

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. 04-49

VERNELLE ROBINSON,

Claimant – Petitioner

v.

D.C. WATER & SEWER AUTHORITY AND GALLAGHER BASSETT SERVICES, INC.,

Employer/Carrier – Respondent.

Appeal from a Compensation Order of
Administrative Law Judge Linda F. Jory
OHA No. 03-231A, OWC No. 570984

Matthew Peffer, Esquire, for the Petitioner

Douglas A. Datt, Esquire, for the Respondent

Before: E. COOPER BROWN, *Chief Administrative Appeals Judge*, 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).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

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 April 12, 2004, the Administrative Law Judge (ALJ) concluded that Claimant-Petitioner (Petitioner) was temporarily totally disabled from July 31, 2003 through February 9, 2004, however any wage loss after February 9, 2004 was the result of Petitioner's voluntary decision to pursue other employment. Petitioner now seeks review of that Compensation Order. Employer-Respondent (Respondent) also seeks review of that Compensation Order.²

As grounds for these appeals, Petitioner and Respondent both allege as error that ALJ's decision is arbitrary, capricious, unsupported 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 §32-1522(d)(2). "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 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 is erroneous, contending that substantial evidence establishes that Petitioner is temporarily totally disabled and that she did not voluntarily limit her income. Respondent counters arguing that substantial evidence establishes that Petitioner is not temporarily totally disabled and the ALJ correctly found that Petitioner voluntarily limited her income.

In its appeal, Respondent alleges that the ALJ erred in concluding that Petitioner's allegation of back pain while performing activities in July of 2003 was causally connected to the work

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 While both parties filed appeals in this matter, for the sake of clarity, throughout this decision Claimant will be referred to as "Petitioner" and Employer as "Respondent."

injury of May 23, 2001. In addition, Respondent contends that the ALJ erred with respect to the nature and extent of Petitioner's disability.

Initially as to Petitioner's appeal, Petitioner contends that she is temporarily totally disabled because she is not able to return to the full duties of her pre-injury employment and that Respondent did not find her employment that was consistent with the restrictions imposed by her treating physician, Dr. Phylis Barson.

Petitioner argues that she had a fifteen pound weight restriction, which was imposed by Dr. Barson, and that Respondent failed to provide employment within that restriction. However, the record reveals that Mr. Salil Kharkar testified that the work performed by Petitioner in July 2003, after she complained of back pain lifting a "full sludge judge", was as a chemical engineering technician and consisted of primarily paperwork. Hearing transcript at 76. As such, Respondent contends that there were no restrictions imposed by Dr. Barron that would prevent Petitioner from performing the paperwork duties that she was assigned.

In addition, Mr. Kharkar indicated that a sludge full of water and sediment would weigh between 10 and 12 pounds. The ALJ specifically noted that Petitioner "did not object or attempt to discredit Mr. Kharkar's testimony as evidence of the actual weight of a full sludge judge . . . based upon Mr. Kharkar's calculations I have found the special work employer had available for claimant to perform in her capacity as a chemical engineer, was within her physical capabilities." Compensation Order at 6.

The ALJ found that Petitioner met her burden under *Logan v. Dist. of Columbia Dep't. of Employment Servs.*, 805 A.2d 237 (D.C. 2002), establishing that as of July 31, 2003, she was not able to return to her pre-injury duties. However, the ALJ found that Respondent had met its burden, under *Logan*, of establishing, at least by the date of the Formal Hearing, that work still available to Petitioner was suitable and within Petitioner's physical capabilities. In the instant matter, the record reveals that Petitioner was informed that she could return to work, that the sludge judge was within her lifting restrictions and in addition, interns would be available to assist handling the sludge judge. However, Petitioner decided not to return to work with Respondent.

The ALJ concluded:

Accordingly, claimant cannot meet her burden of establishing entitlement to ongoing temporary total disability benefits after the date of the Formal Hearing as it was on that date that she was made fully aware that the work made available by employer was suitable available employment which she should have returned to. Thus, any wage loss sustained thereafter was solely the result of her voluntary decision to look for alternative work either as a flight attendant or for other water treatment plants, and not the result of her work injury.

Compensation Order at 6-7.

As such, this Panel must reject Petitioner's arguments raised in her appeal, as the substantial evidence of record supports the ALJ's finding that any wage loss that Petitioner had after February 9, 2004 was the result of her voluntary decision to pursue other employment.

As to Respondent's appeal, Respondent argues that the ALJ erred in concluding that Petitioner's back pain sustained while performing work activities in July 2003 was causally connected to her work injury of May 23, 2001, and thus that she is not entitled to temporary total disability benefits from July 31, 2004 through February 4, 2004.

The ALJ found that with Respondent's stipulation that Petitioner sustained a work injury to her back on May 23, 2001, Petitioner's testimony that she had "unbearable" low back pain while using the sludge judge and Dr. Barson's June 27, 2003 office records relating Petitioner's ongoing back problems to the work injury invoked the presumption of a causal connection between her current disability and her employment. *Whittaker v. Dist. of Columbia Dep't. of Employment Servs.*, 668 A.2d 844 (D.C. 1995); *Ferreira v. Dist. of Columbia Dep't. of Employment Servs.*, 531 A.2d 651, 656 (D.C. 1987).

In rebuttal, Respondent submitted the reports of Dr. Richard Gordon, who opined that Petitioner's back problems were not related to her work injury. However, as the ALJ emphasized:

In as much as [Dr. Gordon] does not opine that claimant no longer suffers from the lower back symptoms she attributed to the May 23, 2001 incident nor does he provide any relevant opinion with regard to the causal relationship of claimant's back problems, he does not deny she has, Dr. Gordon's opinions with regards to claimant's alleged myelopathy is irrelevant and clearly not evidence specific and comprehensive enough to sever the presumed causal relationship between claimant's lower back problems as of January 24, 2004 and her employment.

Compensation Order at 5.

Thus, the ALJ's finding that Petitioner's low back problems continue to be causally related to her work injury of May 23, 2001 is supported by substantial evidence and is in accordance with the law.

As to the nature and extent of Petitioner's injury, the ALJ found, and the record reveals, that Respondent was unaware that Petitioner had only a fifteen pound lifting restriction, and Respondent filed its Application for Formal Hearing after Dr. Barson released Petitioner to return to light duty, but before Dr. Barson reported the lifting restrictions. On this issue, the ALJ stated:

Claimant testified at the Formal Hearing that she was unaware that employer was still in need of someone to perform her pre-injury duties, specifically finishing the special project with the sludge judge. In as much as it was not clear until the Formal Hearing whether or not claimant's pre-injury duties, including the special project work fell

within the physical restrictions placed upon her by her own treating physician, claimant is given the benefit of the doubt that she remained temporarily and totally disabled until the Formal Hearing. All uncertainties however, were resolved at the Formal Hearing by the acceptance of Mr. Kharkar's mathematical skills, i.e. that the sludge weighed less than claimant's lifting restrictions, and by claimant acknowledging and/or conceding, as well, that the special project work was still available to claimant and more importantly that she could have had the interns handle the sludge at anytime.

Compensation Order at 6.

Accordingly, the ALJ's conclusion that Petitioner was entitled to temporary total disability wage loss benefits from July 31, 2003 through February 9, 2004, and that her disability is causally related to the work injury that she sustained on May 23, 2001, but that any wage loss after February 9, 2004 is the result of Petitioner's voluntary limitation of income, is supported by substantial evidence and is in accordance with the law.

CONCLUSION

The Compensation Order of April 12, 2004 is supported by substantial evidence in the record and is in accordance with the law.

ORDER

The Compensation Order of April 12, 2004 is hereby AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

FLOYD LEWIS
Administrative Appeals Judge

June 22, 2006
DATE