

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services
Labor Standards Bureau

Office of Hearings and Adjudication
COMPENSATION REVIEW BOARD



(202) 671-1394-Voice
(202) 673-6402 - Fax

CRB No. 06-33

SUSAN SHIPMAN,

Claimant – Petitioner,

v.

FRESENIUS MEDICAL CARE HOLDING AND CNA INSURANCE CO,

Employer/Carrier – Respondent.

Appeal from a Compensation Order of
Administrative Law Judge Henry W. McCoy
AHD No. 04-470A, OWC No. 571318

Heather Leslie, Esquire, for the Petitioner

Joseph C. Veith, III, Esquire, for the Respondent

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

FLOYD LEWIS, *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, 32-1522 (2005). In accordance with the 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

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 March 2, 2006, the Administrative Law Judge (ALJ) denied the relief requested by Claimant-Petitioner (Petitioner) for permanent partial disability benefits, concluding that Petitioner had not sustained permanent partial disability to her left upper extremity as a result of her August 1, 2001 work injury. Petitioner now appeals that Compensation Order.

As grounds for this appeal, Petitioner alleges as error that ALJ's decision is arbitrary, capricious, unsupported by substantial evidence and is not in accordance with the law.

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. D.C. Official Code §32-1522(d)(2). "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 scope 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 the case under review herein, Petitioner alleges that the ALJ's decision is erroneous, contending that the ALJ erred by disregarding subjective factors in determining Petitioner's impairment rating. Petitioner also alleges that the decision is erroneous because that it is clear from the record that the ALJ felt constrained to award either one impairment rating or the other, and did not consider an intermediate rating, as allowed in the case of *Wormack v. Fishback & Moore*, CRB No. 03-159, AHD No. 03-151 (July 22, 2005).

Employer-Respondent (Respondent) counters that the Compensation Order should be affirmed as *Wormack* does not require that the ALJ pick an intermediate rating, as Petitioner suggests. Respondent contends that the conclusion that there is no permanent impairment is supported by the ALJ's credibility finding and the reports and testimony of Dr. Louis Levitt.

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 this matter, Dr. Joel Fetcher opined that Petitioner had suffered an eighteen (18%) percent impairment to the left upper extremity and Dr. Levitt assigned a zero percent (0%) rating to Petitioner's left extremity and shoulder. In concluding that Petitioner had not suffered a rateable permanent impairment of the upper extremity, the ALJ found that, in weighing the competing medical opinions, the opinion of Dr. Levitt was entitled to greater weight than that of Dr. Fetcher and the ALJ specifically found that Petitioner's testimony was not credible.

In rejecting Dr. Fetcher's opinion, the ALJ stressed that Dr. Fetcher's impairment rating did not match his clinical findings and there were no findings of any musculoskeletal abnormality, as the ALJ specifically noted that it was difficult to determine how Dr. Fetcher arrived at a permanency rating, after examining Petitioner almost a year after the injury. Compensation Order at 6-7.

While crediting Dr. Levitt's rating, the ALJ specifically noted that Dr. Levitt described two tests that are specifically designed to provoke pain and when he performed these tests on Petitioner and asked Petitioner to move in a certain manner, there was no pain response by Petitioner. Dr. Levitt opined that there was nothing about Petitioner's condition that would impair her function and the pain that Petitioner experienced did not cause her permanent injury or permanently affect her ability to work or perform her daily activities. Thus, the ALJ relied on Dr. Levitt's opinion that pain would not entitle Petitioner to a permanency rating in this matter.

This Panel must note that while Petitioner seems to suggest that the *Wormack* decision required the ALJ to choose another rating in this matter other than the ratings assigned by Drs. Fetcher and Levitt, as Respondent points out, this is not required. As noted in *Ray v. Int'l Law Institute* CRB No. 05-261, OHA No. 05-181 (October 21, 2005), the CRB "... cautions that the *Wormack* decision alone does not mandate the ALJ to pick another rating if the facts of the case do not warrant the same." Thus, after reviewing the evidence of record, this Panel can find no error in the ALJ's decision to rely on the rating by Dr. Levitt in this matter.

As to Petitioner's argument that the ALJ was required to make a finding of rateable impairment due to pain, it must be emphasized that the ALJ found that Petitioner's complaints of pain were not credible and explained in great detail the reasons for making this finding on credibility, based on Dr. Levitt's opinion. As the finder of fact, the ALJ is charged with making credibility determinations and those findings are entitled to special weight. *Dell v. Dist. of Columbia Dep't. of Employment Servs.*, 499 A.2d 102, 106 (D.C. 1985).

Accordingly, the Compensation Order of March 2, 2006 is supported by substantial evidence and is in accordance with the law.

CONCLUSION

The Compensation Order of March 2, 2006 is supported by substantial evidence in the record and is in accordance with the law

ORDER

The Compensation Order of March 2, 2006 is hereby AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

FLOYD LEWIS
Administrative Appeals Judge

October 20, 2006
DATE