

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. 02-80

TARA JAMES,

Claimant – Respondent,

v.

PROVIDENCE HOSPITAL,

Self-Insured Employer – Petitioner.

Appeal from a Compensation Order of
Administrative Law Judge Linda F. Jory
OHA No. 02-296, OWC No. 542304

UPON REMAND ORDER FROM THE D.C. COURT OF APPEALS, NO. 03-AA-342

Jeffrey P. Ochsman, Esq., for the Petitioner

Timothy Driscoll, Esq., for the Respondent

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

SHARMAN J. MONROE, *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 (2005). In accordance with the

BACKGROUND

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) was filed on September 3, 2003. Therein, the Administrative Law Judge (ALJ) awarded 37% permanent partial disability benefits to the right lower extremity due to a right ankle injury. The Self-Insured Employer/Petitioner (Petitioner) appealed to the Director, who affirmed the award. The Petitioner subsequently appealed to the D.C. Court of Appeals (DCCA).

In an Order dated March 10, 2004, the DCCA remanded this matter to the agency for further examination. The Court ordered that the specific question: whether the ankle should be considered “as part of the leg, part of the foot or neither” for the purposes of awarding benefits pursuant to D.C. Official Code § 32-1508(3) be definitively answered. The Court indicated that although the Petitioner argued on appeal to the Director that a disability to the ankle translates to a permanent partial disability to the foot the Petitioner’s argument was not addressed in the affirmance. The Court directed that the Petitioner’s other argument, raised but also not addressed, that the ALJ failed to consider an impairment rating other than those presented by the parties be answered. Finally, the Court stated that the Respondent’s procedural argument that the Petitioner did not properly preserve the issue of the correct schedule permanent partial disability based upon an ankle disability may be considered.

ANALYSIS

As an initial matter, the standard 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 § 32-1521.01(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. District of Columbia Department of Employment Services*, 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.

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.

In its initial memorandum and supplemental memorandum on remand, the Petitioner cites D.C. Official Code § 32-1508(3)(O)² in support of its argument that the ALJ erred as a matter of law in awarding schedule permanent partial disability to the leg based upon a disability to the ankle. The Petitioner maintains that the wording of D.C. Official Code § 32-1508(3)(O) reveals an intent to equate an injury to the wrist as an injury to the hand, and an injury to the ankle as an injury to the foot for purposes of a schedule award under the Act. The Petitioner argues that if the Respondent in this case had suffered an amputation to the right ankle, she would have received an award based on the loss of a foot. The Petitioner further argues that there is no rational basis for treating a disability to the ankle any differently and asserts that the Respondent should receive a schedule award based upon the foot.

In regard to the first issue from the Court, review of the statute suggests that it was the intent of the legislature that a disability with an anatomical situs “between the knee or ankle” is to be viewed as a disability to the foot. This is suggested by the statute because, in the only language therein which addresses a distinction between leg and foot disabilities, that being the language dealing with amputations above or below the knee, the statute unequivocally states that an amputation below the knee is to be considered a disability to the foot, under the schedule. D.C. Code § 32-1508(3)(O). There are no Director’s decisions from this agency of which the Panel is aware that specifically address the point. However, the Panel notes that *Travelers Insurance Co., v. Norton*, 30 F.Supp. 119 (September 27, 1939) addressed the issue, and concluded that under the Longshore and Harbor Workers’ Compensation Act (LHWCA),³ the predecessor to the instant Act, where there is no anatomical injury situs “above a point between the knee and ankle” a disability award to the foot was the appropriate award. LHWCA cases have long been held to be persuasive authority in interpreting provisions of the Act that, like the one before us, have language similar to and derived from that act. Cf., D.C. Code § 32-1508 (3)(O) and 33 USCS § 908(c)(15).⁴ *Safeway Stores, Inc. v. D.C. Department of Employment Services*, 832 A.2d 1267, 1270 (D.C. 2003), citing *Joyner v. D.C. Department of Employment Services*, 502 A.2d 1027 (D.C. 1986). Given the apparent intent of the legislature as evidenced by the language cited above, the Panel sees no reason to depart from the logic of *Travelers*, and adopts it as the guiding principal concerning schedule disabilities to the foot under the Act.⁵

As to the second issue, whether the issue discussed above was preserved for review by the Director, the record shows that the issue presented for resolution was the determination of the

² D.C. Official Code § 32-1508(3)(O) states:

Compensation for an arm or a leg, if amputated at or above the elbow or the knee, shall be the same as for a loss of the arm or leg; but if amputated between the elbow and the wrist or the knee and the ankle, shall be the same as for loss of a hand or foot.

³ 33 USCS §§ 901-950 (1982).

⁴ 33 USCS § 908(c)(15) states:

Amputated arm or leg: Compensation for an arm or a leg, if amputated at or above the elbow or the knee, shall be the same as for a loss of the arm or leg; but, if amputated between the elbow and the wrist or the knee and the ankle, shall be the same as for loss of a hand or foot.

⁵ This holding, however, does not preclude a schedule award to the leg if the evidence shows that the situs of a disability is, in fact, to the leg. See *Washington Metropolitan Area Transit Authority v. D.C. Department of Employment Services*, 683 A.2d 470, 474 (D.C. 1996); *Kovacs v. Avis Leasing Corp.*, H&AS No. 84-177, OWC No. 0000792 (July 17, 1986).

nature and extent of permanent partial disability pursuant to D.C. Official Code § 32-1508(a)(3). See Compensation Order at p. 2. At the hearing, the Petitioner presented argument on the nature and extent of the Respondent's disability and questioned the Respondent on her current physical complaints to her leg. Transcript (TR) at pp. 11-16, 31, 33, 38-39. Given the state of the record, the Panel agrees with the Petitioner that the question of whether an injury to the ankle translates to a schedule award to the foot or to the leg was preserved. Although the Petitioner argued at the hearing that the Respondent retained no ratable disability, the Panel agrees with the Petitioner that the question of translation is subsumed in the issue of nature and extent of disability.

As to the third and final question posed by the Court, the Compensation Order in this case was issued on September 3, 2003. At that time, the law in this jurisdiction precluded an ALJ from exercising discretion and adjusting a disability rating based upon the evidence in the record. See *Amaya v. Fort Myers Construction Co.*, Dir.Dkt. No. 03-15, OHA No. 01-080B, OWC No. 544746 (April 29, 2003); *DeGuzman v. Bell Atlantic*, Dir.Dkt. No. 99-73, OHA No. 99-231, OWC No. 016376 (May 31, 2002). However, subsequent to the remand of this case by the Court, the CRB considered and decided the same issue in the case of *Wormack v. Fischbach & Moore Electric, Inc.*, CRB (Dir.Dkt.) 03-159, OHA 03-151, OWC No. 564205 (July 22, 2005). In that case, it was held that an ALJ has broad discretion, based upon and considering the record evidence, to accept either or neither of the medical impairment ratings when addressing the separate, but related issue of disability under the schedule portion of the Act.

CONCLUSION

For the purposes of awarding schedule permanent partial disability pursuant to D.C. Official Code § 32-1508, a disability to the ankle translates to an impairment to the foot. The question of whether an injury to the ankle translates to a schedule award to the foot or to the leg was preserved for consideration on appeal in the instant case. Although lacking at the time the Compensation Order in this case was issued, an ALJ now has broad discretion, upon consideration of the record evidence, to accept either or neither of the medical opinions presented to reach a conclusion on a disability rating.

ORDER

Consistent with the Order of record remand by the District of Columbia Court of Appeals entered with respect to this matter on March 10, 2004, it is hereby ORDERED that this Decision and Order be transmitted to the District of Columbia Court of Appeals, to be included in the appellate record in *Providence Hospital v. D.C. Department of Employment Services and Tara James*, No. 03-AA-342.

FOR THE COMPENSATION REVIEW BOARD:

SHARMAN J. MONROE
Administrative Appeals Judge

September 29, 2006

DATE