

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. 06-58

OTIS MAHONEY,

Claimant – Petitioner

v.

D.C. HOUSING AUTHORITY,

Employer – Respondent.

Appeal from a Compensation Order on Remand of
Administrative Law Judge Terri Thompson Mallett
OHA No. PBL 00-086C; DCP No. HCD001153

Jonathan M. Grossman, Esquire, for the Petitioner

Ross Buchholz, Esquire, for the Respondent

Before: E. COOPER BROWN, *Chief Administrative Appeals Judge*, FLOYD LEWIS and Sharman J. Monroe, *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).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 D.C. Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, sec. 1102 (Oct. 1, 1994), *codified at* D.C. Code Ann. §§ 32-1521.01, 32-1522 (2005). In accordance with the Director's Policy Issuance, 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. Code Ann. §§ 32-1501 to 32-1545 (2005) and the D.C. 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 D.C. Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004.

BACKGROUND

This appeal follows the issuance of a Compensation Order on Remand 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 May 23, 2006, the Administrative Law Judge (ALJ) denied the request for continuing temporary total disability benefits subsequent to June 17, 2002 made by Claimant-Petitioner (Petitioner). Petitioner now seeks review of that Compensation Order.

On October 29, 2004, a Compensation Order was issued which denied Petitioner's request for continuing temporary total disability benefits after June 17, 2002. Petitioner appealed that denial to the CRB and on November 30, 2005, the CRB issued a Decision and Order which remanded this case to the ALJ. In that decision, the CRB concluded that the ALJ had erred by not explaining why the treating physician preference was not applied and by not giving any reasons for rejecting the opinions of Petitioner's treating physicians in favor of Respondent's independent medical examination (IME) physician, Dr. Herbert Joseph. In addition, the CRB noted that the IME report of Dr. Joseph was not evaluated under the "current and fresh" standard.

On remand, the ALJ concluded that the current condition of Petitioner's ankle is not a recurrence of the symptomatology of his March 31, 1999 work injury. Thus, the ALJ again denied Petitioner's claim for relief and Petitioner then filed the instant appeal.

As grounds for this appeal, Petitioner alleges as error that the Compensation Order on Remand is not supported by substantial evidence 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. 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. 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 alleges that the ALJ's decision that Petitioner's present right ankle condition is not causally related to his March 31, 1999 work injury should be reversed because the weight of evidence clearly indicates that Petitioner should receive

disability benefits. Petitioner contends that the ALJ erred by ignoring the legal rule that an employer bears the burden of presenting persuasive medical evidence sufficient to substantiate a modification or termination of benefits. Petitioner also argues that the ALJ failed to consider the aggravation rule of compensable accidental injuries and that the opinions of Petitioner's treating physicians should not have been rejected.

Respondent counters by arguing that the ALJ's decision is supported by substantial evidence and that the ALJ properly addressed the burden issue and found that Respondent had the initial burden of proof that he sustained a recurrence of the March 31, 1999 injury. Respondent also contends that the ALJ properly considered the aggravation rule and found that there was no substantial evidence of a current work-related disability and that the ALJ properly detailed the reasons and made findings of fact, which are supported by substantial evidence, for rejecting the treating physician preference.

Petitioner argues that the ALJ committed error by ignoring the rule that an employer has the burden of presenting evidence to substantiate a modification of benefits. However, Petitioner's argument on this issue must be rejected. While Petitioner is correct that once the government in these cases has accepted a claim for disability compensation, the burden is on the government to produce persuasive evidence to justify a modification or termination, in this matter, Petitioner's claim for recurrence was never formally accepted.

As the ALJ noted, Petitioner's claim was only "provisionally accepted", until missing files and documents could be located and a Final Determination was then made on July 17, 2002. On this issue, the ALJ stated:

The July 17, 2002 Final Order [ER-1] denying TTD benefits issued by the Disability Compensation Program is the initial decision related to Claimant's request for TTD benefits. Thus, the initial burden of production to prove a recurrence of the symptomology of Claimant's 1999 injury is on Claimant.

Compensation Order on Remand at 5.

After reviewing the evidence of record, this Panel must reject Petitioner's argument on this point. Since Petitioner asserts that he suffered a recurrence of his March 1999 work injury, Petitioner had the burden to prove the recurrence.

As to Petitioner's argument that the ALJ failed to apply the aggravation rule, it must be emphasized that the ALJ incorporated by reference the findings of fact contained in the earlier Compensation Order and found that the incident in March of 1999 caused a temporary aggravation of Petitioner's pre-existing right ankle fracture, but that aggravation had resolved. Moreover, concerning Petitioner's aggravation argument, the ALJ found that Petitioner's own medical records indicated that Petitioner sustained a non-work related intervening injury in 2000 and as such, Petitioner's current condition is not the natural and direct result of his compensable injury of March 31, 1999.

On October 13, 2000, Petitioner stated that “he slipped on some boards and injured [his] ankle again.” Petitioner’s exhibit 16 at 3. The ALJ also noted that Petitioner’s physical therapy records from Kaiser Permanente, dated April 17, 2000 refer to a diagnosis of right ankle sprain/old right ankle fracture, but “[t]here is no evidence that the right ankle sprain referenced in this Kaiser Permanente record relates to Claimant’s 1999 work-related injury.” In addition, the ALJ stressed that Petitioner was seen by Dr. Joseph Avery in 2001 with complaints of right ankle swelling, however, “[a]gain there is no evidence in the records from Dr. Avery that the condition of his right ankle is recurrence of the symptomatology of Claimant’s 1999 work injury.” Compensation Order on Remand at 6. As such, there is substantial evidence in the record to support the ALJ’s conclusion that an intervening non-work related right ankle injury occurred in 2000.

Petitioner also argues that the ALJ erred by rejecting the treating physician preference. In evaluating the medical evidence of record, the testimony of a treating physician is ordinarily preferred over that of a physician retained solely for litigation purposes. *Harris v. Dep’t. of Employment Servs.*, 746 A.2d 297, 302 (D.C. 2000); *Stewart v. Dep’t. of Employment Servs.*, 606 A.2d 1350, 1353 (D.C. 1992). Notwithstanding this preference for the testimony of a treating physician over that of a physician hired to evaluate a workers’ compensation claim, an administrative law judge may reject the testimony of the treating physician and credit the opinion of another physician when there is conflicting evidence. In doing so, the fact-finder must give reasons for rejecting the testimony of the treating physician. *Canlas v. Dep’t. of Employment Servs.*, 723 A.2d 1210, 1211-12 (D.C. 1995).

The ALJ, after clearly recognizing the treating physician preference, detailed the reasons for rejecting the opinion of Petitioner’s treating physicians. After reviewing the reports from Petitioner’s physician, Dr. Lawrence Manning, the ALJ concluded that Dr. Manning’s submissions were vague and incomplete and the ALJ clearly detailed the reasons for rejecting this physician’s reports. Compensation Order on Remand at 7-8.

In addition, the ALJ described the reasons for rejecting the opinion of Petitioner’s physician, Dr. S. Roger Parthasarathy, noting that Dr. Parthasarathy opined that Petitioner’s degenerative findings on his diagnostic studies “are more likely than not related to his prior injury and is unrelated to his 3/31/99 work-related injury.” Petitioner’s exh. 3 at 1. In addition, the ALJ stressed that Dr. Parthasarathy’s opinion that Petitioner was not able to work after March 31, 1999 is inconsistent with the evaluation and medical reports of June 1999 by Petitioner’s physician, Dr. John Cohen, who opined that Petitioner’s most recent pain had resolved, Petitioner could return to work and he was without complaint and completely asymptomatic. Compensation Order on Remand at 9.

As such, this Panel can find no error with the ALJ’s decision to reject the opinions of Petitioner’s treating physicians. In addition, Respondent points out that the January 31, 2003 medical report of Dr. Joseph satisfied the “current and fresh” standard, as it reviewed the January 2, 2003 report of Dr. Parthasarathy and the December 11, 2002 report of Dr. Manning. In this report, Dr. Joseph opined that he agreed with the opinion of his treating physician, Dr. Cohen, that Petitioner’s March 31, 1999 episode was a temporary aggravation of a pre-existing condition and had completely resolved. Thus, the report of Dr. Joseph was current and fresh when the record closed in this matter.

Moreover, as previously emphasized, the ALJ found that there was substantial evidence of record that Petitioner suffered an intervening non-work related episode in 2000. Thus, the ALJ's conclusion that the current condition of Petitioner's ankle is not causally related to his March 31, 1999 work injury is supported by substantial evidence and is in accordance with the law.

CONCLUSION

The Compensation Order on Remand of May 23, 2006 is supported by substantial evidence in the record and is in accordance with the law.

ORDER

The Compensation Order on Remand of May 23, 2006 is hereby AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

FLOYD LEWIS
Administrative Appeals Judge

October 20, 2006
DATE