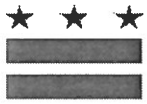
GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

DEPT. OF EMPLOYMENT SERVICES
COMPENSATION REVIEW BOARD
2015 DEC 28 PM 12 20

CRB No. 15-125 (1)

CARLOS HERNANDEZ,
Claimant–Respondent,

v.

CLARK FOUNDATIONS, LLC and
AMERICAN ZURICH INSURANCE COMPANY,
Employer/Carrier–Petitioners.

On Reconsideration of a December 17, 2015 Decision and Remand Order
Regarding an Appeal from a July 10, 2015, Compensation Order by
Administrative Law Judge Nata K. Brown
AHD No. 14-587, OWC No. 694808

(Issued December 28, 2015)

Brian P. Riley for the Claimant
Sarah Burton for the Employer

Before HEATHER C. LESLIE, JEFFREY P. RUSSELL, *Administrative Appeals Judges* and LAWRENCE D. TARR, *Chief Administrative Appeals Judge*.

HEATHER C. LESLIE for the Compensation Review Board.

AMENDED DECISION AND REMAND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

Claimant was employed as a skilled laborer for Employer. On July 24, 2012, Claimant injured his left knee and both hands when he fell down an escalator.

Claimant came under the care of Dr. Richard Barth for his bilateral hand injuries and Dr. Randall Lewis for his left knee injury. Dr. Barth diagnosed Claimant with a crush injury of the right hand with multiple lacerations and recommended a conservative course of treatment to his right hand. Dr. Barth recommended carpal tunnel surgery to his left hand which Claimant declined. Dr. Lewis diagnosed Claimant with a patellofemoral contusion and also recommended a conservative course of treatment. Eventually, both Dr. Barth and Dr. Lewis released Claimant to work with no restrictions.

On July 31, 2014, Dr. Michael Franchetti performed an independent medical evaluation (IME) at the request of Claimant. After obtaining a history of Claimant's injuries and treatment and performing a physical evaluation, Dr. Franchetti opined Claimant suffered from a 37% permanent partial impairment to this right hand and a 20% permanent partial impairment rating to his left lower extremity as a result of his work injury. In a second IME of October 16, 2014, Dr. Franchetti opined Claimant suffered from a 25% permanent partial impairment to his left upper extremity as a result of severe carpal tunnel syndrome, a result of his work injury.

On October 22, 2014, Dr. Barth opined Claimant suffered from a 2% permanent partial impairment to the right index finger, a 2% permanent partial impairment to the right middle finger and a 3% permanent partial impairment to the left hand.

A full evidentiary hearing occurred on April 23, 2015. Claimant sought an award for permanent partial disability to both hands and left knee. Hearing transcript at 6, 13-14. The sole issue to be adjudicated was the nature and extent of Claimant's disability. A Compensation Order (CO) was issued on July 10, 2015 which awarded Claimant 25% permanent partial disability to his right hand, 15% permanent partial disability to his left upper extremity, and a 20% permanent partial disability to his left lower extremity.

Employer appealed. Employer argues the ALJ erred in rejecting the treating physician's opinion, erred in determining the treating physician, Dr. Lewis, did not provide an impairment rating to the left lower extremity, and erred in not addressing the credibility of Dr. Franchetti in light of the disciplinary action, a Consent Order, against him in the state of Maryland.

Claimant opposed the appeal, arguing Employer failed to "adduce sufficient grounds for this Board to overrule the Compensation Order," thus the CO should be affirmed. Claimant's opposition, unnumbered at 6.

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* D.C. Workers' Compensation Act of 1979, as amended, D.C. Code §§ 32-1501 to 32-1545 (2005) at § 32-1521.01(d)(2)(A). Consistent with this standard of review, the CRB and this Review Panel are constrained to uphold a Compensation Order (CO) 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 Int'l v DOES*, 834 A.2d 882, 885 (D.C. 2003).

ANALYSIS[1]

We first address Employer's argument that the ALJ erred when determining Dr. Franchetti was the only physician to rate the left knee. Employer points this panel to certain findings of Dr. Lewis where he notes Claimant has no effusion, tenderness, instability, no joint line tenderness and the results of objective testing. Employer's argument at 5. Employer also points this panel to the January 29, 2015 report from Dr. Lewis wherein he opines Claimant suffered 0% permanent partial impairment to his left knee as a result of his work injury, contrary to the ALJ's assertion that Dr. Franchetti was the only physician to rate Claimant's left knee. Compensation Order at 7. As we are remanding the case for further consideration of the consent order against Dr. Franchetti, discussed more fully below, the ALJ is to rectify this mistake and take into consideration, when weighing the evidence, Dr. Lewis' opinion that Claimant did not have a permanent partial impairment to his left knee as a result of the work injury.

Employer further argues that the ALJ erred in rejecting the treating physician's opinion. Employer specifically argues the ALJ did not articulate reasons why Dr. Barth's opinions were rejected in favor of Dr. Franchetti, Claimant's IME physician, and thus the rejection is not in accordance with the law.

It is well settled in the District of Columbia that in situations where there are conflicting medical opinions, the opinion of the treating physician is preferred over those of physicians retained simply to examine the claimant for the purposes of litigation. *Stewart v. DOES,* 606 A.2d 1350 (D.C. 1992). In the case before us, there is no dispute that Dr. Barth and Dr. Lewis are Claimant's treating physicians for the work related injury.

A review of the CO reveals that after acknowledging the preference accorded to the opinion of the treating physicians, the ALJ did not articulate any reasons for rejecting Dr. Barth's opinion other than the impairment ratings given were "very low." We cannot agree that this reason alone is sufficient to support the wholesale rejection of Dr. Barth's opinion. On remand, if the ALJ does not afford Dr. Barth the treating physician preference and rejects his opinion, articulable reasons must be provided to support this rejection. Until such time, we cannot say that the CO is supported by the substantial evidence in the record.

We also agree with Employer that it was in error for the ALJ not to discuss what impact, if any, the disciplinary action had on Dr. Franchetti's rating. As Employer points out, the CRB recently determined, in a case involving Dr. Franchetti's disciplinary action, that the "Consent Order may go to the credibility of the physician in question and the admission of a Consent Order does not automatically undermine a physicians' credibility in a case." *Parker v. Howard University Hospital*, CRB No. 13-079(R), AHD No. 11-044A (April 1, 2015). While we are mindful the

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[1] A Decision and Remand Order in this appeal was issued by the CRB on December 17, 2015. In that Decision, the CRB mistakenly stated that Dr. Lewis did not give an opinion regarding any permanent impairment to the left knee. On December 23, 2015, Employer submitted a Motion for Reconsideration. In light of the arguments made by Employer and upon further review of the evidence in the file, we agree with Employer that Dr. Lewis did opine on January 29, 2015 that Claimant suffered 0% permanent partial impairment to his left knee as a result of his work injury. Employer's Motion for Reconsideration is granted and this Amended Decision and Remand Order is issued as a result.

ALJ does not have to inventory all the evidence, parties are entitled to have their defenses/arguments addressed.

As we are remanding the case, we also task the ALJ with clarifying what the claim for relief was with respect to the left hand. As we noted earlier in the facts of record and procedural history, a review of the transcript shows Claimant sought permanent partial disability to his hands, not to either upper extremity. The claim for relief as articulated in the CO only refers to the upper extremities. However the ALJ's order denotes Claimant's right hand and left upper extremity. Upon remand, the ALJ is to clarify what was sought and awarded, and if needed, reopening of the record.

CONCLUSION AND ORDER

The July 10, 2015 Compensation Order is not supported by the substantial evidence in the record and is not in accordance with the law. It is VACATED and REMANDED for further findings of fact and conclusions of law consistent with the above discussion.

So ordered.