

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. 06-89

JOANN CHOCK,

Claimant – Respondent,

v.

D.C. METROPOLITAN POLICE DEPARTMENT,

Self-Insured Employer/Carrier – Petitioner.

Appeal from a Compensation Order of
Administrative Law Judge Fred D. Carney, Jr.
AHD No. PBL06-005, DCP No. 761034-2003-0002

Lauren Pisano, Esquire for the Petitioner

Andrea Comentale, Esquire for the Respondent

Before LINDA F. JORY, FLOYD LEWIS AND JEFFREY P. RUSSELL, *Administrative Appeals Judges.*

LINDA F. JORY, *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 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

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 Order, which was filed on July 26, 2006, the Administrative Law Judge (ALJ) concluded Respondent's work related injury of July 6, 2003 resulted in a 70% permanent partial disability to Respondent's upper right extremity.

As grounds for this appeal, Petitioner alleges the ALJ's finding that Respondent is entitled to a 70% award to her right upper extremity is not consistent or supported by substantial evidence.

Respondent has filed a response asserting that the standard of substantial evidence has clearly been met by the ALJ because a reasonable person could conclude that Respondent suffered from the degree of permanency and the decision should be affirmed.

ANALYSIS

As an initial matter, the scope of review by the Compensation Review Board (CRB) and this Review Panel (hereafter, the 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. App. 2003). Consistent with this scope of review, the CRB and this panel are bound 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 asserts two errors made by the ALJ in granting Respondent's claim for relief. Petitioner initially asserts that the ALJ erred in relying solely on the report of Respondent's treating physician, Dr. Hampton Jackson as Petitioner asserts Dr. Jackson's report is confusing and misleading. Petitioner asserts that "it is clear that [Dr. Jackson's] impairment rating is for [Respondent's] dominant hand, i.e., the right hand" despite his use of the term "upper extremity". Secondly, Petitioner asserts the ALJ's assignment

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. Official Code §§ 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.

of 70% was not made in accordance with the CRB's decision in *Wormack v. Fischbach & Moore Electric, Inc.*, CRB (Dir. Dkt.) No. 03-159, AHD No. 03-151 (July 22, 2005).²

Respondent has not responded to Petitioner's first allegation that Dr Jackson's report should not be relied upon because it is confusing, but does assert that pursuant to the Court of Appeals in *Kralick v. District of Columbia Dep't. of Employment Services*, 842 A.2d 705 (D.C. 2004)(*Kralick*), Dr. Johnson's opinion is entitled to the treating physician's preference and therefore afforded greater weight. With regard to Petitioner's assertion that the ALJ's assignment of 70% was not made in accordance with the CRB's decision in *Wormack*, Respondent asserts and the Panel agrees that the CRB in *Wormack* indicated that although an ALJ may apply the rating of either party's physician, *or any numerical rating falling in between those two ratings*, the rating to be applied is left to the sound discretion of the ALJ based upon the evidence before him (or her).

Moreover, as the Panel cautioned in *Garcia v. Burger King*, CRB (Dir. Dkt.) 03-160, AHD No. 03-391, OWC No. 560579 (May 18, 2006), the *Wormack* decision alone does not mandate the ALJ to pick another rating if the facts of the case do not warrant the same. The Panel is mindful that recently the CRB agreed that the rationale of *Wormack* could also be followed in cases involving public sector employees. See *Barron v. District of Columbia Dep't. of Employment Services*, CRB No. 06-054 AHD No. PBL 05-010 (July 19, 2006). Nevertheless, the Panel agrees with Respondent that the ALJ in the instant matter was under no obligation to choose any numerical rating falling in between the two ratings of record. The Panel finds the ALJ provided sound reasoning for his reliance on the opinion of Dr. Jackson, particularly referring to Respondent's "candid" testimony that because of her elbow injury, she is unable to transition from one keyboard to another in a timely manner; unable to lift her right arm past her waist; and drops items as light as a glass of soda or a knife or folder because she lacks grip strength. CO at 5.

In sum, the ALJ has not demonstrated even an inference that Dr. Jackson's rating of 70% was more than what the evidence of record demonstrated. Accordingly, the Panel agrees with the ALJ's determination that there exists no reason to disregard the opinion of the treating physician in the instant matter and concludes the finding of 70% permanent partial impairment to the upper right extremity is supported by substantial evidence in the record.³

Accordingly, the Panel does not find the facts of the instant matter warrant a remand to the ALJ to consider an award that represents a rating amount somewhere between the competing ratings of medical impairment and concludes the ALJ's finding of a 70% upper right extremity impairment is supported by substantial evidence.

² Pursuant to the *Wormack* decision, the ALJ is no longer bound to pick one permanent partial impairment rating over another especially in situations where the ALJ finds both ratings are contrary to the ALJ's interpretation of the evidence of record.

³ In so concluding, the Panel rejects Petitioner's attempt to discredit Dr. Jackson's report because he referred to Respondent's dominant hand (although he was assessing the entire upper right extremity for permanent loss) as the Panel concludes it is relative and reasonable for Dr. Jackson to make note of the fact that the elbow injury Respondent suffered was to his dominant extremity which the Panel clearly finds has a greater debilitating effect than an injury to the non dominant hand.

CONCLUSION

The ALJ's Conclusion that Petitioner has suffered a 70% permanent partial impairment to her upper right extremity is supported by substantial evidence and in accordance with the law.

ORDER

The Compensation Order of July 26, 2006 is hereby AFFIRMED .

FOR THE COMPENSATION REVIEW BOARD:

LINDA F. JORY
Administrative Appeals Judge

November 8, 2006
Date