

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 (Dir.Dkt.) No. 04-54

BETTY LANCASTER SHORT,

Claimant – Respondent

v.

HOWARD UNIVERSITY AND LIBERTY MUTUAL INSURANCE COMPANY,

Employer/Carrier – Petitioner.

Appeal from a Compensation Order of
Administrative Law Judge Karen R. Calmeise
OHA No. 04-042, OWC No. 183471

Christopher R. Costabile, Esquire, for the Petitioner

Lisa M. Re, Esquire, for the Respondent

Before LINDA F. JORY, FLOYD LEWIS and SHARMAN J. MONROE, *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 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 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 23, 2004, the Administrative Law Judge (ALJ) concluded that Claimant-Respondent (Respondent) was temporarily totally disabled from August 14, 2002 to the present and continuing. Employer-Petitioner (Petitioner) now seeks review of that Compensation Order.

As grounds for this appeal, Petitioner alleges as error that the ALJ's determination that Respondent is unable to return to her modified duty secretarial position is not supported by the substantial evidence in the record.

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 that Respondent is unable to return to her modified position as a secretary is erroneous, as the ALJ erred in crediting the opinion of Respondent's treating physician that she is not able to return to her prior employment due to her work-related back injury. Petitioner contends that the well-reasoned opinion of its physician, Dr. Robert Collins, opines that Respondent is capable of returning to work and leads to the conclusion that Respondent is not temporarily totally disabled.

In granting Respondent's request for relief, the ALJ gave greater weight to the opinion of Respondent's treating physician, Dr. Azer, noting that this physician had the opportunity to examine Respondent over a greater period of time and was therefore, able to provide an opinion as to the ability of Respondent to return to work. In evaluating the medical evidence of record, the testimony of a treating physician is ordinarily preferred over that of a physician retained solely for litigation purposes. *Harris v. Dep't. of Employment Servs.*, 746 A.2d 297, 302 (D.C. 2000); *Stewart v. Dep't. of Employment Servs.*, 606 A.2d 1350, 1353 (D.C. 1992).

This Panel can find no reason to disturb the ALJ's decision to credit the opinion of Dr. Azer, the treating physician, over Petitioner's physician, Dr. Collins. Moreover, the ALJ specifically

noted and credited Respondent's testimony that she was not able to perform the modified work duties, as she is taking pain medication which causes significant drowsiness that affects her ability to perform her job.

Finally, Petitioner argues that since Respondent testified that she is able to perform some work duties for her church, Respondent is not disabled as she claims. However, this argument was rejected by the ALJ, as the ALJ correctly noted that it has been held that evidence that a claimant is able to earn occasional wages or perform only certain kinds of gainful employment does not necessarily prevent a finding of total disability, citing *American Mut. Ins. Co. v. Jones*, 138 U.S. App. D.C. 269, 271, 426 F.2d 1263, 1265 (1970) and 2 Arthur Larson, Workers' Compensation Law, § 57.51(a), at 10-283 to 10-288 (1995). After reviewing the record as a whole, the ALJ did not err in finding that without a showing by Petitioner that there is available alternative employment that Respondent is physically able to perform, that she is entitled to receive temporary total disability benefits. *Joyner v. Dist of Columbia Dep't. of Employment Servs.*, 502 A.2d 1027, 1031 n. 4 (D.C. 1986).

Accordingly, the ALJ's conclusion that Respondent presented credible evidence that she was temporarily totally disabled from August 14, 2002 to the present and continuing is supported by substantial evidence and is in accordance with the law.

CONCLUSION

The Compensation Order of April 23, 2004 is supported by substantial evidence in the record and is in accordance with the law.

ORDER

The Compensation Order of April 23, 2004, is hereby AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

FLOYD LEWIS
Administrative Appeals Judge

December 27, 2005 _____
DATE