

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA M. MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 12-004

ALLAN B. DOWNING,
Claimant–Petitioner,

v.

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,
Self-Insured Employer—Respondent/Cross Appellant

Appeal from a Order by
Administrative Law Judge Anand K. Verma
AHD No. PBL 11-015, DCP No. 30090824958-0001

Richard J. Link, Esquire, for the Petitioner
Shermineh C. Jones, Esquire, for the Respondent

Before: HENRY W. MCCOY, HEATHER C. LESLIE,¹ and MELISSA LIN JONES, *Administrative Appeals Judges*.

HENRY W. MCCOY, *Administrative Appeals Judge*, for the Compensation Review Board.

DECISION AND REMAND ORDER

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board (CRB) pursuant to D.C. Official Code § 1-623.28, 7 DCMR § 118, and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005).

PROCEDURAL HISTORY AND FACTS OF RECORD

Claimant, who was employed as a custodian, suffered a work-related injury on August 26, 2009 when he fell off a ladder onto his left side. The Public Sector Workers' Compensation

¹ Judge Leslie has been appointed by the Director of DOES as an interim CRB member pursuant to DOES Policy Issuance No. 11-03 (June 13, 2011).

Program (PSWCP) accepted Claimant's claim for injuries to his head back, upper left extremity, and right leg and awarded wage loss and medical benefits.

On March 16, 2011, the PSWCP issued Claimant a notice of intent to terminate his benefits effective April 16, 2011 citing a change in his condition based upon a January 20, 2011 independent medical evaluation (IME) by Dr. Robert Gordon. Claimant timely filed a request for a formal hearing. Claimant's wage loss benefits were terminated effective April 16, 2011.

At the October 13, 2011 formal hearing in this matter, Claimant requested the reinstatement of temporary total disability benefits from April 17, 2011 to August 25, 2011.² With a principle dispositive finding that Claimant was not totally disabled from returning to work after May 24, 2011, the presiding Administrative Law Judge (ALJ) awarded Claimant TTD benefits from April 17, 2011 through May 24, 2011, with causally related medical expenses already incurred. Claimant timely appealed January 5, 2012, with Employer filing a cross appeal on January 20, 2012.

PRELIMINARY MATTER

On January 25, 2012, Employer filed "Respondent's Motion to Stay December 15, 2011, Compensation Order on Remand."³ The authority to stay payment of an award of compensation is contained in the CRB's regulations at 7 DCMR 260. Stays of Compensation, which states:

- 260.1 The filing of an Application for Review shall not stay the effectiveness of a compensation order nor the payment of an amount ordered by it pending review by the Board.
- 260.2 Upon application by the employer the Board may stay a compensation order.
- 260.3 The Board shall only stay a compensation order on the grounds that the employer would suffer irreparable injury by complying with it.

In support of its request for a stay, Employer asserts that if it is required to make payments to Claimant it would be unable to obtain reimbursement in the event the CO is reversed and that making payments would also add to the District of Columbia government's budget shortfall resulting in workforce reductions to address that deficit. We find nothing in these arguments that demonstrate irreparable injury.

If payment of the award under this CO would increase the government's deficit and require workforce reductions, Employer would be making the same argument in every case it appealed. Yet this has not happened. Furthermore, Employer has many options at its disposal to obtain reimbursement of funds; it merely needs to exercise those options. We therefore see no basis upon

² In his Application for Review, Claimant avers that he had return to full duty work by August 25, 2011.

³ Employer mistakenly entitles the document as a "Compensation Order on Remand" when it is actually the initial Compensation Order.

which Employer would suffer irreparable injury by complying with the CO. The motion for a stay is denied.

STANDARD OF REVIEW AND ANALYSIS

The scope of review by the CRB is limited to making a determination as to whether the factual findings of the Order are based upon substantial evidence in the record and whether the legal conclusions drawn from those facts are in accordance with the applicable law.⁴ Section 1-623.28(a) of the District of Columbia Government Merit Personnel Act of 1978, as amended, D.C. Official Code § 1-623.1 *et seq.* (“Act”). Consistent with this standard of review, the CRB must uphold a Compensation Order that is supported by substantial evidence, even if there is substantial evidence in the record to support a contrary conclusion, and even where the CRB might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

As his first assignment of error, Claimant asserts that the record evidence does not support the ALJ’s determination denying temporary total disability benefits from May 25, 2011 to August 25, 2011. Claimant argues that the treatment reports from his treating physician, Dr. Rida Azer, provide substantial evidence that for the period for which TTD benefits were denied he remained physically incapable of performing his pre-injury job due to the restrictions imposed by Dr. Azer.

In its cross-appeal, Employer argues the ALJ’s decision to grant TTD benefits from April 16, 2011 to May 24, 2011 was erroneous because it submitted sufficient evidence to show Claimant’s condition had changed and Claimant failed to show to the contrary. In the alternative, Employer asserts even if Claimant’s disability continued after April 16, 2011, the ALJ’s decision to deny TTD benefits after May 24, 2011 is supported by substantial evidence insofar as Claimant’s treating physician released him to return to work with restrictions from that date forward.

In this jurisdiction, it has been consistently held that once the government-employer has accepted a claim of disability compensation and has actually paid benefits, the burden of proof rests with the government-employer to present substantial and recent medical evidence to justify a modification or termination of those benefits.⁵ Upon such a showing, the burden of production shifts to Claimant to show that Claimant’s condition has not changed such that a modification or termination of benefits is warranted.

In the CO, the ALJ makes no clear statement that Employer met its burden by presenting persuasive evidence sufficient to substantiate the termination of Claimant’s benefits and Claimant does not raise it as an issue on appeal. As Employer relied upon its exhibits admitted into evidence at the hearing to meet its burden, it would appear the ALJ, in making findings #8 and #9 regarding

⁴ “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 International v. District of Columbia Department of Employment Services*, 834 A.2d 882 (D.C. 2003).

⁵ See *Toomer v. D.C. Dept. of Corrections*, CRB No. 05-202, OHA No. PBL No. 98-048A, DCP No. LT5-DOC001603 (May 2, 2005); *Jones v. D.C. Dept. of Corrections*, Dir. Dkt. No. 07-99 OHA No. PBL No. 97-14, ODC No. 312082 (December 19, 2000); *Robinson v. D.C. General Hospital*, ECAB No. 95-8, ODCVC No. 302585 (July 8, 1997).

Dr. Gordon's independent medical evaluation (IME), that Employer met its burden and proceeded to a determination as to whether Claimant met his burden when it shifted to him.

With regard to the period for which Claimant has requested reinstatement of his disability benefits, the ALJ found

7. Dr. Azer issued disability certificates holding claimant off work from December 13, 2010 to January 12, 2011 and from April 18, 2011 through May 24, 2011. On June 3, 2011, Dr. Azer released claimant to return to work with restrictions of pushing/pulling, lifting and overhead use of the left extremity until the next evaluation until July 1, 2011. Claimant was not totally disabled in returning to work after May 24, 2011. (Citation omitted.)

CO at 4.

The ALJ found the medical reports of Claimant's treating physician more persuasive for the period April 17, 2011 through May 24, 2011 as treatment reports and disability certificates from the treating physician deemed Claimant to be totally disabled from performing his pre-injury work duties. The ALJ, in weighing the competing medical evidence without the treating physician preference that has now been eliminated in public sector cases, gave specific reasons for rejecting the IME opinion of Dr. Gordon, citing the inconsistencies with the other medical evidence. The record supports the ALJ's reasoning and it will not be disturbed for this brief period.

With regard to the period from May 25, 2011 through August 25, 2011, Claimant argues the ALJ erred in finding that he was not totally disabled in returning to work after May 24, 2011. The ALJ arrived at this finding based on the treating physician's disability certificate of June 3, 2011 which appears to release Claimant to return to work with the restrictions of bending, stooping, heavy lifting, prolonged standing or walking, pushing/pulling, and overhead use of the left upper extremity. Dr. Azer's treatment report of June 3, 2011 specifically states that "Because of his work injury, this patient should avoid any activities that involve bending, stooping, kneeling, squatting, pushing, pulling and lifting heavy objects, unprotected heights and objects heavier than 15 pounds."

While "activities" to be avoided could include work activities and there is no specific reference to work activities in either the disability certificate or the treatment report, it must be assumed that the ALJ considered the reference was implied. However, while it is reasonable to assume that these restrictions imply a release to light duty, it is not reasonable to conclude that these imposed restrictions render Claimant capable of performing his pre-injury work duties. Accordingly, we are constrained to remand this case back to the ALJ for further findings of fact as to whether Claimant's physical condition has changed such that he is able to return to his former pre-injury employment without restrictions, based upon the weighing of the totality of the medical and other relevant evidence of record.⁶

Claimant also asserts this matter should be returned to resolve his claim for carpal tunnel surgery. We agree, for this and other reasons.

⁶ See *Logan v. DOES*, 805 A.2d 237 (D.C. 2002).

In the CO, the ALJ limited the award of medical benefits to “causally related medical expenses, already incurred.” At the hearing, the ALJ had the parties agree that they had stipulated to medical causal relationship. It is also clear from the hearing transcript that Claimant was seeking authorization for the recommended carpal tunnel surgery.⁷

Employer argues in its cross-appeal that the record does not support the ALJ’s stipulated findings that Claimant suffered a left wrist injury and that the work related accident caused the left wrist injury. In addition and notwithstanding Employer’s counsel’s verbal agreement that medical causal relationship was stipulated to, counsel now argues, as supported by the hearing transcript, that Employer considered whether Claimant’s carpal tunnel syndrome was medically causally related to the work accident to be a contested issue.⁸ Employer argues a remand is warranted to resolve these issues.

In stating the parties had stipulated to medical causal relationship, the ALJ does not state what disabling condition is medically causally related. As Employer continued to assert in its closing argument that the left wrist was not an accepted injury and thus the diagnosed carpal tunnel syndrome (CTS) could not be related to the work injury, it was incumbent upon the ALJ to correct counsel at the hearing or resolve the matter in the CO. As neither was done, this matter must be returned. On remand, the ALJ shall also specifically address Claimant’s request to authorize CTS surgery.

CONCLUSION AND ORDER

The Compensation Order of December 15, 2011 is not supported by substantial evidence in the record and is not in accordance with the law. Accordingly, the CO is REVERSED and REMANDED for further consideration in keeping with the above discussion.

FOR THE COMPENSATION REVIEW BOARD:

HENRY W. MCCOY
Administrative Appeals Judge

April 4 , 2012
DATE

⁷ Hearing Transcript (HT), p. 8.

⁸ HT, pp. 49 – 51.