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. 03-104

CHESTER L. WHITCHER,

Claimant–Petitioner

v.

TRANSWESTERN PROPERTY COMPANY AND TRAVELERS INSURANCE COMPANY,

Employer/Carrier–Respondent

Appeal from a Compensation Order of
Administrative Law Judge Anand K. Verma
OHA/AHD No. 02-289B, OWC No. 543939

Stephan D. Karr, Esquire, for the Petitioner

Amy L. Epstein, Esquire, for the Respondent

Before E. COOPER BROWN, *Acting Chief Administrative Appeals Judge*, JEFFREY P. RUSSELL, and SHARMAN J. MONROE, *Administrative Appeals Judges*.

JEFFREY P. RUSSELL, *Administrative Appeals Judge*, for the Compensation 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 District of Columbia 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 District of Columbia Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §§ 32-1501 to 32-1545 (2005), and the District of Columbia Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Code Ann. §§ 1-623.1 to 1-643.7 (2005), including responsibility for

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 July 31, 2003, the Administrative Law Judge (ALJ) granted Petitioner's claim for an award of costs of vocational rehabilitation services, but denied Petitioner's claim for temporary total disability benefits from February 28, 2002 through July 31, 2002. Petitioner now seeks review of that Compensation Order. Respondent opposes the appeal, but has not opposed the award of vocational rehabilitation costs.[2]

In his "Memorandum of Points and Authorities" (Memorandum), Petitioner does not characterize his contentions on appeal as being a lack of support for the ALJ's decision from an evidentiary standpoint (that is, he does not characterize the alleged errors of the ALJ as being related to factual findings unsupported by substantial evidence in the record), nor does he characterize the basis of this appeal as being a misapplication of any specific facts to a particular legal precept.

Our review of the contents of the Memorandum lead us to conclude that Petitioner's bases for appeal are: (1) lack of substantial evidence to support the ALJ's factual finding that Petitioner was capable of returning to his pre-injury job without restriction as of February 28, 2002; (2) legal error in determining that Petitioner's lack of work due to his ceasing to earn wages from a subsequent job with MC Services did not entitle Petitioner to temporary total disability benefits; (3) an assertion of legal error in not awarding temporary total disability benefits based upon a notation in a job description produced by Respondent in which it was written that Petitioner's pre-injury job with Respondent did not permit any "modified duty", which Petitioner interprets to be an admission that Petitioner was unable to perform the pre-injury job and that Respondent declined to offer him a modified position; and (4) legal error in connection with failing to accept the alleged opinions of a treating physician, Dr. Marshall Steele, said to be contained in Dr. Steele's deposition and a report or letter dated August 22, 2002, which according to Petitioner constitute a medical restriction prohibiting certain physical activities associated with his pre-injury employment with Respondent.

Respondent asserts that the denial of the claimed wage loss benefits was supported by substantial evidence, in the nature of a signed release to return to the pre-injury position as described in a job description executed by Dr. Steele on February 27, 2002, and that even assuming that Petitioner is not earning wages from the subsequent job with MC Services, that wage loss is not compensable because (1) Petitioner's ceasing work with MC Services is due to his job having been terminated for economic, non-disability reasons, and (2) any physical incapacity to perform the MC Services position is irrelevant to Petitioner's claim for wage loss benefits, because Petitioner is capable of returning to the pre-injury job as it existed when Petitioner worked for Respondent.

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administrative appeals filed prior to October 1, 2004, the effective date of the District of Columbia Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004.

[2] The Compensation Order awarded costs in connection with four days of services described only as "vocational rehabilitation" , found to have been obtained (apparently but not explicitly by Petitioner on his own) on September 6, October 17, December 12 and December 31, 2002. What those costs were are nowhere mentioned in the Compensation Order. Neither party has raised any issue concerning this aspect of the award in these appeal proceedings.

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. Code Ann. §32-1501 to 32-1545 (2005), at §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. Dist. of Columbia Dep't. of Employment Servs.*, 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.

Turning to alleged error number one, the record contains, at RE 2, a document entitled "Full Duty Job Description", in which Dr. Steele has authorized a full time return to work in a position with certain described physical requirements, as of February 27, 2002. The record also contains Petitioner's admission at the formal hearing that the exhibit "fairly and accurately" reflects the requirements of Petitioner's pre-injury job with Respondent. HT 51. As such, the record contains evidence that a reasonable person might accept to reach the conclusion that, as of February 27, 2002, Petitioner was physically capable of returning to his pre-injury job without restriction, and thus there is substantial evidence to support such a conclusion. The first identifiable allegation of error is therefore rejected.

Regarding the second allegation of error, that Petitioner is nonetheless entitled to temporary total disability benefits because Petitioner alleges that he is incapable of performing the duties of his subsequent job at MC Services due to physical limitations created by the work injury, Petitioner's argument to such entitlement is not in accordance with the law. That is, in order to establish entitlement to total disability benefits, a claimant must show that, as a result of his work injury, he is physically unable to perform the duties of the pre-injury job. *Logan v. District of Columbia Dep't. of Employment Services*, 805 A.2d 237 (D.C. 2002). In the absence of such a showing, the alleged inability to perform a subsequent job is not relevant to an employer's obligation to pay wage loss benefits.[3] Thus, the second identified alleged error is rejected.

Regarding the third alleged error, that concerning the notation contained in Dr. Steele's release to return to full duty, where the "Modified Duty Available" question is checked "no", Petitioner misapprehends the import and meaning of that notation. By all appearances, the "Full Duty Job Description" accurately describes Petitioner's pre-injury job, which as previously noted, Petitioner admitted in his testimony. The described lack of "modified" employment appears to mean only that a person holding the described position must be able to perform the described tasks to the level

[3] We do not reach the question of whether Petitioner's ceasing to be employed with MC Services is a function of his work injury, as alleged by Petitioner in these proceedings, or a function of Petitioner's job with that employer becoming unavailable for economic, non-injury related reasons, because such inquiry is not relevant to the outcome of this appeal.

described, and that one can not hold the position if those requirement must be "modified" to accommodate a particular physical limitation. We therefore find no merit in this ground for appeal.

Regarding the fourth identified allegation of error, it appears to be uncontradicted that Dr. Steele is an attending or treating physician, and that his opinions must be accorded "great weight" under the Act. *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). As noted above, it is clear that the record contains substantial evidence in the form of Dr. Steele's opinion that Petitioner could return to his pre-injury job without restriction as of February 27, 2002. However, Petitioner argues that that same doctor's opinion, when considering a letter dated August 22, 2002 in which he writes "It is my opinion that [Petitioner] probably would not have been able to perform his duties as a construction manager between February 18, 2002 and the present time" (CE 2), his deposition testimony that his work release for climbing did not include climbing scaffolding (CE 20, deposition transcript of Dr. Steele, page 62 - 63), and his deposition testimony that he also would not authorize climbing ladders (CE 20, page 96), coupled with Petitioner's testimony that his pre-injury job did require that he climb ladders on occasion (HT 29 – 32), supports the conclusion that Dr. Steele has restricted Petitioner from returning to his pre-injury job.

In assessing this argument, we note first that CE 2, when considered in conjunction with Dr. Steele's deposition testimony concerning the various possibilities concerning the varying requirements of a "construction manager" job, is unilluminating. Dr. Steele makes clear in that deposition that he knows little about the duties of a "construction manager", and allows as some "construction manager" jobs have requirements that others do not. To suggest that the August 22, 2002 letter is useful in reaching a conclusion in this case, in light of the doctor's subsequent admissions concerning the lack of specific knowledge in his possession about generalized "construction manager" jobs, and his acknowledgment that "construction manager" positions vary from employer to employer, in unsupportable. See, CE 2, pages 66 – 72, 101 – 103.

The only remaining question, therefore, is whether Petitioner's testimony concerning the ladder climbing requirements of his pre-injury job, coupled with Dr. Steele's testimony at the deposition that he would not authorize ladder climbing, is sufficiently significant to require a remand for further evaluation of the evidence by the ALJ. We conclude that it is not. In the light most favorable to his claims on appeal, Petitioner has at best identified a single instance in which the opinion of Dr. Steele concerning a specific, discrete aspect of Petitioner's pre-injury job could characterized as being internally inconsistent. This is not a situation in which two medical opinions, one from a treating or attending physician, and the other from an independent medical examiner (IME) are in conflict. Rather, to the extent that there is a conflict, it is within the corpus of the opinions of a single physician. Thus, to the extent that any such conflict exists, the ALJ was free to weigh the evidence from the treating physician "as a whole", and conclude as he did, that the admittedly accurate job description contained in the physician-executed authorization to return to work results in a conclusion that Petitioner was capable at that time and thereafter of a return to work in the pre-injury job without restriction or modification.

Accordingly, we conclude that there was no legal error in assessing the medical opinion of the treating physician in this case.

CONCLUSION

The Compensation Order of July 31, 2003 is supported by substantial evidence in the record and is in accordance with the law.

ORDER

The Compensation Order of July 31, 2003 is hereby AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD

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JEFFREY. P. RUSSELL
Administrative Appeals Judge

June 28, 2005
DATE