15, 2004 lumbar spine MRI and physical therapy progress notes and without claimant's physical examination." Compensation Order at 3. While there is an established preference for the opinion of the treating physician, the treating physician's opinion can be rejected if the fact-finder sets forth specific and legitimate reasons for doing so. *Canlas v. Dist. of Columbia Dep't. of Employment Servs.*, 723 A.2d 1210, 1211-12 (D.C. 1995). On this point, this Panel concludes that the ALJ's rejection of Dr. Lippitt's conclusion that Petitioner was totally disabled is supported by substantial evidence and the ALJ articulated specific reasons for not relying on the opinion of the Petitioner's treating physician, Dr. Lippitt.

Furthermore, the record reveals, as the ALJ noted, that Dr. Lippitt's opinion did not take into consideration the fact that Petitioner could perform some type of modified work activity, as even Petitioner admitted that he returned to work in a modified position with Cracker Barrel until June of 2004, when he returned to Senegal for what the ALJ found was personal reasons. Also, Respondent notes and the record reveals, that Petitioner's wages with Cracker Barrel were equal to and greater than his wages while he was employed with Respondent. Since this residual work capacity was not recognized in Dr. Lippitt's opinion, it was rejected by the ALJ.

The ALJ found that Petitioner was medically capable of continuing in his modified employment position with Cracker Barrel and as such, when Petitioner left that position in June of 2004, it was a voluntary limitation of income under D.C. Official Code §32-1508(V)(iii). The ALJ, emphasizing that Petitioner's alleged back condition did not hamper his ability to perform his job until he voluntarily left that employment in June of 2004, stated:

Thus, claimant's voluntary termination of employment without any functional capacity evaluation justifying it amounts to voluntary limitation of income under D.C. Code §32-1508(V)(iii)(2001). Clearly, claimant's loss of wages during the claimed period cannot be

deemed attributable to any lapse on the part of employer, such as employer's failure to accommodate claimant by offering a modified duty position consistent with claimant's medical restrictions.

Compensation Order at 6.

As such, the ALJ determined that based upon a review of the record evidence as a whole, Petitioner was not entitled to temporary total disability benefits from October 20, 2003 to the present and continuing. This Panel concludes that this determination is supported by substantial evidence and is in accordance with the law.

#### CONCLUSION

The Compensation Order of December 28, 2004 is supported by substantial evidence in the record and is in accordance with the law.

#### ORDER

The Compensation Order of December 28, 2004 is hereby AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

---

FLOYD LEWIS  
Administrative Appeals Judge

---

August 3, 2005  
DATE