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
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CRB No. 06-051

VERNON PLATER,

Claimant–Respondent,

v.

UNITED PARCEL SERVICE AND LIBERTY MUTUAL INSURANCE COMPANY,

Employer/Carrier–Petitioner.

Appeal from a Compensation Order of
Administrative Law Judge David L. Boddie
AHD No. 03-432A, OWC No. 585956

Curtis Hane, Esquire, for the Petitioner

Matthew Peffer, Esquire, for the Respondent

Before JEFFREY P. RUSSELL, LINDA F. JORY and FLOYD LEWIS, *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]

[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 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 May 24, 2006, the Administrative Law Judge (ALJ) granted Respondent's claim for temporary total disability benefits from December 26, 2004 through September 5, 2005, and temporary partial disability measured by actual partial wage loss from September 6, 2005 through the date of the formal hearing and thereafter. Petitioner now seeks review of that Compensation Order.

As grounds for this appeal, Petitioner alleges as error that: (1) the ALJ erred in denying Petitioner's motion to re-open the record to admit records demonstrating the amount of Respondent's return-to-work wages, both pre- and post-hearing; (2) the ALJ improperly rejected the opinion of Petitioner's IME physician; (3) the ALJ gave Petitioner's videotape surveillance evidence inadequate consideration and evidentiary weight; and (4) the ALJ erred in accepting Respondent's treating physician's opinion regarding Respondent's physical functional capacity.

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

Regarding the second, third and fourth assignments of error, they each fall into the category of allegations that the ALJ erred when assessing the weight of the evidence; in each case, Petitioner's complaint appears to be that the ALJ had but one choice, and that that choice was to accept Petitioner's view of the evidence and to reject Respondent's. In each instance, Petitioner's arguments consist of nothing more than that Petitioner believes that the ALJ should have accepted the evidence that it prefers, and rejected the evidence put forth by Respondent.

It is axiomatic that determinations of the weight to be given to competing evidence is within the sound discretion of the ALJ, and that under the Act, administrative and judicial reviewers must defer to the facts as found by the ALJ, so long as they are supported by substantial evidence. 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); *Marriott Int'l., supra.* Further, with regard to medical opinion, this Agency

has long held that the opinions of a treating physician are entitled to great weight and are to be preferred to those of an IME physician under normal circumstances, unless the ALJ has identified specific reasons to accept as superior the competing evidence from the IME physician. *Butler v. Boatman & Magnani*, OWC No. 044699, H&AS No. 84-348 (December 31, 1986), *Short v. District of Columbia Department of Employment Services*, 723 A.2d 845 (D.C. 1998), and *Stewart v. District of Columbia Department of Employment Services*, 606 A.2d 1350 (D.C. 1992); *Erickson v. Washington Metropolitan Area Transit Authority*, OWC No. 181489, H&AS No. 92-63, Dir. Dkt. No. 93-82 (June 5, 1997). While the ALJ might well have reached a conclusion consistent with Petitioner's preferred view of the evidence in this case, it has presented nothing to demonstrate that acceptance of its preferred position is the only reasonable interpretation allowed, and the findings of the ALJ must accordingly be affirmed.

Regarding the first assignment of error, relating to the earnings records of from Respondent's new employment, while Petitioner would be correct that those records are necessary were the parties to have been in dispute concerning the amount of those earnings and were they seeking a determination from the ALJ about the appropriate compensation rate in light of those amounts, in this case the ALJ did not rule upon that question. Rather, all the ALJ did was grant the request for an award of partial wage loss benefits based upon the wage differential between the pre-injury average weekly wage and the return to work wages. Presumably, the precise amount of wages under the partial award is not subject to determination until such time as those wages are earned. Employer is not under an obligation to make such partial wage loss payments until the actual earnings have been determined, and the ALJ did not rule otherwise. Accordingly, it was not error for the ALJ to have failed to consider the wage records, given that they were not relevant to any dispute that was before him.[2]

CONCLUSION

The Compensation Order of May 2, 2006 is supported by substantial evidence in the record and is in accordance with the law.

ORDER

The Compensation Order of May 2, 2006 is hereby AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

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JEFFREY P. RUSSELL
Administrative Appeals Judge

[2] In light of the fact that return-to-work wages may fluctuate, the Act does not contemplate that the ALJ exercise continuing jurisdiction on an open-ended basis for the regular monitoring of the appropriate compensation rate. With some exceptions, such as where there is an issue concerning whether such fluctuations are a function of something other than incapacity from the injury, only where there is some dispute concerning the amount of those wages would the outcome of a formal hearing turn on such evidence.

July 7, 2006
DATE