

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. 07-095

SUSAN DAMEGREENE,

Claimant–Respondent,

v.

AMERICAN RED CROSS,

Self-Insured Employer–Petitioner.

Appeal from a Final Order of
Administrative Law Judge Melissa Lin Klemens
AHD No. 97-411F, OWC No. 532972

Robert C. Baker, Jr., Esq., for Petitioner

Benjamin T. Boscolo, Esq., for Respondent

Before E. COOPER BROWN, *Chief Administrative Appeals Judge*, SHARMAN J. MONROE and FLOYD LEWIS, *Administrative Appeals Judges*.

E. COOPER BROWN, *Chief Administrative Appeals Judge*, for 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 No. 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, *codified at* 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. 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 Reform and Anti-Fraud Amendment Act of 2004.

BACKGROUND

Pursuant to a Compensation Order issued September 21, 2001, Claimant-Respondent (hereafter Respondent) was found to have sustained an occupational disease arising out of and in the course of her employment with Employer-Petitioner (hereafter Petitioner), and awarded temporary partial disability benefits based upon the difference between her pre-injury weekly wage while employed with Petitioner and her post-injury average weekly net profits gained from self-employment in a company that Respondent had formed. This Compensation Order was affirmed by the Director in *Damegreene v. American Red Cross*, Dir. Dkt. No. 01-81, OHA no. 97-411C (May 13, 2002).

Subsequently, upon satisfaction of the temporary partial disability award rendered pursuant to the September 21, 2001 Compensation Order, *i.e.* payment by Petitioner of the maximum amount of temporary partial disability benefits to which Respondent was entitled under D.C. Official Code § 32-1508(5), Respondent filed a claim for permanent partial disability benefits, contending that the extent of her disability remained the same and that she was entitled to additional benefits as her wage loss was permanent. Concluding that Respondent continued to be restricted in her ability to work and thus remained unable to return to her pre-injury employment, and that her condition had stabilized as much as it ever would, the then-presiding ALJ held that Respondent's wage loss was permanent in nature. Respondent was thus awarded permanent partial disability benefits, with her wage loss ordered to be calculated under Section 32-1508(3)(v)(ii)(II) with her annual earnings calculated based on her net profits from self-employment. *Damegreene v. American Red Cross*, OHA No. 97-411E, OWC No. 532792 (July 2, 2004), *aff'd Damegreene v. American Red Cross*, CRB No. 04-78 (May 25, 2006).

In January of this year Petitioner filed an Application for Formal Hearing with the Administrative Hearings Division seeking modification of the July 2, 2004 Compensation Order pursuant to D.C. Official Code § 32-1524(a). Petitioner asserted that based upon a failure by Respondent to cooperate with vocational rehabilitation and refusal to accept suitable part-time employment that was offered, there existed a change of conditions within the meaning of Section 32-1524(a) warranting modification of the award rendered pursuant to the July 2, 2004 Compensation Order. Following a preliminary hearing held pursuant to *Snipes v. D.C. Dept. of Employment Services*, 542 A.2d 832 (D.C. 1988) (referred to as a "*Snipes* hearing"), the presiding ALJ refused to order review of the compensation award previously ordered, and dismissed Respondent's Application for Formal Hearing by Order dated April 4, 2007.

Pursuant to a timely appeal filed with the Compensation Review Board, Petitioner seeks review of the ALJ's Order denying its application for modification of the July 2, 2004 Compensation Order. Petitioner asserts that the Order is not in accordance with applicable law and that the findings set forth therein are not supported by substantial evidence of 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. See D.C. Workers' Compensation Act of 1979, as amended, D.C. Official Code § 32-1521.01(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. D.C. Dep't. of Employment Serv's.*, 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.

Pursuant to the instant action, Petitioner sought modification before AHD of the July 2, 2004 Compensation Order that awarded Respondent permanent partial disability benefits, which benefits Respondent is currently receiving, based upon Respondent's purported failure since issuance of the 2004 Compensation Order to cooperate with vocational rehabilitation and rejection of an offer of suitable part-time employment.

Prior to holding a full evidentiary hearing on Petitioner's request for modification, the ALJ scheduled an initial "Snipes hearing".² Based upon the evidence and arguments presented at that time, the ALJ denied Petitioner's request for a full hearing based upon the determination that Petitioner failed to make the requisite threshold showing that there was reason to believe that Respondent's condition had changed within the meaning of D.C. Official Code § 32-1524(a) since issuance of the prior compensation award.³ The basis for the ALJ's conclusion, as set forth in the Order, was that the prior compensation order adjudicating Respondent to be permanently partially disabled involved a determination by the then-presiding ALJ that Respondent's self-employment, which served as a basis for computing Respondent's partial wage loss, constituted suitable alternative employment, a determination which the ALJ viewed as the "law of the case."

It is unclear whether the ALJ was persuaded by Respondent's argument before AHD that the Act does not contemplate vocational rehabilitation after a claimant has returned to suitable alternative employment. Nevertheless, the ALJ ignored the basis for Petitioner's modification request (*i.e.* failure to cooperate with vocational rehabilitation), and focused instead upon what the ALJ characterized as the prior Compensation Order's rejection of the argument that Respondent "had voluntarily limited her income by starting her own business" which she continued to own and operate, and that "Nothing has changed in regards to [Respondent's] employment, her comparative income, or the calculation of her indemnity benefits since the issuance of [the prior] compensation order." Order, at pg. 2. Accordingly, the ALJ held that Petitioner "failed to

² The purpose of a "Snipes hearing", as explained by the Court of Appeals in *Snipes v. D.C. Dept. of Employment Services*, 542 A.2d 832 (D.C. 1988), is to determine whether there exists reason to believe that a change of condition within the meaning of D.C. Official Code § 32-1514(a) has occurred since issuance of a prior award of compensation such that a full evidentiary hearing on the claimant's or employer's request for modification of the existing award should be heard.

³ Section 32-1524(a) provides for the review of a prior order awarding of disability benefits, upon timely application, "where there is reason to believe that a change of conditions has occurred which raises issues concerning . . . the fact or the degree of disability or the amount of compensation payable pursuant thereto. . . ."

demonstrate a change in condition concerning the fact or degree of disability or the amount of compensation payable.” Order, at pg. 3. The ALJ thus refused to order review of the compensation award previously ordered, and dismissed Respondent’s application.⁴

Based upon our review of the record before us, including the Order appealed, the “Snipes hearing” transcript, the exhibits offered into evidence by Petitioner at that time, and the briefs of the parties on appeal,⁵ this Review Panel concludes that the ALJ’s rejection of Petitioner’s application at the preliminary “*Snipes*” stage, without a full evidentiary hearing, constitutes legal error warranting reversal and remand of this appeal to the Administrative Hearings Division, for the reasons hereafter discussed.

To begin with, in rejecting Petitioner’s request for a full hearing, the ALJ employed the standard applicable to the weighing of the evidence upon a full modification hearing, rather than that applicable at the preliminary “*Snipes*” stage. As previously noted, in dismissing Petitioner’s application the ALJ held that Petitioner “failed to demonstrate a change in condition concerning the fact or degree of disability or the amount of compensation payable.” However, as the D.C. Court of Appeals has noted, the test applicable at the “*Snipes*” stage is whether the moving party has presented sufficient evidence to establish a “reason to believe” that a change in conditions has occurred such that a full evidentiary hearing on the movant’s request for modification should be conducted.

At the preliminary hearing stage, Section 32-1524(a) “requires some affirmative factual showing that a change of conditions has occurred.” *Washington Metropolitan Area Transit Authority (WMATA) v. D.C. Dept. of Employment Services*, 703 A.2d 1225, 1230 (D.C. 1997) (citing *Snipes, supra*, 542 A.2d at 834 & n.4, 835). In order to meet the “reason to believe” standard, “something short of full proof” is required in order to support an evidentiary hearing, *Id.*, with the burden of demonstrating at this stage the existence of a change of condition being described as “a light one.” *Walden v. D.C. Dept. of Employment Services*, 759 A.2d 186, 191 (D.C. 2000). The purpose of the preliminary proceeding under section 32-1524 is “to examine evidence which could establish, if credited, changed conditions.” *Walden*, 759 A.2d at 192 (quoting *Snipes*, 542 A.2d at 834 n.4). The moving party need only meet a “modest threshold burden of producing minimal evidence to support the ‘reason to believe’ standard.” *Id.* The moving party “need only offer *some evidence* of (1) a change in the fact or the degree of disability, and (2) some initial work-related injury that caused the previous disability.” *Id.*

Our second basis for reversing the ALJ’s rejection of Petitioner’s claim for relief and returning this matter to AHD for further proceedings focuses upon the ALJ’s misconception that because Respondent is currently performing what was previously determined to be suitable alternate

⁴ The Order also purportedly remanded the case to the Office of Workers’ Compensation. See, however, *Gooden v. Nat’l Children’s Center/Stone v. Ogdan Entertainment*, CRB Nos. 03-137 & 03-142, 2006 DC Wrk. Comp. LEXIS 485 (April 14, 2006) (ALJ’s authority to remand to OWC limited to specified circumstances under the Act and governing regulations).

⁵ Only Peititioner’s legal memorandum was considered, as Respondent did not submit a response to the instant appeal.

employment, that determination constitutes “the law of the case” and is beyond challenge,⁶ thus negating any requirement on Respondent’s part to participate in vocational rehabilitation or accept alternative or additional part-time employment within her restrictions that would return Respondent’s income to a level more closely in keeping with her pre-injury employment. Petitioner did not, however, challenge the prior Compensation Order’s determination that Respondent’s self-employment constituted suitable alternative employment, but instead charged that since the issuance of the 2004 Compensation Order, Respondent refused to participate in vocational rehabilitation and rejected an offer of suitable alternative part-time employment intended not to replace Respondent’s self-employment but to supplement the income Respondent derived through her self-employment. As hereinafter discussed, both are acceptable claims to assert in support of a modification request under the Act.

In the instant case the prior determination of the nature and extent of Respondent’s disability is not in dispute. The July 2, 2004 Compensation Order, of which modification is now sought, reaffirmed the prior finding (pursuant to the Compensation Order of September 21, 2001) that Respondent sustained a work-related occupational disease and found, based upon the evidence presented, that Respondent’s disability was permanent in nature. The then-presiding ALJ further determined that the extent of Respondent’s disability was partial only, based upon the fact that Respondent was engaged in alternative self-employment within her work restrictions that provided Respondent with an income less than her pre-injury average weekly wage.

In the Order herein at issue, the ALJ makes reference to the foregoing determinations as the “law of the case,” presumably suggesting that relitigation of the claim or the issues raised therein is barred by *res judicata* and/or collateral estoppel. *See Walden v. D.C. Dept. of Employment Services*, 759 A.2d 186, 189 (D.C. 2000). However, as the Board has recently noted, D.C. Official Code § 32-1524 has been held by the D.C. Court of Appeals to create a specific procedure to revisit issues previously decided by a compensation order, creating an exception to the doctrine of *res judicata* in cases that fall within its purview. *Kelly Millhouse v. Washington Metropolitan Area Transit Authority*, CRB No. 06-85, AHD No. 95-348B (July 20, 2007), *citing*, *Short v. D.C. Dept. of Employment Services*, 723 A.2d 845, 850 (D.C. 1998); *Walden, supra*, 759 A.2d at 190. Section 32-1524 is expressly “designed for the review of a specific compensation award covering an issue ‘previously decided’ by that order.” *Capitol Hill Hospital v. D.C. Dept. of Employment Services*, 726 A.2d 682, 685 (D.C. 1999). “[T]he statute provides for re-examination of previously determined issues upon a proper showing that a change of circumstances has occurred warranting a modification of the order.” *Washington Metropolitan Area Transit Authority (WMATA) v. D.C. Dept. of Employment Services*, 703 A.2d 1225, 1231 (D.C. 1997).

Consistent with the foregoing case authority, both the Office of Hearings and Adjudication (now AHD) and the Compensation Review Board have recognized issues arising subsequent to a wage-loss disability award involving vocational rehabilitation and the voluntary limitation of income as legitimate focus of modification proceedings under Section 32-1524. For example, in *Mardequeo Machuca v. John Juennemann Painting*, OHA No. 87-250F, OWC No. 107760 (March 29, 2005), the ALJ proceeded to a formal hearing on a modification request upon determining that the employer’s proffered evidence of failure on the part of the employee to

⁶ *But see* discussion, *infra*.

cooperate with vocational rehabilitation services, where the employee was receiving temporary total disability benefits pursuant to a prior compensation order, met the initial “reason to believe” burden required of the moving party by *Snipes* pursuant to a modification proceeding.⁷

Recently, in *Frank Hines v. Washington Metropolitan Area Transit Authority*, CRB No. 07-004, AHD No. 98-263D (Dec. 22, 2006), the CRB acknowledged the validity of failure to cooperate in vocational rehabilitation as a basis for invoking the “changed circumstances” grounds for modification of a prior compensation order. The appeal therein was remanded to AHD “with instructions to conduct a preliminary review of the evidence to determine whether there is some evidence of a change of conditions since [the date of the prior compensation order] affecting the fact or degree of disability or the amount of compensation to which [the claimant] is entitled.”

In light of the foregoing, we remand the instant case to AHD to assess whether Petitioner’s proffered evidence regarding Respondent’s cooperation (or lack thereof) with the vocational rehabilitation offered by Petitioner, and the evidence asserted by Petitioner as showing an unreasonable refusal on Respondent’s part to accept suitable part-time alternative employment designed to supplement Respondent’s existing self-employment, meet the “reason to believe” test such that a full evidentiary hearing is warranted under D.C. Official Code § 32-1524(a) on Petitioner’s modification application. In so doing, we express no view as to whether the evidence proffered by Petitioner meets the preliminary test required by *Snipes*. Nor do we express any view as to whether Petitioner may ultimately be entitled to the relief it seeks should the ALJ order a full evidentiary hearing on the modification request.

CONCLUSION

The Final Order herein appealed failed to apply the proper test for initially determining whether, based upon the evidence presented by Petitioner, there exists reason to believe that a change of condition has occurred within the meaning of D.C. Official Code § 32-1524(a) such that a full evidentiary hearing on Petitioner’s application for a modification of the prior Compensation Order should have been conducted.

⁷ See also, *Crawford v. Greater S.E. Community Hospital*, H&AS No. 96-293, OWC No. 249415 (Dec. 6, 2002), citing *WMATA v. DOES*, 703 A.2d. 1225, 1231 (D.C. 1997) (“[I]ssues of failure to cooperate with vocational rehabilitation, which calls for a penalty of suspension of benefits, D.C. Code § 32-1507(d), and voluntary limitation of income, requiring a reduction in compensation by the amount a job the claimant could have obtained had he cooperated, D.C. Code § 1508(5), [are] cognizable issues for modification.”); *Bivens v. Chemed/Rotor Rooter Plumbing*, OHA No. 01-202B, OWC No. 560668 (Feb. 7, 2005) (ALJ found that the employer’s vocational rehabilitation efforts since last formal hearing revealed “a potential change in the status of claimant’s earning capacity via the evidence of employment opportunities” presented to the claimant.); *Campbell v. Coastal Int’l Security*, OHA No. 02-121C, OWC No. 565078 (Feb. 17, 2005) (finding that the claimant’s unreasonable failure to cooperate with vocational rehabilitation leads constituted change in the amount of compensation payable, thus warranting modification of existing compensation order).

ORDER

The Final Order of April 4, 2007 herein appealed is hereby VACATED, and this matter is REMANDED to the Administrative Hearings Division for further consideration consistent with this Decision.

FOR THE COMPENSATION REVIEW BOARD:

E. COOPER BROWN
Chief Administrative Appeals Judge

August 31, 2007

DATE