

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. 04-08

RAYBURN L. LEVY,

Claimant - Petitioner

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY AND

CRAWFORD & COMPANY,

Employer/Carrier - Respondent

Appeal from a Compensation Order of
Administrative Law Judge David L. Boddie
AHD No. 98-064B, OWC No. 236775

Benjamin T. Boscolo, Esquire for the Petitioner

Donna Henderson, Esquire, for the Respondent

Before LINDA F. JORY, SHARMAN J. MONROE, *Administrative Appeals Judges* and E. COOPER BROWN, *Chief 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 (1994), 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 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

Pursuant to 7 D.C.M.R § 230.04, the authority of the Compensation Review Board extends over appeals from compensation orders including final decisions or orders granting or denying benefits by the Administrative Hearings Division (AHD) or the Office of Workers' Compensation (OWC) under the public and private sector Acts.

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 24, 2003, the Administrative Law Judge (ALJ), concluded Claimant – Petitioner (Petitioner) had no wage loss attributable to his work injury and denied Petitioner's claim for temporary total disability benefits

Petitioner has filed an Application for Review contending that the decision is not in accordance with the case law established in *Baliles v. District of Columbia Department of Employment Services*, 728 A.2d 661(D.C. 1999) (*Baliles*) and *Tamara G. Hogan v. Design for Business Interiors*, Dir. Dkt. No. 01-09, OHA No. 00-194,OWC No. 105137 (Dir. Dec. April 11, 2002) and should therefore be reversed.

Respondent has responded to the Application for Review asserting that the CRB need not decide whether the ALJ applied the correct case law because Petitioner retired from the work force and did not lose any wages as a result of the knee surgery.

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. D.C. Official Code § 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. District of Columbia Department of Employment Services* 834 A.2d 882 (D.C. 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.

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. Official Code §§ 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.

As to the merits of the Petitioner's appeal, the record was thoroughly reviewed. The ALJ found claimant was not entitled to any additional temporary total or wage loss disability benefits as he had voluntarily retired, citing *Baliles*. Petitioner asserts that the Court of Appeals ruling in *Baliles* is inapplicable to the facts of the instant matter and his claim for TTD should not be barred by the *Baliles* holding. Specifically, Petitioner asserts that *Baliles* was physically able to work and he retired from his employment and then sought temporary total disability benefits but that he (Petitioner) retired while he was able to work and then secured new employment after he retired. Petitioner asserts further that unlike *Baliles*, he was totally unable to work due to his knee injury during the claimed period.

Respondent reiterates the position taken before the ALJ, that Petitioner voluntarily limited his income by retiring as there is "just no credible evidence that he retired as a result of anything other than 'personal expediency'". In support thereof, Respondent relies on a decision of the Director in *Donaldson v. Washington Metropolitan Area Transit Authority*, Dir. Dkt. No. 98-99, OHA No. 93-513A (April 13, 1999)(*Donaldson*). Respondent asserts that like Petitioner, *Donaldson* provided no evidence that he was under medical care for his knees at the time of his retirement and admitted that no doctor recommended to him that he retire or remain off work.

The Panel agrees that the evidence of record supports the ALJ's finding that as a result of Petitioner's voluntary retirement, Respondent is not responsible for wage loss benefits to Petitioner, contrary to Petitioner's argument that unlike *Baliles* Petitioner was actually physically unable to work during the period claimed. Since the employment relationship was severed, (for reasons not related to his injury) it is impossible to speculate if Petitioner would have undergone the arthroscopic surgery two years later or how Respondent would have handled the alleged recurrence of disability i.e., with light duty etc.² The ALJ's conclusion that claimant's voluntary retirement precludes him from further wage loss benefits is supported by substantial evidence and is in accordance with the law.

The Panel finds that the ALJ went further, assuming *arguendo* that claimant had not retired, and addressed the issue of whether Petitioner was able to recover additional wage loss benefits after stipulating that his work injury resulted in permanent partial disability to both his left and right extremities. The ALJ determined that the factual scenario and issues before him presented were similar to those presented in companion cases before the Court of Appeals in the matter of

² See also *Franklin v. District of Columbia Department of Employment Services*, 709 A.2d 1175 (April 2, 1998) (*Franklin*). The Court's rationale therein also supports the ALJ's determination. *Franklin* resigned her job to take a job that was admittedly a better paying job, but, prior to her last day of work was diagnosed with carpal tunnel syndrome. *Franklin* asserted that her attempt to commence work with her new employer did not absolve the first employer of responsibility which the Court of Appeals rejected. While the Panel acknowledges that whether or not the instant Petitioner took the real estate job instead of remaining employed with employer because it was a better paying job has not been established, the Panel finds the Court's reliance on Professor Larson approach in *Franklin* to be relative to the instant matter. Professor Larson stated "the number and variety of reasons for quitting are almost unlimited, but the issue remains the same: was the disability in any significant degree a factor in the decision to resign". *Franklin, supra* at 1179.

Cherrydale Heating & Air Conditioning v. District of Columbia Department of Employment Services, 722 A.2d 31 (D.C. 1998) (*Cherrydale*).

Generally, once an employee reaches maximum medical improvement and receives a schedule award for permanent partial disability, the employee is not entitled to temporary total disability benefits for future wage loss arising out of the same injury. See *Sharon Smith v. District of Columbia Department of Employment Services*, 548 A.2d 95, 99 (D.C. 1988) (*Smith*). However, where an employee has suffered a schedule injury to some particular member or members and some unusual and extraordinary condition develops therefrom as a result, which condition affects some other member or the body itself, an increased award is proper and may be made to cover additional temporary total disability. *Cherrydale, supra*, 722 A.2d at 34.

Petitioner challenges the ALJ's interpretation and application of rationale in the *Cherrydale* case and asserts that the fact pattern and conclusion set forth by AHD and affirmed by the Director in *Tamara Hogan v. Design for Business Interiors*, Dir. Dkt. No. 01-09, AHD No. 00-194, OWC No. 105137 (April 11, 2002) (*Hogan*)³ are applicable as Petitioner asserts he experienced a change in his condition so extreme that it warranted an exception to the holding in *Smith*.

In the instant matter, the ALJ initially outlined the Court's differentiation between the two companion cases before it in *Cherrydale*, specifically the circumstances of the claimants Gabrielle Evans (*Evans*) and Howard Poole (*Poole*), both asserting loss of wages due to a worsening of their condition after reaching maximum medical improvement. In affirming the award of additional temporary total disability compensation benefits to claimant *Poole*, the Court found the Director's reasonable interpretation and narrow exception to *Smith* served the humanitarian purposes of the statute by holding that where an employee has suffered a scheduled injury to some particular member or members and some unusual or extraordinary condition develops therefrom as a result, which condition affects some other member or the body itself, an increased award is proper and should be made to cover additional temporary total disability as "it is certainly reasonable to regard amputation as an extraordinary condition that affects . . . the body itself – in a way that lesser treatment including surgery does not". *Cherrydale*, 722 A.2d at 34; CO at 8.

While the ALJ failed to elaborate on the Director's conclusions and the Court's reasons for affirming the Director regarding *Gabrielle Evan's* situation, the ALJ stated in the CO that "under the evidence and facts of this case, I find that they are more analogous to the *Evans* case". CO at 8, 9. The Court in *Evans* found the Director drew a reasonable distinction between *Evan's* and *Poole's* situations, specifically, that the deterioration that *Evans* experienced which led to two separate surgeries to both her hand and left knee did not justify benefits outside the framework of the previous schedule awards. *Cherrydale, supra* at 38. The Court held "In the words of *Smith*,

³ The Panel acknowledges that the ALJ in *Hogan* did not agree that the criteria needed to carve an exception to *Smith* was that a condition was not foreseeable but instead concluded that "when an *extraordinary or extreme condition* develops requiring additional time off from work claimant should be able to receive wage loss benefits from employer". See *Tamara Hogan v. Design for Business Interiors*, OHA No. 00-194, OWC No. 105137 (January 5, 2001) (citing, *Cherrydale*; *Scamperino v. Federal Envelope Co.*, 288 N.W. 2d 477, 479, 480 (Neb. 1980).

Evans' need for surgery and attendant lost wages was foreseeable and within the 'conclusively presumed . . . effect on future earnings potential' that a schedule award embodies".⁴

Having reviewed the record the Panel agrees the facts of the instant matter are analogous to the facts facing the ALJ and the Director in the *Evans* matter, *i.e.*, that the arthritis Petitioner developed which led to arthroscopic surgery was neither unusual or extraordinary. In so concluding, the Panel acknowledges the ALJ's reference to the medical evidence of record, specifically the deposition and reports of Dr. Azer. In his deposition, Dr. Azer stated x-rays of Petitioner's knees showed traumatic arthritic damage due to the injury for which he treated conservatively and performed an arthroscopic surgical intervention on January 2, 2001. The ALJ reported, "The medical evidence thereafter concludes with a January 11, 2002 report which notes a change of condition of right knee by Dr. Azer in which he states the claimant gets occasional pain and swelling of the right knee and has effuse, in addition to the ongoing findings of crepitus with flexion and extension". CO at 4. Petitioner has received permanent partial disability benefits for the right extremity as a result of the right knee condition and there is no evidence that these findings as recited by Dr. Azer could be considered as "unusual and extraordinary condition developed therefrom as a result which condition affects some other member or the body itself". *Cherrydale, supra* at 35.

Having found that the ALJ's conclusion that Petitioner's circumstances follow those in *Evan's*, the Panel sees no reason why the ALJ should consider whether Petitioner's arthritic changes and need for arthroscopic surgery constitutes an extraordinary or extreme condition pursuant to *Hogan*.

For reasons set forth above, the Panel finds the ALJ's denial of payment of temporary total disability compensation benefits is supported by substantial evidence and in accordance with the law. *See Marriott Int'l v. District of Columbia Department of Employment Services*, 834 A.2d 882 (D.C. 2003); D.C Code §32-1501 to 322-1545(2005) at §32-1521.01 (d)(2)(A).

CONCLUSION

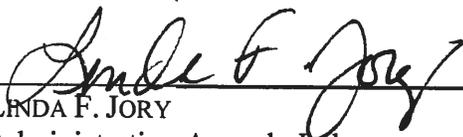
The Compensation Order of December 24, 2003 is supported by substantial evidence of record, and is in accordance with the law.

⁴ See *Sharon Smith, supra* , quoting in part 2 A. Larson, Workmen's Compensation Law §585.11, at 10-323-24 (1987)

ORDER

The Compensation Order issued on December 24, 2003 is hereby **AFFIRMED**.

FOR THE COMPENSATION REVIEW BOARD:



LINDA F. JORY
Administrative Appeals Judge

August 8, 2006
DATE