

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. 05-230

JUAN SCOTT,

Claimant–Petitioner,

v.

DISTRICT OF COLUMBIA METROPOLITAN POLICE DEPARTMENT,

Employer-Respondent.

Appeal from a Compensation Order of
Administrative Law Judge Robert R. Middleton
OHA/AHD No. PBL 00-022A, DCP No. 342385

Juan Scott, *pro se* Claimant-Petitioner¹

Christine LeFlore, Esq., for Employer-Respondent²

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

JEFFREY P. RUSSELL, *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 § 1-623.28, § 32-1521.01, 7 DCMR § 118, and DOES Director's Directive Administrative Policy Issuance No. 05-01 (Feb. 5, 2005).³

¹ Petitioner was represented by Robert Taylor, Esq., at the formal hearing. However, Petitioner filed the instant appeal without counsel, and no counsel has entered an appearance in connection herewith.

² Although Respondent was represented at the formal hearing, it has not participated in this appeal.

³ 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

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 Compensation Order from the former Office of Hearings and Adjudication, currently the Administrative Hearings Division (AHD) of the Office of Hearings and Adjudication (OHA). In that Recommended Compensation Order (the Compensation Order), which was filed on March 29, 2005, the Administrative Law Judge (ALJ) denied Petitioner's claim for temporary total disability benefits from May 12, 1992 to the present and continuing, and in the alternative, for temporary total disability benefits from October 1991, to the present and continuing.

Petitioner's "Petition For Review and Objection of the Compensation Order" contains no specific request for relief. Review thereof reveals the following identifiable complaints or allegations of specific irregularity or error alleged to have been committed by the ALJ:

1. The ALJ had previously heard an earlier aspect of this case when the ALJ was a hearing examiner.
2. The hearing that the ALJ presided over was not conducted in a fair manner.
3. The ALJ "fabricated stories".
4. Respondent did not rehabilitate Petitioner to perform an alternate position that was suitable.
5. The ALJ failed to rule on a motion or request to recuse himself from this case.
6. The Compensation Order was not issued in a timely fashion.
7. Petitioner's experiences in connection with this claim and his termination by Respondent have caused stress and psychological injury.

In a handwritten appendix to his filing, Petitioner listed numerous provisions of the District of Columbia Workers' Compensation Act, D.C. Official Code § 32-1501, *et seq.*, in support of his appeal, without reference to how said provisions applied to this case. However, said provisions govern private sector workers' compensation claims, but have no application for disability compensation claims for city employees such as Petitioner.

While the Petition contains additional statements and assertions, the Board is unable to glean sufficient information from those additional items to frame cogent legal complaints.

Regarding the first item listed above, the complaint does not rise to the level of a cognizable ground for appeal, and will not be considered. The second and third items are insufficiently specific to be subject to analysis, and will not be considered. The fifth item is not supported by

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 § 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.

the record, that is, neither the Petition, the record transmitted, nor the transcript of proceedings includes any motion for recusal; the grounds for said alleged motion are not identified in the Petition and can not be gleaned from the record. The alleged failure to rule on the alleged motion will therefore not be considered. The sixth item does not constitute grounds for appeal, and will not be considered.

Item seven, the denial of the claim for psychological injuries, and item four, the alleged failure to provide vocational rehabilitation or suitable alternative employment, will be addressed as the subject of this appeal.

ANALYSIS

As an initial matter, the scope of review by the Compensation Review Board (CRB) and this Compensation 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. Comprehensive Merit Personnel Act of 1978, as amended, D.C. Official Code § 1-623.01, *et seq.*, at § 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. District of Columbia Department of Employment Services*, 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 alleged failure to provide suitable alternative employment or to otherwise provide vocational rehabilitation, the ALJ discussed the disability status of Petitioner on page 5 of the Compensation Order, writing as follows:

As noted in the initial Findings of Fact following claimant’s 1992 formal hearing, claimant’s TTD benefits ... were terminated following the issuance of medical reports from Drs. Kobrine, Levitt and Collins. Said termination occurred on November 30, 1992. While [that prior Compensation Order] upheld [employer’s] decision to halt benefits due to resolution of claimant’s physical injuries, claimant was ordered to be referred to an appropriate psychiatric specialist in order to assess claimant’s complaints of a stress related injury. Thereafter, I find claimant was referred to an independent psychiatrist, Dr. Brain [sic] Schulman, who, evaluated claimant and determined he was fully capable of returning to his regular duties and responsibilities as a warehouseman for employer herein. I find Dr. Schulman’s psychiatric opinion was issued in 1993.

I find claimant did not timely appeal the November 30, 1992 Final Compensation Order

Compensation Order, page 5.

After several pages of additional fact finding and then discussion, the ALJ continued as follows:

Upon issuance of the November 30, 1992 Final Compensation Order, which became a final order for the purposes of this case on December 31, 1992, claimant was provided his appeal rights and had the option of filing an appeal with ECAB. Since the record is devoid of any Petition for Review having been filed, claimant's case for appeal purposes is now closed, and the decision to deny further benefits [predicated upon the physical injury] became the law of the case. Accordingly, consideration of claimant's physical injuries has now in fact become *res judicata*.

Compensation Order, page 8.

The procedural facts recited above concerning the determination in the 1992 Compensation Order that the effects of the physical injury had resolved, leaving Petitioner physically capable of an unrestricted return to his pre-injury employment without modification, and the lack of any appeal of that order, are uncontroverted on the record, and are not challenged on appeal. Further, Petitioner's counsel at the formal hearing recited these same procedural facts in the opening statement, at HT 27 – 31, specifically acknowledging the termination of benefits in the Final Compensation Order of November 30, 1992 (approving the Recommended Compensation Order of November 29, 1992), and the referral therein for a psychiatric evaluation. Additionally, review of the prior Compensation Order itself confirms the finding of a resolution of the physical injuries without residual disability. Specifically, that Compensation Order contains the following:

Considering the weight of the medical evidence of record, I am persuaded that the claimant is no longer disabled from the 1991 work injury. In rendering this decision as to the physical aspects of claimant's injury, I rely on the medical opinions of Drs. Kobrine, Levitt and Collins ... Dr. Arthur Kobrine rendered a medical report which detailed a normal neurological examination ... [which included findings of] normal strength, tone reflex and sensory findings ...

Dr. Louis Levitt ... orthopedist, performed a physical examination ... and found a normal examination with no objective pathology or measured loss to explain claimant's alleged residual symptoms [and he] reviewed the MRI scan and opined that the scan was normal for an individual of claimant's age. Dr. Levitt found no evidence of either cervical or lumbar radiculopathy. He determined that claimant had reached maximum medical benefit of treatment following the work trauma and could return to work ...

A second orthopedic opinion ... by... Dr. Robert Collins ... found claimant to have normal range of motion of his neck with no spasm or limitation of motion ...

[and he] opined that there were no residuals from the March 11, 1991 work injury and that claimant could return to full duty with no limitations.

Juan Scott v. District of Columbia Metropolitan Police Department, H&AS No. PBL 92-31, ODCVC No. 342385 (Recommended Compensation Order November 29, 1992), page 7 – 9.

First, review of the record reveals that this specific claim, for vocational rehabilitation or placement in a modified job, was not made below, and consequently is not reviewable at this level.

Beyond that, even if some aspect of the claim can be said to have been made by implication, given the above described findings in the prior Compensation Order, the claim that Petitioner would be entitled to vocational rehabilitation or modified duty employment is unsupported at this time, and is, as the ALJ noted, *res judicata*. We note that it is clear from the cited transcript that there was no claim of a change in conditions. Rather, it was Petitioner's contention at the formal hearing that certain alleged irregularities in the process following the denial of benefits for a psychiatric claim concerning the appeals from that denial somehow revived Petitioner's right to appeal or re-hear the November 1992 determination that his physical injuries and resultant disability had resolved. However, Petitioner's counsel provided no legal support for the proposition at the formal hearing, Petitioner has provided none in these proceedings, and we are aware of none. Accordingly, the un-appealed determination approved in the Final Compensation Order of November 30, 1992 and set forth in the Recommended Compensation Order of November 29, 1992, that Petitioner's physical injuries from the work injury had resolved without residual disability is *res judicata*, and the ALJ's so concluding in the Compensation Order under review herein is in accordance with the law. That being the established law of the case, there is no basis for Petitioner's contention that Respondent was or is obligated to provide disability benefits, vocational rehabilitation or suitable alternative employment.

Concerning the denial of the claim for psychiatric disability or injury, the ALJ properly noted that such claims are governed by the rule established in *Dailey v. 3M Company*, H&AS No. 85-259, OWC No. 066512 (May 19, 1988). Although the ALJ's discussion and analysis of the psychiatric claim is less clear than it might have been, review of that discussion indicates that he appropriately determined that Petitioner's job duties as a warehouseman were not inherently stressful from an objective viewpoint, and that there was nothing about the work incident itself (striking one's head while climbing onto a forklift) that was "objectively" likely to cause the same type of alleged psychiatric reaction in a non-predisposed individual. Petitioner has not challenged these findings. Rather, it appears that Petitioner's basis for his psychiatric claim, at least on appeal, is related to the allegedly stressful nature of the aftermath of the work injury, including what he appears to view as an unfair termination. In rejecting Petitioner's claim in this regard, the ALJ specifically referenced the opinion of Dr. Brian Schulman, a psychiatrist who evaluated Petitioner in January 1993 (as described in Employer's Exhibit No. (EE) 3), as a result of the recommendation of the ALJ contained in the prior Compensation Order. According to the report of Dr. Schulman following that evaluation, Petitioner did not sustain any psychiatric injury as a result of the work injury or its aftermath. See, EE 3. Dr. Schulman also reevaluated Petitioner on September 21, 2004, and the record contains his September 28, 2004 report concerning that evaluation. EE 2. The ALJ concluded, based upon the contents of that report,

that Petitioner had sustained no “mental disorder” resultant from the March 11, 1991 injury. Review of EE 2 and EE 3 reveals that Dr. Schulman did, indeed, reach the conclusions that the ALJ attributed to him. While these opinions were contrary to the opinions of Petitioner’s orthopedic physician and Petitioner’s psychologist, the ALJ noted his reasons for acceptance of Dr. Schulman’s opinion: Dr. Schulman had examined Petitioner closer in time to the work injury than had the orthopedic doctor or the psychologist, and his opinion was pursuant to the American Medical Association Guidelines to Evaluation of Permanent Impairment. Further, the ALJ specifically found, on page 5 of the Compensation Order, that claimant was not a credible witness concerning his alleged psychological distress. Even given the preference normally accorded treating physician opinion under *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), these reasons are sufficient, in the context of this case, to permit the ALJ to prefer the opinion of a Board Certified psychiatrist who has examined a claimant twice, once around the time of the injury and again recently in the time frame of the formal hearing, and who evaluated a claimant consistent with the AMA Guidelines, to that of a psychologist and an orthopedic doctor, on a question of psychiatric specialty.

In summary, we find that the ALJ’s determination that Petitioner has sustained no psychiatric injury as a result of the work injury to be supported by substantial evidence and to be in accordance with the law.

CONCLUSION

The Compensation Order of March 29, 2005 is supported by substantial evidence and is in accordance with the law.

ORDER

The Compensation Order of March 29, 2005 is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

JEFFREY P. RUSSELL
Acting Administrative Appeals Judge

June 1, 2005

DATE