

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 No. 05-202,

RICKEY TOOMER,

Claimant – Petitioner

v.

D.C. DEPARTMENT OF CORRECTIONS,

Employer – Respondent.

Appeal from a Compensation Order of
Administrative Law Judge Robert R. Middleton
OHA No. PBL 98-048A, DCP No. LT5-DOC001603

Harold Levi, Esq., for the Petitioner

Gail L. Davis, Esq., for the Respondent

Before SHARMAN J. MONROE, LINDA F. JORY and JEFFREY P. RUSSELL, *Administrative Appeals Judges*.

SHARMAN J. MONROE, *Administrative Appeals Judge*, on behalf of the Review Panel:

DECISION AND REMAND 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 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

BACKGROUND

This appeal follows the issuance of a Final Compensation Order by the Assistant Director for Labor Standards of the District of Columbia Department of Employment Services, approving and adopting a Recommended Decision on Remand from the Office of Hearings and Adjudication (OHA).² In that Recommended Decision on Remand, which was filed on January 21, 2005, the Administrative Law Judge (ALJ) denied the Claimant's request to reinstate temporary total disability benefits related to his July 22, 1997 work injury. The Claimant-Petitioner now seeks review of the Final Compensation Order.³

As grounds for this appeal, the Claimant-Petitioner alleges as reversible error the ALJ's limited review of the record evidence to one medical report to determine the nature and extent of his disability related to the July 22, 1997 work injury.

ANALYSIS

As an initial matter, the standard 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 §32-1501 *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 standard of review, the CRB and this

§1-623.1 *et seq.*, 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.

² Pursuant to the Director's Directive, Administrative Policy Issuance 05-01, the functions of the Office of Hearings and Adjudication have been assigned to the Administrative Hearings Division (AHD). Throughout this decision, the new office names, CRB and AHD, will be used.

³ Along with his Petition for Review, the Claimant-Petitioner also filed a Motion for Expedited Review Memorandum in Support of Thereof wherein he requested that his appeal be processed on an expedited, emergency basis given the amount of time that has lapsed since his benefits were terminated and his current physical condition. Attached to the Motion was a February 7, 2005 letter from Dr. Daniel Herman with progress notes addressing the Claimant-Petitioner's current physical condition. First and foremost, there is no indication in the record that this February 7, 2005 letter was admitted into evidence before the ALJ. The CRB's review is limited to the record made before an ALJ; it is not empowered to accept new evidence addressing the merits of a case. See *Woodland v. AFSCME*, Dir. Dkt. No. 99-99, H&AS No. 98-270 (June 19, 2000). Therefore, the February 7, 2005 letter will not be considered in rendering this decision. Second, the Claimant-Petitioner's Motion is denied. Pursuant to the D.C. Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004 and Administrative Policy Issuance 05-01, a decision on an appeal must be rendered within 30 days after it is assigned to a panel. This case will be processed in accordance with this mandate.

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, Claimant-Petitioner alleges that the ALJ's decision is not based upon substantial evidence in the record as a whole. Specifically, the Claimant-Petitioner asserts that, in reaching his decision, the ALJ clearly did not consider the medical reports of Dr. Hampton Jackson, Dr. Eric Dawson, and Dr. Carol Sheridan and the various diagnostics report which he submitted into evidence, but based his findings of fact solely on the report of Dr. Bruce Ammerman in violation of the law. The Claimant-Petitioner also asserts that regardless of whether he is capable of returning to work without restrictions, he is entitled to the payment of his causally related medical expenses. Finally, the Claimant-Petitioner argues that, pursuant to the ruling in *Lightfoot v. District of Columbia*, 339 F.Supp. 2d 78 (D.D.C 2004), he must immediately receive prospective benefits and then retroactive benefits regardless of this appeal.⁴

In its response, the Employer-Respondent asserts that the Claimant-Petitioner is laboring under the mistaken belief that the ALJ was adjudicating this case *de novo*. It cites the Motion to Remand and Memorandum in Support of Motion filed by the Claimant-Petitioner with the D.C. Court of Appeals, wherein the Claimant-Petitioner requested the court to remand this matter to the Office of Hearings and Adjudication for consideration of Dr. Ammerman's report, and the court's Order remanding the matter "for further administrative proceedings consistent with petitioner's motion." It maintains that the medical evidence the Claimant-Petitioner is referring to, except for the report of Dr. Ammerman, was assessed in a previous proceeding which culminated in a Final Compensation Order dated June 8, 2001 finding that the Claimant-Petitioner was able to return to work. The Employer-Respondent argues that the finding was affirmed in an Opinion and Remand Order dated May 28, 2002 and that the finding, and its concomitant determination not to accord great weight to the opinions of the treating physician, are now final and not subject to re-litigation. On entitlement to medical benefits, the Employer-Respondent asserts that the issue was not raised by the Claimant-Petitioner in the proceeding before the ALJ and cannot be raised in this appeal.

In his reply, the Claimant-Petitioner asserts that Dr. Ammerman's opinion contradicted the opinion of Dr. Joseph Callan, whose opinion was relied upon to terminate his benefits. Also, the Claimant-Petitioner admits that he filed a Motion to Remand with the D.C. Court of Appeals, but did not state therein that Dr. Ammerman's opinion was to be considered on remand without also considering the rest of the record.

⁴ In its response, the Employer-Respondent indicated that a motion to stay was pending before U.S. District Court of Appeals for the District of Columbia in the *Lightfoot* case. Regardless, the CRB is empowered to review compensation orders for legal sufficiency and to dispose of decisions under review via an order. The Claimant-Petitioner appealed the Final Compensation Order in his case and this CRB will, accordingly, review that decision. Resolving matters currently pending in federal court are not within the CRB's grant of authority and will not be considered.

The current procedural posture of this case is germane to this appeal because it helps to answer the question of whether the ALJ committed reversible error in only considering Dr. Ammerman's opinion.⁵ Following an affirmance of the June 8, 2001 Final Compensation Order denying benefits, the Claimant-Petitioner filed an appeal with the D.C. Court of Appeals. While the court appeal was pending, Dr. Bruce Ammerman issued a report, predicated upon a July 26, 2002 examination, which was made at the behest of the Third Party Administrator, opining that the Claimant-Petitioner cannot return to work and that his cervical and lumbar disc diseases were aggravated by his 1997 work injury. Dr. Ammerman summarized his opinion in a letter dated August 22, 2002. The Claimant-Petitioner sought to have the ALJ consider Dr. Ammerman's opinion, but the ALJ declined because the matter was pending before the court. The Claimant-Petitioner then moved the court for a remand "to OHA and/or DCP in order to have Dr. Ammerman's report considered." Claimant Exhibit No. 3. The Claimant-Petitioner stated in his motion that the report was material, *i.e.*, it went to the issue before the ALJ, and was not adduced at the hearing because it was non-existent. Thus, contrary to his assertion in his reply, the Claimant-Petitioner's requested remand was for the specific purpose of having Dr. Ammerman's opinion considered. In its subsequent Order, the court specifically remanded "for further administrative proceedings *consistent with petitioner's motion.*" [emphasis added]. Claimant Exhibit No. 4. Consequently, the review of OHA and DCP on remand was limited to considering Dr. Ammerman's opinion.⁶

The Third Party Administrator (TPA) reviewed Dr. Ammerman's opinion. In a Reconsideration Final Order dated April 29, 2003, the TPA ultimately decided that Dr. Ammerman did not specifically state there was a causal connection between the Claimant-Petitioner's disability and his 1997 work injury, and denied benefits. Claimant Exhibit Nos. 5-7. The Claimant-Petitioner filed a request for formal hearing.

At the formal hearing, the ALJ's review was limited to Dr. Ammerman's opinion by the court's Order. In addition, since the TPA did not reinstate or modify, but continued the termination of, the Claimant-Petitioner's benefits, consistent with case law established in *Jones v. D.C. Department of Corrections*, Dir. Dkt. No. 07-99, OHA No. PBL No. 97-14, ODC No. 312082 (December 19, 2000) and *Robinson v. D.C. General Hospital*, ECAB No. 95-8, ODCVC No. 302585 (July 8, 1997), the ALJ's review focused on whether the employer presented substantial and recent medical evidence to support a modification or termination of benefits.

In his decision, the ALJ stated,

"[n]owhere in the three documents presented by the claimant does the medical specialist [Dr. Ammerman] causally connect claimant's

⁵ The procedural history of this case is complicated and was thoroughly set forth in the January 21, 2005 Final Compensation Order.

⁶ The initials "OHA" stand for the Office of Hearings and Adjudication, now called the Administrative Hearings Division. The initials "DCP" stand for the Disability Compensation Program, now called the Third Party Administrator.

physical impairments to his employment duties as a lead correctional officer. Claimant's myriad health conditions, including his degenerative conditions to the lumbar and cervical spine, are simply unrelated to his employment duties."

Recommended Decision on Remand at p. 8.

The ALJ then rejected Dr. Ammerman's opinion and denied the Claimant-Petitioner's request to reinstate benefits. This rejection, however, cannot stand because it is contradicted by the record evidence. A review of the record shows that in his July 26, 2002, Dr. Ammerman opined that the Claimant-Petitioner "appears to have pre-existent lumbar disc disease, which appears to have been aggravated by the 7/2/97 incident, as well as cervical symptoms." Claimant Exhibit No. 8. Indeed, the ALJ summarized Dr. Ammerman's opinion on the Claimant-Petitioner's physical condition as "appearance of pre-existent lumbar disc disease, which appears had been aggravated by the July 2, 1997 work related injury". Recommended Decision on Remand at p. 8. Because of this contradiction within the decision itself, the panel is unable to determine whether the decision is based upon substantial evidence. This matter must be remanded to the ALJ for reconciliation of his contradictory statements concerning Dr. Ammerman's opinion.⁷

CONCLUSION

The ALJ's limited review of the record evidence to the reports of Dr. Bruce Ammerman in order to determine whether the Claimant-Petitioner was entitled to reinstatement of temporary total disability benefits was consistent with the December 12, 2002 Order from the D.C. Court of Appeals and, thus, not a reversible error. However, the Final Compensation Order of January 21, 2005 denying the reinstatement of the Claimant-Petitioner disability benefits due to his July 2, 1997 must be remanded for further findings of fact and conclusions of law with respect to Dr. Ammerman's opinion.

⁷ On remand, the ALJ should be mindful that in this jurisdiction a work-related aggravation of a pre-existing condition is compensable. See *Anamaleche-Oladokun, v. District of Columbia Public Schools*, OHA No. PBL 04-002(A), DCP No. LT7-BOEDU004741 (August 16, 2004).

ORDER

The Final Compensation Order of January 21, 2005 is hereby REVERSED AND REMANDED for findings of fact and conclusions of law consistent with the above discussion.

FOR THE COMPENSATION REVIEW BOARD:



SHARMAN J. MONROE
Administrative Appeals Judge

May 2, 2005

DATE