

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA M. MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 11-074

AMANDA SANTOS,

Claimant- Petitioner,

v.

RED COATS, INC., and CNA,

Employer/Carrier - Respondents.

Appeal from a Compensation Order of
Administrative Law Jeffrey P. Russell
OHA No. 11-099, OWC No. 662075

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2011 SEP 13 AM 8 33

Neil J. Fagan, Esquire, for the Claimant
Joseph C. Veith, III, Esquire, for the Employer

Before HEATHER C. LESLIE¹, MELISSA LIN JONES, and LAWRENCE D. TARR, *Administrative Appeals Judges*.

HEATHER C. LESLIE, *Administrative Appeals Judge*, for the Compensation Review Board.

DECISION AND ORDER

OVERVIEW

This case is before the Compensation Review Board (CRB) on the request for review filed by the Claimant - Petitioner (Claimant) of the July 22, 2011, Compensation Order (CO) issued by an Administrative Law Judge (ALJ) in the Hearings and Adjudication Section of the District of Columbia Department of Employment Services (DOES). In that CO, the ALJ denied the Claimant's request for permanent partial disability benefits to the right arm and right leg. We AFFIRM.

BACKGROUND AND FACTS OF RECORD

The Claimant worked as a Cleaner for the Employer. On August 3, 2009, the Claimant sustained injuries to various parts of her body, including her back, right leg and right arm. The Claimant

¹ Judge Heather C. Leslie is appointed by the Director of the DOES as an Interim Board Member pursuant to DOES Administrative Policy Issuance No. 11-02 (June 13, 2011).

sought treatment at George Washington University Hospital and with Dr. Frederick Parker. The Claimant underwent conservative care consisting of physical therapy and medication. The Claimant also underwent various objective testing including x-rays and an MRI performed on December 28, 2009. After treatment, the Claimant sought an award for 30% permanent partial disability to the right arm and 25% permanent partial disability to the right leg.

A full evidentiary hearing was held on June 22, 2011. The Claimant submitted the Independent Medical Evaluation (IME) of Dr. H.S. Pabla to support the requested permanent partial disability to the right leg and right arm. The Employer produced the IME of Dr. Louis Levitt who opined the Claimant did not suffer from any permanent partial disability in either her right arm or right leg. In a Compensation Order dated July 22, 2011, the ALJ denied the requested benefits, finding that the Claimant sustained 0% permanent partial disability to her right arm and right leg. The ALJ found the Claimant to be an incredible witness and found that she had failed to prove by a preponderance of the evidence, through medical evidence, any entitlement to permanent partial disability benefits.

The Claimant timely appealed the Compensation Order and simultaneously submitted a Motion to Remand for the Submission of Additional Evidence, specifically surveillance video that the Employer was to have submitted as an exhibit but withdrew on the date of the hearing. In support of her application for review, the Claimant argues that the ALJ erred in failing to consider and comment on the results of the December 28, 2009 MRI. The Claimant states this omission renders the Compensation Order not being supported by the substantial evidence in the record. Claimant's Argument at 4.

The Employer responds by asserting that the Compensation Order is supported by the substantial evidence in the record. The Employer also argues that the Claimant's Motion for Remand for the Submission of Additional Evidence should be denied.

THE STANDARD OF REVIEW

The scope of review by the CRB 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 District of Columbia Workers' Compensation Act of 1979, D.C. Code, as amended, §32-1501 *et seq.*, at §32-1521.01(d)(2)(A) of the ("Act") and *Marriott International v. DOES*, 834 A.2d 882 (D.C. 2003).

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. *Id.* at 885.

DISCUSSION AND ANALYSIS

We first address the Claimant's Motion for Remand to allow for additional evidence to be submitted, as the outcome may determine whether we address the issue of nature and extent. In order to succeed, the Claimant must first satisfy the requirements outlined in D.C. Code §32-1522(b)(2) which states, in pertinent part,

If any party shall apply to the Mayor for leave to adduce additional evidence and shall show to the satisfaction of the Mayor that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the initial hearing before the Mayor, the Mayor may order such additional evidence to be taken and to be made a part of the record.

In tandem with the above statute, 7 DCMR §264.1(a)(b), dealing with the submission of additional evidence, states,

Where a party request leave to adduce additional evidence the party must establish: (a) that the additional evidence is material, and (b) that there existed reasonable grounds for the failure to present the evidence while the case was before the Administrative Hearings Division or the Office of Workers' Compensation (depending on which authority issues the Compensation order from which appeal was taken).

Thus, a moving party must show the evidence is relevant and there were reasonable grounds for the failure to submit the evidence at the Formal Hearing.

The Claimant asserts that this Panel should remand the case for the submission of surveillance videos covering two days, November 11, 2010 and November 12, 2010. The Claimant argues that the surveillance videos are relevant as they show how the Claimant performs her daily activities and would aid the ALJ in his determination of the Claimant's credibility. A review of the Compensation Order shows the ALJ based much of his determination on the Claimant's lack of credibility shown by several inconsistencies between her testimony concerning the location of her injuries and the medical records presented, including those of her treating physician. While it can be argued that the video may sway the ALJ to reconsider his credibility finding, we need not reach that conclusion as the Claimant fails in the second prong of the requirements outlined above, that there were reasonable grounds for the failure to adduce such evidence at the Formal Hearing.

The Claimant states that the surveillance videos were never "intended" to be presented by the Claimant in the first place as they were to be part of the Employer's Exhibits. Claimant's Argument at 4. The Employer withdrew this exhibit on the day of the hearing. A review of the hearing transcripts reveals that the Claimant, through Counsel, never objected to the withdrawal of the Employer's evidence, nor offered the videos into evidence as part of Claimant's exhibits in light of the Employer's withdrawal. The Employer argues that the Claimant was provided with the surveillance video prior to the Formal Hearing in the Employer's exhibit package, a contention the Claimant has not responded to otherwise. Claimant's Counsel had ample time to review the video and assess its evidentiary weight. Clearly, the Claimant did not intend for the surveillance video to be a part of her exhibit does not present any reasonable grounds for the failure to offer the surveillance as an exhibit at the Formal Hearing. Thus, the Claimant fails in showing that there were reasonable grounds for the failure to adduce such evidence.

Turning next to the issue of nature and extent, the Claimant argues that the ALJ erred as he did not "discuss or seek to reconcile the MRI results with his findings or Dr. Levitt's evaluation." Claimant's Argument at 3. The Claimant alleges that since the MRI was not discussed in the findings of facts, the CO is not supported by substantial evidence as the conclusions of law do not flow rationally from his findings.

Although the CO does not separately discuss the specific MRI report, it is clear the ALJ gave thorough consideration to the medical evidence in the record, including a discussion of both the opinions rendered by the IME physicians, to come to his conclusion that the Claimant did not suffer a permanent impairment to either her right arm or right leg.² Specifically,

Beyond Claimant's testimony, she offered the IME report of Dr. Pabla. As noted before, the report makes no specific findings and contains no report of symptoms in the right leg. As to the right arm, Dr. Pabla opines that the permanent partial impairment rating "for the right arm, shoulder is 30%" due to arm weakness from the rotator cuff group of muscles and due to limits on Claimant's reported ability to perform a number of tasks with that arm; and he assigns a 25% impairment of "the right wrist, arm, as a result of the incident on August 3, 2009."

Dr. Pabla's opinions are not easy to understand. First, the twice-used combined constructions are somewhat obfuscatory. What precisely is meant by "right arm, shoulder" and "right wrist, arm"? Is he saying that the shoulder injury has caused a 30% medical impairment to the arm, or is he saying that there is a 30% medical impairment to the shoulder which in his view is the same thing as the arm? This is significant, because, while the arm is a scheduled member, the shoulder is not. Similarly, one asks the same question relative to the "right wrist, arm" construction: the arm is a scheduled member, the wrist is not. Further, Dr. Pabla is no more clear when it comes to what the total degree of impairment to the arm is. Is he of the opinion that the 25% is in addition to the 30%, or is it subsumed within the 30%, or is there some other figure that represents the overall impairment rating taking into account the two distinct sources of the alleged impairment?

In contrast to these ambiguities, Dr. Levitt's IME reports are clear and direct. He has conducted what appears to be a thorough review of all the medical records, and his report of the history given by Claimant echoes Dr. Fine's, where it is stated that Claimant "has no leg symptoms or parathesias to the lower extremities" (EE 7, June 7, 2011 Report). He concluded that, except for self-limiting responses and extreme complaints of pain, her exam was normal, and that review of the objective tests – x-rays and MRIs – yielded normal results. Accordingly he opined that Claimant has a 0% medical impairment of both the arm and the lower back.

Santos v. Red Coats, Inc. et al, AHD No. 11-099, OWC No. 662075 (July 22, 2011).

We find no error in the ALJ accepting the opinion of Dr. Levitt over that of Dr. Pabla. Dr. Levitt, a medical expert, gave his professional opinion of the Claimant's condition in light of his examination and review of the objective testing, including the MRI. Thus, we find no merit to the Claimant's contention that the ALJ erred by not *independently* discussing the MRI in his findings. Moreover, the failure to mention and discuss with specificity every piece of evidence, including the MRI, does not mean the Compensation Order is not supported by the substantial

² The Employer offered the IME of Dr. Louis Levitt who opined the Claimant did not suffer from any permanent partial disability in either her right arm or right leg. In the Compensation Order dated July 22, 2011, the ALJ concluded that the Employer had not successfully rebutted the presumption of compensability when analyzing medical causally relationship, finding that although Dr. Levitt asserts the Claimant does not have an ongoing injury, his opinion was not sufficient to rebut the presumption of compensability. Because the Employer did not appeal this ruling, we will not address the sufficiency of this opinion as rebuttal evidence.

evidence in the record. It has been held that ALJ's are not required to inventory the evidence and explain in detail why a particular part of it is accepted or rejected. See *Sturgis v. DOES*, 629 A.2d 547, 554 (D.C. 1993). We find no error in the ALJ relying upon Dr. Levitt's interpretation of the MRI.

The Claimant, in essence, is asking us to re-weigh the record evidence in her favor. This is beyond our authority. As stated above, 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 International, supra*. Here the ALJ's decision is supported by the substantial evidence in the record.

CONCLUSION AND ORDER

The July 22, 2011 Compensation Order is supported by the substantial evidence in the record and is in accordance with the law. The Compensation Order is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:



HEATHER C. LESLIE
Administrative Appeals Judge

September 13, 2011

DATE