

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA M. MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 12-155

RONALD A. ARMSTEAD,

Claimant-Petitioner,

v.

GREYHOUND LINES, INC. AND BROADSPIRE

Employer and Carrier-Respondents.

Appeal from a Compensation Order by
The Honorable Belva Newsome
AHD No. 12-212, OWC No. 676234

Matthew Peffer, Esquire for the Petitioner
Barry D. Bernstein, Esquire for the Respondent

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

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

DECISION AND REMAND ORDER

OVERVIEW

This case is before the Compensation Review Board (CRB) on the request for review filed by the Claimant - Petitioner (Claimant) of the September 4, 2012, Compensation Order (CO) issued by an Administrative Law Judge (ALJ) in the Office of Hearings and Adjudication 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. We REVERSE and REMAND.

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

FACTS OF RECORD AND PROCEDURAL HISTORY

On November 17, 2010, the Claimant suffered an injury to the right arm when he attempted to pull himself up into a bus. The Claimant sought medical treatment, ultimately coming under the care and treatment of Dr. Joel Fechter. Dr. Fechter opined the Claimant suffered a right shoulder and right elbow strain as a result of his work injury and recommended a course of conservative treatment. On February 7, 2011, Dr. Harvey Mininberg, Dr. Fechter's associate, noted the Claimant's improvement with treatment and released the Claimant from care.

On October 26, 2011, the Claimant underwent an independent medical evaluation (IME) with Dr. Michael Franchetti. Dr. Franchetti took a history of the Claimant's injury and medical treatment, and performed a physical examination. Dr. Franchetti opined the Claimant suffered from post traumatic right elbow lateral epicondylitis as a result of the November 17, 2010 work injury. Dr. Franchetti further opined the Claimant suffered from a 27% permanent partial disability of the right upper extremity.

The Employer sent the Claimant for an IME with Dr. Clifford Hinkes on March 7, 2011. Dr. Hinkes took a history of the Claimant's injury and medical history, and performed a physical examination. Dr. Hinkes diagnosed the Claimant with right median nerve neuritis, right tennis elbow, right shoulder strain and sprain, all resolved. Dr. Hinkes opined the claimant did not suffer from any permanent partial disability as a result of the work injury.

A Formal Hearing was held on June 27, 2012. The Claimant sought award of 27% permanent partial disability to the right upper extremity. The only issue to be adjudicated was the nature and extent of the Claimant's alleged disability. A CO was issued on September 4, 2012 denying the Claimant's claim for relief in its entirety. The CO gave greater weight to the opinion of the Employer's IME physician over that of the Claimant's IME physician, in concluding the Claimant did not suffer from a permanent impairment to this right upper extremity.

The Claimant timely appealed the CO on September 25, 2012. The Claimant argues on appeal that the ALJ failed to consider the medical impairment, the Maryland factors and the effect of the work injury on the claimant's earning capacity, citing *Wormack v. Fischbach & Moore Electric, Inc.*, CRB No. 03-159, AHD No. 03-151, (July 22, 2005). The Employer opposes, arguing the CO is supported by the substantial evidence in the record and should be affirmed.

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

Initially we note that under the Section II of the CO, titled the "Claim For Relief," the payment of causally related medical expenses and bills is listed as a claim to be adjudicated, along with the request for an award of permanent partial disability benefits to the right upper extremity. However, the sole issue listed to be decided was the nature and extent of the Claimant's disability, if any. No stipulations were recited, either at the Formal Hearing or in the CO. What makes this problematic is that we cannot discern on what basis the ALJ is denying the request for medical bills and expenses to be paid as there is no discussion within the CO of medical bills outstanding or whether they are causally related.

We do find it noteworthy that in argument, the Claimant seems to allude to medical causal relationship having been at issue when, he argues that he had "met the burden of proving that the condition is causally related to the employment..." Claimant's argument unnumbered at 6. Without a recitation of any stipulations or an explanation as to why the medical expenses and bills were denied, we cannot say that the decision is supported by the substantial evidence in the record. As such, we must reverse and remand the denial of payment of causally related medical expenses and bills and remand this part of the claim for relief for clarification of the stipulated issues, and the basis for the denial (or award) of causally related medical bills, separate from the denial (or award) of permanent partial disability benefits.²

A review of the CO reveals the following:

There is no presumption of the nature and extent of a claimant's disability. A claimant has the affirmative duty to present substantial evidence of the level of benefits sought. See, *Dunston v. District of Columbia Department of Employment Services*, 509 A.2d 109 (D.C. 1986). "[T]he presumption [of the compensability of a claim] has no application to a determination of the nature and extent of [a claimant's] injury. [Claimant] is entitled to a presumption that his claim is compensable, i.e., that his injury 'arises out of employment. He is not entitled to a presumption that his injury has left him totally and permanently disabled." *Id.* at 111.

A claimant must prove the nature of his disability, i.e., whether it is temporary or permanent, and the extent thereof, i.e., whether the disability is partial or total. *Teklu v. Jury's Dole Hotel*, CRB No. 08-016, AHD No. 05-241, OWC No. 601765 (January 23, 2008). In proving a work-related injury rendered him partially disabled, the claimant must present substantial, credible medical evidence of the disability entitling him to level of benefits requested. See *Whittaker v. District of Columbia Dept. of Employment Services*, 668 A.2d 844 (D.C. 1995).

² In a contested case, in order to conform to the requirements of the District of Columbia Administrative Procedure Act, D.C. Code § 2-501 et seq., (DCAPA), an agency's decision must (1) state findings of fact on each material issue in contest, (2) those factual findings must be supported by substantial evidence, and (3) the conclusions of law must flow rationally from those factual findings. The failure to satisfy these requirements renders an agency decision unsupported by substantial evidence. *Perkins v. DOES*, 482 A.2d 401 (D.C. 1984).

CO at 4.

The District of Columbia Court of Appeals (DCCA) has held the correct burden of proof when deciding the nature and extent of a Claimant's disability is preponderance of the evidence. Specifically,

Despite the statement by the ALJ in this, and many other cases, that the claimant's burden of proving the extent of a disability is "substantial credible evidence," the correct burden of proof is a preponderance of the evidence. *WMATA v. DOES and Browne, Intervenor*, 926 A.2d 140 (D.C. 2007). See also *Burge v. DOES*, 842 A.2d 661, 666 (D.C. 2004); *Upchurch v. DOES.*, 783 A.2d 623, 628 (D.C. 2001).

If the ALJ awarded benefits, we would be forced to remand the case with directions for the ALJ to clearly identify that the ALJ utilized the correct standard of proof.³ However, the ALJ denied the Claimant's request under the substantial evidence standard, a lesser standard than that of a preponderance of the evidence. Had this been the only issue present in the CO, we would have found this error to be harmless and affirmed. However, as we are remanding the case, as discussed further below, we direct the ALJ to apply the correct burden of proof, that of a preponderance of the evidence, in the Compensation Order on Remand.

Moreover, we also must point out that the ALJ erroneously referred to a rating of Dr. Fecther, who did not rate the Claimant, rather than Dr. Franchetti. See CO at 5. Upon remand, the ALJ is directed to correct these apparent errors.

Turning to the Claimant's first argument, the Claimant argues the CO failed to properly consider the opinion of the treating physician when determining whether or not the Claimant suffered from a permanent partial disability impairment. A review of the evidence in the record reveals that the only physicians who rendered an opinion on whether the Claimant suffered from a permanent partial disability to the right upper extremity, were the IME physicians, Dr. Hinkes and Dr. Franchetti. The treating physician, Dr. Fecther, did not render any opinion on what permanent impairment the Claimant may, or may not, have suffered as a result of her work related injury. Thus, the only two medical opinions she could take into consideration regarding what permanent partial disability the Claimant may be entitled to, were that of the IME physicians.

Furthermore, contrary to the Claimant's argument that the ALJ completely disregarded the opinion of the treating physician, it is clear the ALJ did take into consideration Dr. Fecther's

³ In *WMATA v. DOES and Payne Intervenor*, 992 A.2d 1276 (D.C. 2010), the Court of Appeals also stated,

[H]ere the hearing examiner's analysis of the nature and extent of a claimant's disability reflect[ed] confusion as to the correct allocation of the burden of proof, the court could not determine whether conclusions legally sufficient to support the decision flow[ed] rationally from the findings, and thus a remand was necessary for further consideration of the evidence by the examiner under the proper standards.

opinion in her findings of fact as well as her acknowledgment that “Drs. Fecther and Minninberg [sic] discussed the possibility of an injury to Armsteads’ lateral epicondyle if his elbow failed to improve.” CO at 5. We find no error in the ALJ taking into consideration Dr. Fecther’s opinion, but relying upon the two IME opinions which directly address permanent partial disability to the Claimant’s right upper extremity, if any when considering the nature and extent of the Claimant’s injury.

Next, the Claimant argues that the CO failed to address the five factors enunciated in D.C. Code § 32-1508(U-i), pursuant to *Wormack v. Fishback & Moore Electric, Inc.*⁴ Specifically, the Claimant argues the ALJ failed to articulate the impact that each of these factors played, if any, in the ultimate finding that was reached. Claimant’s argument unnumbered at 9. We disagree.

Wormack does not mandate specific findings be made with regard to the factors commonly referred to as the “Maryland five factors.” In *Kane v. WMATA*,⁵ when addressing virtually the same argument, the CRB stated,

Nothing in the APA or Agency precedent requires that an ALJ make specific findings on every potential factual scenario or criteria that might have had a potential effect on a determination. They require that the record be considered as a whole, and that findings of fact be made based thereon. If there is substantial evidence in that record upon which the ALJ relies and which a reasonable mind might accept to support the factual findings, and if the legal conclusion reached by the ALJ flows rationally from those facts, the decision must be affirmed.

Kane, supra at 3.

Moreover, nothing in the Act requires the ALJ to consider the “Maryland five factors,” or even the AMA Guides. D.C. Code § 32-1508(U-i) states, in pertinent part,

In determining disability ... [under the schedule], the most recent edition of the American Medical Association Guides to the Evaluation of Permanent Impairment *may* be utilized, along with the following 5 factors: (i) Pain; (ii) Weakness; (iii) Atrophy; (iv) Loss of endurance; and (v) Loss of function.” (Emphasis added.)

The statute clearly utilizes the term “may” to allow the ALJ the discretion to determine what factors, if any, ultimately to use in coming to a conclusion on what permanent partial disability the Claimant may, or may not be, entitled too. The ALJ is free to consider which of the Maryland five factors are deemed to be appropriate, or not, depending on the case.

A review of the CO reveals the following discussion when addressing the impact of the injury on the Claimant:

Armstead returned to work full duty for GLI in January 2011. (FF 5) In performing his work duties, Armstead seeks shorter routes and a lessening of the

⁴ CRB No. 03-159, AHD No. 03-151 (July 22, 2005).

⁵ CRB No. 10-071, AHD No. 09-483 (November 8, 2011).

loading and unloading of passenger's luggage. (FF 5) Armstead continues to take assignments for charter bus runs where lifting of bags is limited. (FF 6) Armstead continues to work 60 hours for GLI with some charter bus runs. (FF 7). Armstead testified that he continued to lift weights with a strap to support his right upper extremity and to target practice, but for shorter periods of time due to pain. (FF 8)

CO at 5.

The above passage seems *support* a finding of some disability. However, after discussing the Claimant's residual effects as a result of the work related injury, which included seeking shorter routes, and less lifting and bending, the ALJ then denied in its entirety any claim for permanent partial disability benefits. We find this to be in conflict with the findings of fact, recited by the ALJ and the applicable law in the District of Columbia.

As the ALJ noted,

The ALJ may consider more than just the medical impairment ratings in determining the extent of an injured claimant's schedule disability. In addressing the nonmedical question of industrial use, the ALJ has broad discretion to consider the medical impairment, the D.C. Five Factors, and the effect of the work injury on Claimant's industrial capacity in arriving at a percentage of disability under the Act. *See Corrigan v. Georgetown University*, CRB No. 06-094, AHD No. 06-256, OWC No. 604612 (September 14, 2007). The determination can result in accepting one physician's rating over another, or in reaching a different conclusion altogether. *See Negussie v. District of Columbia Dept. of Employment Services*, 915 A.2d 391, 392 (D.C. 2007).

CO at 6.

Upon remand, the ALJ is directed to reconcile the apparent finding of residual effects of the work injury on the Claimant, as outlined above, with the applicable law taking into consideration the DCCA's recent decision in *Jones v. DOES*, 41 A.3d 1219 (April 26, 2012). If the ALJ does award a percentage of permanent partial disability, the ALJ is to give specific reasons for the disability was awarded.⁶

⁶In *Jones* the DCCA, while acknowledging the predictive nature of permanent partial disability determinations, also indicated that any disability award amount must be explained and reasons for the award must be outlined. Without any explanation from the ALJ, the DCCA determined that it would be impossible to determine whether or not the ALJ's determination flowed rationally from the factual findings and whether or not the ALJ applied the law correctly, taking into account the entirety of the record.

CONCLUSION AND ORDER

The September 4, 2012 Compensation Order is REVERSED and REMANDED consistent with the above discussion.

FOR THE COMPENSATION REVIEW BOARD:

HEATHER C. LESLIE
Administrative Appeals Judge

December 6, 2012
DATE