

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA MARÍA MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 12-087

TRINIDAD BLANCO,
Claimant–Petitioner,

v.

**DARIO ZUCCHI and TRAVLERS INDEMNITY COMPANY OF AMERICA,
Employer and Insurer–Respondent.**

Appeal from a May 10, 2012 Compensation Order of
Administrative Law Judge Belva D. Newsome
AHD No. 11-098A, OWC No. 655839

Michael Kitzman, Esquire, for the Petitioner
Amy L. Epstein, Esquire, for the Respondent

Before JEFFREY P. RUSSELL,¹ HEATHER C. LESLIE,² and MELISSA LIN JONES, *Administrative Appeals Judges*.

JEFFREY P. RUSSELL, for the Compensation Review Board.

DECISION AND REMAND ORDER

BACKGROUND

Trinidad Blanco injured her right arm while working as a housekeeper for Dario Zucchi. According to a transcript of proceedings (HT 1) before an Administrative Law Judge (ALJ) in the hearings section of the Department of Employment Services (DOES) that took place June 30, 2011, the following procedural history is described.

Ms. Blanco and Mr. Zucchi had previously attended an informal conference in the Office of Workers' Compensation (OWC), following which, on April 9, 2010, the Claims Examiner (CE) issued a recommendation that Ms. Blanco be awarded permanent partial disability benefits under the schedule in the amount of 33% to the right arm. Ms. Blanco had sought an award of 52% based

¹ Judge Russell was appointed by the Director of DOES as a Board member pursuant to DOES Administrative Policy Issuance No. 12-01 (June 20, 2012).

² Judge Leslie was appointed by the Director of DOES as a Board member pursuant to DOES Administrative Policy Issuance No. 12-02 (June 20, 2012).

upon an impairment evaluation by Dr. Jeffrey Phillips, while Mr. Zucchi maintained that the disability was only 4%, based upon an impairment evaluation by Dr. David Johnson. Mr. Zucchi initially rejected the recommendation, but subsequently the parties agreed to accept the recommendation, and they jointly advised the CE of this fact and requested that the recommendation be reduced to a final order. On March 10, 2010, Mr. Zucchi paid the 33%, but the CE never issued a final order. A subsequent informal conference was held on February 7, 2011, at which Ms. Blanco presented an updated evaluation from Dr. Philips increasing his impairment rating by 1% to 53%, while Mr. Zucchi presented an updated evaluation from Dr. Johnson indicating that there had been no worsening since his prior evaluation.³

The June 30, 2011 transcript, HT 1, does not reveal what recommendation resulted from this second informal conference, but does reveal that one party or the other rejected it and filed an Application for Formal Hearing (AFH). The transcript also reveals that as a result of the AFH, the June 30, 2011 proceedings had been scheduled in order to permit Ms. Blanco to seek an additional 20% permanent partial disability award to the right arm. The formal hearing did not occur on that date, however, because for reasons not discussed in the transcript, Ms. Blanco was unable to attend. The transcript concludes with the parties conferring with the presiding ALJ on selection of a new date for the formal hearing, which date was selected after the proceedings went off record.

The proceedings of June 30, 2011 proceeded under a caption including the Administrative Hearings Division (AHD) number AHD 11-098.

On March 6, 2012, a second transcribed proceeding (HT 2) occurred, this one under case number AHD 11-098A. By convention, the addition of the "A" suffix indicates that the AFH which led to the June 30, 2011 proceedings had been dismissed, and a new AFH filed, resulting in a new formal hearing date being scheduled under case number 11-098A. These new proceedings were conducted by a different ALJ.

The March 6, 2012 proceeding was a formal hearing, following which a Compensation Order (which is the Compensation Order now under review) was issued on May 6, 2012.⁴ The Compensation Order indicates that the AFH for AHD No. 11-098A was filed October 21, 2011. At the formal hearing, Ms. Blanco presented her own testimony and medical records, including a new medical evaluation from Dr. Phillips dated November 22, 2010, containing his impairment rating of 53%. Mr. Zucchi presented an updated evaluation by Dr. Johnson indicating that Ms. Blanco had sustained a 4% impairment.

In the Compensation Order of May 6, 2012, the ALJ identified the Claim for Relief as "Blanco seeks payment of permanent partial disability of 53% to her upper right extremity from November 22, 2010", and the Issues Presented as "Does Blanco suffer from a permanent p[sic] partial disability of 53% of her upper right extremity from November 22, 2010?" In the Conclusions of

³ In a subsequent addendum, Dr. Johnson explained that although his examination revealed some improvement from his earlier examination, his impairment rating remained unchanged because he was utilizing a newer edition of the AMA Guides, which resulted in an impairment rating numerically identical to that which resulted when employing the earlier edition.

⁴ Although the signature of the issuing ALJ is properly dated May 10, 2012, the Certificate of Service erroneously lists the date of issuance as May 10, 2011.

Law the ALJ wrote “The evidence of record does not support the conclusion that Blanco has an increased permanent partial disability to her right upper extremity from 33% to 53%”, and in the Decision she wrote “Based upon the record herein, and the applicable law, it is hereby ordered that: 1. Blanco’s claim for permanent partial disability to her right upper extremity of 53 % is DENIED.”

Ms. Blanco filed a timely appeal of the Compensation Order to the CRB, to which Mr. Zucchi has filed a timely opposition.

Ms. Blanco argues in this appeal that the Compensation Order must be vacated because it fails to make findings of fact concerning what, if any, permanent partial disability she has suffered, and because it impermissibly alludes to Ms. Blanco’s returning to her pre-injury job in reaching a conclusion that she has not suffered a disability to the degree that she claims. She also argues that the failure of the ALJ to make specific findings as to the effect of the “five factors” of pain, weakness, atrophy, loss of endurance and loss of function requires reversal.

Mr. Zucchi argues that the Compensation Order should be affirmed because it is supported by substantial evidence and is in accordance with the law.

Because the Compensation Order improperly framed the issues presented and failed to resolve several necessary preliminary questions regarding whether this case presents a modification request under D.C. Code § 32-1524, and if so, whether it is timely, we vacate the Compensation Order and remand for further proceedings and consideration.

STANDARD OF REVIEW

The scope of review by the CRB is generally 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*, D.C. Workers’ Compensation Act of 1979, as amended, D.C. Code § 32-1501, *et seq.*, (the Act) at § 32-1521.01 (d)(2)(A), and *Marriott International v. DOES*, 834 A.2d 882 (D.C. 2003). Consistent with this standard of review, the CRB and this review panel must affirm 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 this panel might have reached a contrary conclusion. *Id.*, at 885.

DISCUSSION AND ANALYSIS

The first problem presented by the procedural facts as we glean them from HT 1 and HT 2 is whether this proceeding constitutes a modification proceeding under D.C. Code § 32-1524. According to HT 1, a recommendation was issued by OWC recommending that Ms. Blanco be awarded 33% ppd to the right arm. Although HT 1 suggests that that recommendation was initially rejected, it also indicates that the rejection was withdrawn, and the ppd was paid, and that this occurred on or before March 10, 2010. If the facts as outlined in HT 1 are correct, then no AFH was filed within 34 days of March 10, 2010. If these facts are correct, then the OWC recommendation became a Final Order by operation of law on April 13, 2010. *See*, DCMR § 7-219.22.

D.C. Code § 32-1524 states:

- (a) At any time prior to 1 year after the date of last payment of compensation or at any time prior to 1 year after rejection of a claim [...] the Mayor may, upon his own initiative or upon application of a party in interest, order a review of a compensation case pursuant to the procedures provided in § 32-1520 where there is reason to believe that a change of conditions has occurred which raises issues concerning: (1) the fact or degree of disability or the amount of compensation payable pursuant thereto [...].

The modification limitations found in this section of the Act are applicable to stipulated schedule disability awards that have become final. See, *Smith v. DOES*, 548 A.2d 95 (D.C. 1988); *Levy v. WMATA*, CRB No. 11-151, AHD No. 98-064C, OWC No. 236775 (June 8, 2012). Thus, if the information in HT 1 is correct, Ms. Blanco's "application" for modification had to be filed by April 13, 2011. The AFH which resulted in the formal hearing of March 6, 2012 was filed, according to the Compensation Order, on October 21, 2011, more than five months beyond one year from the date the OWC recommendation became final by operation of law, and more than six months after one year from the date that HT 1 recites was the date the agreed upon ppd award was paid.

We recognize that an informal conference was held February 7, 2011, in which conference a modification was sought. The record before us does not reveal what the result of that conference was. We assume that there may be some scenario under which a timely application for modification may have been filed, and there may be circumstances under which there has continuously been a pending application for modification such that the request for modification was perpetuated. But we are not, on this record, in a position to make that determination. A remand is necessary for the purpose of further fact finding on this question.

Second, from a substantive point of view, assuming the matter was properly pending before AHD at the time of the March 6, 2012 formal hearing, the Compensation Order's characterization of the issues and framing of the Conclusions of Law and Decision render impossible an assessment of whether the ALJ found that there had been a change in the fact or degree of disability. Asserting that Ms. Blanco has failed to establish a change as great as she has claimed is not the same as saying that she has not established a change at all. Ms. Blanco is entitled not only to have her claim considered as stated in her claim for relief; she is also entitled to a finding and conclusion concerning whether she has suffered a deterioration in some other amount. This is reversible error. See, *Muhammad v. DOES*, 774 A.2d 1107 (D.C. 2001).

The manner in which the decision is couched also prevents any possibility of Ms. Blanco ever seeking a further modification for any additional deterioration in the future -- from what baseline would that be judged? A remand is necessary so that, in the event the ALJ determines that there has been a timely AFH seeking modification of the agreed upon stipulation as to the degree of disability, there can also be a determination if there has been a change in the degree of disability, and if so, what her new, resulting disability is.

We are aware that the ALJ who issued the decision is no longer with the Agency, and thus the matter will need to be assigned to another ALJ to carry out this remand. Since the new ALJ will be

required to start the matter from the ground up, we will not address the remaining issues on appeal, beyond stating that (1) specific reference to the “five factors”, while laudable, is not a prerequisite to a valid Compensation Order, and (2) reference to a claimant’s ability to return to the pre-injury job as a factor to be considered in connection with industrial disability is not error.

CONCLUSION AND ORDER

The record before us does not permit a determination as to whether Ms. Blanco’s request for modification is timely, rendering impossible our ability to exercise our review obligations. The failure of the Compensation Order to make findings of fact concerning whether Ms. Blanco has experienced a change in the degree of her disability, and if so, what her present disability consists of, render the decision unsupported by substantial evidence and not in accordance with the law.

The Compensation Order is vacated, and the matter is remanded with instructions that a determination be made if the request for modification is timely, and if so, for consideration of the claim and issuance of a new Compensation Order in which findings of fact and conclusions of law are made as to whether there has been a change in Ms. Blanco’s condition warranting a modification of the OWC final order, and if so, to what degree her disability has changed.

FOR THE COMPENSATION REVIEW BOARD:

JEFFREY P. RUSSELL
Administrative Appeals Judge

February 19, 2013
DATE