

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. 07-043

SHELDA KRALICK,

Claimant–Respondent,

v.

DISTRICT OF COLUMBIA DEPARTMENT OF HUMAN SERVICES,

Employer–Petitioner.

Appeal from a Compensation Order of
Administrative Law Judge Henry W. McCoy
OHA/AHD No. PBL XX-885, DCP No. 10092

Daniel R. Long, Esquire, for Claimant-Respondent

Kevin Turner, Esq., for Employer-Petitioner

Before JEFFREY P. RUSSELL, SHARMAN J. MONROE and LINDA F. JORY, *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).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 § 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.

BACKGROUND

This appeal follows the issuance of a Compensation Order on Remand by the Administrative Law Judge (ALJ) in the Administrative Hearings Division (AHD) of the Office of Hearings and Adjudication (OHA). In that Compensation Order on Remand, which was filed on January 31, 2007, the ALJ granted Respondent's claim for temporary total disability benefits from July 17, 1990 through March 14, 2006, and permanent total disability benefits thereafter and continuing, as well as causally related medical care.²

Petitioner's Application for Review (AFR) seeks reversal of the determination by the ALJ that Respondent is permanently totally disabled. In the AFR, Petitioner contends that the finding of permanent total disability status is unsupported by substantial evidence and is not in accordance with the law, due to the fact that (1) there are references to Respondent's improvement in the medical records subsequent to the date that the ALJ found Petitioner to have attained permanency status, and (2) Petitioner's evidence, being the report of an independent medical evaluation (IME) performed by Dr. Pasquale X. Montesano at Petitioner's request on April 10, 2006, which was not offered into evidence by Petitioner at the formal hearing but was offered by Respondent, demonstrates that Respondent's medical condition is subject to improvement, to the point of probable employability, if Respondent undergoes "reconstructive surgery".

Respondent has filed no response to the AFR.

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. App. 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.

² For reasons unexplained, in the Application for Review (AFR), Petitioner's only substantive complaint concerning the Compensation Order is stated as follows: "In the CO, Claimant's request for bilateral hearing aids was granted. In support of the Petition for Review, the following Memorandum of Points and Authorities is submitted." However, nothing in the Compensation Order or the memorandum submitted by Petitioner makes any reference to hearing aids, bilateral or otherwise. Rather, the claim appears by all appearances to be related to orthopaedic injuries and conditions involving Respondent's low back with radicular leg involvement. Further, nothing in the memorandum references any error claimed in connection with the award of medical care, service or devices. Accordingly, we deem the description of the alleged error as set forth in the AFR to be an inadvertent error on counsel's part, and further deem this appeal to be limited to Respondent's complaints concerning the award of permanent total disability benefits.

Turning to the case under review herein, the only error that Petitioner alleges is that the determination of permanency is premature, for two reasons.

First, Petitioner asserts that the medical records fail to demonstrate that Respondent has attained maximum medical improvement, because there are two references to Respondent's having improved medically in the record, one being an office note from Dr. William Snider dated September 14, 1987 (CE 5), and the other an office note from the same physician dated November 10, 1988 (CE 5).

Even assuming (which we do not) that two such notes in the medical record demonstrate that a patient may have the capacity for further improvement in the future, they are irrelevant to the finding made by the ALJ, which is that Respondent has been permanently totally disabled from and after March 15, 2006, long after these two isolated and rather general notes were authored.

Second, Petitioner asserts that there is potential for improvement and possible employability sometime in the future if Respondent undergoes reconstructive surgery. This argument is premised upon the IME report of Dr. Montesano, CE 21, which is quoted by Petitioner in its memorandum, and in which the doctor asserts as follows:

My recommendation is that she have reconstructive surgery. I think she would have an 80% chance of having a significant improvement with reconstructive surgery and a significant chance, perhaps 60-70% chance that she would be able to return to work and wouldn't be disabled, but the patient I'm evaluating today clearly is disabled. While she has a severe problem, it's straightforward, and basically, I think that some obvious problems have been missed that need to be addressed. They are capable of being addressed, and with reconstructive surgery, I think that she would be able to return to work.

Memorandum of Points and Authorities in Support of Petitioner's Petition for Review, page 4. Again assuming (which again we don't) that such a speculatively optimistic IME report from a non-treating physician would be sufficient to render the ALJ's contrary determination invalid, in this case the most that can be said of the report is that it could support a conclusion that in some unspecified time in the future there is a chance that Respondent's condition will improve contingent upon her decision to undergo reconstructive surgery, and conditioned upon that surgery being successful, and if both those conditions are met and there is improvement, there is a possibility that Respondent might be able to perform some level marketable work. Such a determination does not prevent a finding that Respondent's condition "permanent" as the law defines that condition in workers' compensation contexts: "[D]isability is *permanent* if it 'has continued for a lengthy period, and it appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period'". *Logan v. District of Columbia Dep't of Employment Serv's.*, 805 A.2d 237 (2002), at 241, citing and

quoting *Smith v. District of Columbia Dep't of Employment Serv's.*, 548 A.2d 95 (1988), at 98, n. 7 (italics in original).

Respondent might argue that there is a possibility of future improvement in such a case, and therefore until it is known whether such a possibility becomes a reality the condition is subject to change, and hence is not permanent. This argument, while not without intuitive and intellectual appeal, has already been considered and rejected by the Court of Appeals in *Safeway Stores v. District of Columbia Dep't of Employment Serv's.*, 806 A2d 1214 (2002), wherein the court ruled that even the *likelihood* of a total knee replacement at a future time would not forestall the attainment of permanency, if the legal test is met. Thus, the court held that the fact that a claimant was likely to improve when he has knee replacement surgery in the future (the surgery being forestalled because of the advisability of waiting several years, in order to diminish the need for a second surgical replacement during his lifetime), an eventuality that all agreed was likely to occur, did not preclude a determination that the current condition meets the test for permanency under workers' compensation principles. See, *Safeway, supra*, at 1221. And see, *Tinordi v. Washington Capitals, et al.*, OHA No. 00-276A, OWC No. 538226 (November 20, 2003).

While these cited cases dealt not with the Act, but rather with the private sector workers' compensation law, they are premised not upon the specific wording of the statute, but rather upon general principles of workers' compensation jurisprudence, and have equal validity and applicability under both the public and private sector statutes and schemes.

In this case, the ALJ noted, and Petitioner does not contest either before the ALJ or in this appeal, that the disabling condition has been ongoing for a long time, since 1990, and Petitioner has offered no evidence that the passage of time by itself is expected to result in further improvement in Respondent's medical condition. As such, the test of permanency has been satisfied. The extent of Respondent's disability, total, is not subject to contest either before the ALJ or in this appeal; accordingly, the ALJ was not erroneous in concluding that Respondent is permanently totally disabled from and after March 15, 2006.

CONCLUSION

The Compensation Order on Remand of January 31, 2007 is supported by substantial evidence and is in accordance with the law.

ORDER

The Compensation Order on remand of January 31, 2007 is affirmed.

FOR THE COMPENSATION REVIEW BOARD:

JEFFREY P. RUSSELL
Administrative Appeals Judge

March 27, 2007
DATE