GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

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COMPENSATION REVIEW BOARD

CRB No. 14-136

DEPT. OF EMPLOYMENT SERVICES
COMPENSATION REVIEW BOARD
2015 MAY 12 PM 1 56

CATHERINE HUBBARD,
Claimant–Respondent,

v.

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,
Employer-Petitioner.

Appeal from an October 27, 2014 Compensation Order on Remand
by Administrative Law Judge Fred D. Carney, Jr.
AHD No. PBL. 12-008, DCP No. 76000600012007104-0001

Harold L. Levi for the Claimant
Andrea G. Comentale for the Employer[1]

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

JEFFREY P. RUSSELL for the Compensation Review Board.

DECISION AND REMAND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

The following recitation of background and procedural facts is taken from a prior Decision and Remand Order (DRO) issued by the Compensation Review Board (CRB) on January 27, 2014 in connection with this claim:

> On November 18, 2003, Claimant was employed as a teacher. On that day, Claimant tripped and fell over a bench, injuring her right hand and arm, and hit both lower legs against the bench. Claimant subsequently filed a claim with the Office of Risk Management (ORM) for an injury to her right hand and arm, and both lower legs. Claimant was diagnosed with a right upper extremity contusion and right carpal tunnel syndrome (CTS). The Employer accepted the injury to her right hand and arm, and both lower legs. Claimant continued to work and continued to seek medical treatment.

[1] Employer was represented by Pamela Smith at the Formal Hearing.

On January 2, 2007, Claimant experienced a worsening of her symptoms in her right hand and wrist while writing on a black board. The Employer accepted her claim for her right wrist CTS.

Claimant also sought treatment for neck pain. Claimant was treated by Dr. Patrick Fasusi, a pain management specialist, who opined the Claimant needed epidural injections or steroid ganglion blocks. Dr. Fasusi also recommended Claimant refrain from working beginning December 17, 2008. The Employer denied the request for neck treatment. Claimant did not appeal this denial.

Dr. Fasusi referred Claimant to Dr. Robert Wilson for right CTS release which was performed on April 30, 2009. Claimant also underwent left CTS surgery. Claimant subsequently began to treat with Dr. Wilson's colleague, Dr. Rankin. Dr. Rankin opined the Claimant had cervical disc disease and recommended an MRI, therapy, and a referral to a neurologist. The Employer denied these requested medical treatments.

The Employer sent the Claimant for an additional medical evaluation (AME) [footnote omitted] with Dr. David C. Johnson on August 4, 2011. Dr. Johnson took a history of the injury, reviewed medical records and performed a physical examination. Dr. Johnson was unable to determine whether or not Claimant's neck symptoms were related to any underlying disc disease which may have been aggravated by the work injury, stating not enough information was in the record to make a determination. Dr. Johnson did opine that as it relates to both hands, the Claimant was at maximum medical improvement and that the left hand is unrelated to the January 2, 2007 injury. Dr. Johnson opined the Claimant could return to work as a teacher.

On October 23, 2011, the Employer issued a Notice of Intent to Terminate Public Sector Workers' Compensation Payments (NOI) based upon the AME of Dr. Johnson. The Claimant was notified in the NOI that her disability benefits would be terminated. The Claimant timely requested a reconsideration of the NOI. The Final Decision on Reconsideration (FDR) upheld the NOI.

The Claimant timely filed for a Formal Hearing, seeking reinstatement of temporary total disability benefits from December 16, 2011 to the present and continuing and authorization for medical treatment based on injuries to the neck, hands, and right upper extremity. A CO was issued on September 4, 2013, awarding the Claimant's request. The ALJ concluded that the Claimants current symptoms to both hands, both wrists, neck, and right shoulder were caused by the work injuries of 2003 and 2007.

The Employer appealed. The Employer argues the CO is not supported by the substantial evidence in the record and is not in accordance with the law. Specifically, the Employer argues that ALJ did not have jurisdiction to award benefits for injuries other than what was related to the right CTS relying on the CRB's reasoning in

> *Minter v. District of Columbia Office of the Chief Medical Examiner*, CRB No. 11-024 and 11-035, AHD No. PBL 073A (December 15, 2011). The Employer also argues the ALJ was in error in relying, in part, upon an AME not in the record, that the ALJ's conclusions regarding causal relationship were not supported by the evidence in the record, and that many of the statements made in the CO's statements of fact are unsupported by the evidence in the record.
>
> The Claimant, in opposition, argues that the CO is supported by the substantial evidence in the record and in accordance with the law.

DRO, pp. 1 – 3.

In the body of the DRO, the CRB wrote:

> A review of the record before us reveals two NOD's [Notices' of Determination], an NOD dated November 18, 2003 which accepted the right hand, right arm and both lower leg injuries [citing CE 2] and an NOD dated July 5, 2007 which accepted the Claimant's claim of CTS to the right wrist [citing EE 1]. Thus, the ALJ's jurisdiction extended only to the right hand, wrist, arm and both lower legs and what benefits Claimant may be entitled to as it relates to these body parts. Based upon the record before us, an NOD has not been issued addressing any other body part, including the right shoulder or neck. Thus, it was in error for the ALJ to consider these body parts and award benefits based upon them. Upon remand, the ALJ is to re-evaluate the Claimant's claim for relief considering only the right hand, right arm, right wrist and both lower legs, the claims properly before AHD. Until such time as Claimant requests a NOD regarding the compensability of the neck and left wrist, AHD is precluded from rendering a decision.

DRO, p. 4.

Then, in the Conclusion and Order, the CRB wrote:

> The Compensation Order of September 4, 2013 is not supported by the substantial evidence in the record and in accordance with the law. It is VACATED and REMANDED. Upon remand, the ALJ is to reconsider Claimant's request for disability benefits, based upon injures to her right hand, right arm, right wrist and both lower legs. Any other injuries, including to the neck and right shoulder, is [sic] not properly before AHD. Finally, the ALJ is directed to exclude references to the MSS Peer Review Report.

DRO, p. 6.

On October 27, 2014, the ALJ issued a Compensation Order on Remand (COR), in which the Claim for Relief and the issue to be resolved are identified as follows:

CLAIM FOR RELIEF

> Claimant seeks an award under the Act for payment [sic] temporary total disability benefits for injuries to her neck, both hands and right upper extremity from December 16, 2011 to the present and continuing and authorization of ongoing medical treatment.

ISSUE

> Whether there has been a change in condition to Claimant's accepted injures [sic] that supports a termination of Claimant's benefits?

COR, p. 1.

In the body of the Findings of Fact, the COR states:

> Claimant introduced its July 5, 2007 acceptance form which indicates Claimant's January 2, 2007 claim was accepted for right carpal tunnel only. (CE 4). Therefore, the jurisdiction of AHD is limited to the issue of the right wrist only.

COR, p. 7

In the Conclusions of Law and Order sections, the COR states:

CONCLUSIONS OF LAW

> Based upon a review of the record evidence as a whole, I find and conclude Claimant continues to receive conservative treatment to her right wrist/hand that provides her with "some relief". I find and conclude the NOD that Claimant sought a formal hearing to review is limited to Claimant's right wrist. There is insufficient evidence to support a conclusion that Claimant's right wrist alone prevents her from returning to work as a teacher. Therefore I find Employer has failed to meet it [sic] burden to show by a preponderance of the evidence that the termination for treatment of right wrist/hand was justified.

ORDER

> It is **ORDERED** Claimant's claim for continuing temporary total wage loss and medical benefits for her right hand/wrist is hereby **GRANTED.** It is further **ORDERED** that the rest of Claimant's claim is **DENIED.**

COR, pp. 10 – 11.

Employer filed a timely "Application for Review" (AFR) and "Employer-Petitioner's Memorandum of Points and Authorities in Support in Support of Application for Review of October 27, 2014 Compensation Order on Remand" (Employer's Brief), to which Claimant responded by filing

"Claimant-Respondent's Opposition to Employer-Petitioner's Application for Review" (Claimant's Brief) opposing the AFR.

Because the finding that jurisdiction is limited to the "issue of the right wrist only" is in direct conflict with the mandate of the CRB in the DRO, the Claim for Relief, Conclusions of Law and Order are internally inconsistent, and it is not possible to determine what benefits the COR purports to award or deny, we vacate the COR and remand for further consideration.

STANDARD OF REVIEW

The scope of review by the CRB, 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 on Remand 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. Comprehensive Merit Personnel Act of 1978, as amended, D.C. Code § 1-623.01, *et seq.*, at § 1-623.28(a), and *Marriott International v. DOES*, 834 A.2d 882 (D.C. 2003).

Consistent with this standard of review, the CRB is 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.

ANALYSIS

Preliminarily, we agree with Claimant's assertion on page 3 of her Brief that, although the ALJ did not explicitly cite *Mahoney v. D.C. Public Schools*, CRB No. 14-067, AHD No. PBL 14-004, 8-9 (November 12, 2014), the COR is structured properly in accordance with the burdens of the respective parties in this case. Employer has not argued otherwise. In any event, on remand, the ALJ is reminded to be cognizant of *Mahoney* and apply it accordingly.

Employer raises multiple contentions of error, in four general categories:

(A) Many Of The ALJ's Findings and Statements Of Fact Are Unsupported By The Evidence Of Record [Employer's Brief, p. 8]

...

(B) The Record Does Not Contain Any Medical Evidence to Support That Claimant Satisfied Her Burden [*Id.* p. 9]

...

(C) The Finding That Dr. Johnson's 2011 AME Report Conflicts With Other Credible Evidence of Record Is Not Supported By Substantial Evidence [*Id.* p. 12]; and

...

(D) The ALJ's Conclusions of Law are Contradictory and Misleading [*Id.* p 14].

Claimant responds by arguing that all the factual findings in the COR are supported by substantial evidence and that the legal conclusions drawn are in accordance with the law. Claimant's Brief, pp. 4 – 5. While Employer's Brief refers to numerous specific instances in the COR and the record in support of its contentions, Claimant does not address any of them specifically in her Brief.

We have reviewed the COR, and agree with Employer's Argument (D). We cannot reconcile the ALJ's statement that "Claimant introduced its July 5, 2007 acceptance form which indicates Claimant's January 2, 2007 claim was accepted for right carpal tunnel only. (CE 4). Therefore, the jurisdiction of AHD is limited to the issue of the right wrist only" (COR, p. 7) with his Finding of Fact that "Claimant continues with temporary impairment to her right wrist/hand, and left wrist/hand. Claimant's current impairments are related, wholly or in part, by a combination of her age-related degeneration and the residuals of her 2003 and 2007 work injuries" (COR p. 5).

The conflict is compounded by the fact that it is impossible to tell what medical care the ALJ did and did not intend to award. Similarly, since the factual finding statement purports to be limiting the ALJs perception of what claims were before him to the "right wrist", it is impossible to ascertain what period or periods of temporary total disability he intended to award.

Further, the statement regarding "the jurisdiction of AHD" being limited to "the right wrist only" is in direct conflict with the ruling and mandate of the CRB that "Upon remand, the ALJ is to reconsider Claimant's request for disability benefits, based upon injures to her right hand, right arm, right wrist and both lower legs. Any other injuries, including to the neck and right shoulder, is [sic] not properly before AHD" (DRO, p. 6).

Adding to the uncertainty and conflict is the ALJ's statement in the Conclusions of Law that "[t]here is insufficient evidence to support a conclusion that Claimant's right wrist alone prevents her from returning to work as a teacher. Therefore I find Employer has failed to meet it [sic] burden to show by a preponderance of the evidence that the termination for treatment of right wrist/hand was justified." (COR, p. 10). The two sentences are a *non sequitur*. Whether there is some typographical error or misunderstanding of the impact of the first sentence on the second is impossible to tell.

We also agree that the COR contains contradictory or at least highly ambiguous findings concerning when or if Claimant returned to work. In the procedural background portion, the COR states:

> On November 18, 2003, Claimant was working for Employer as a teacher. On that day, while taking her students to the gym, Claimant tripped over a bench and fell. She used her out-stretched hands to block her fall. Claimant filed a claim for benefits for injuries arising out of the fall. On December 16, 2003, the Office of Risk Management … issued a Notice of Determination (NOD) which informed Claimant that her claim was accepted for injuries to her right hand, right arm, and both legs. Claimant received medical treatment and continued working. Claimant was diagnosed with right upper extremity contusion and right carpal tunnel syndrome (CTS). Claimant continued to work and continued to seek medical treatment.

COR, p. 2.

Then, on the following page, the following appears in the first paragraph of the Findings of Fact:

> The parties have stipulated, and I accordingly so find, Claimant sustained injury to her right wrist, notice of injury and filing of claim were timely given, Claimant received wage loss benefits from October 2, 2008, and Claimant has not returned to work since the injury.

COR, p. 3.

These two statements are irreconcilably in conflict, and obviously concern a central matter to be resolved, *i.e.*, if and when Claimant was off work, and why.

Although Employer raises additional instances of factually inconsistent statements and complains that the COR's conclusions concerning the substance of the opinions of various physicians, we will not continue with an exhaustive review of each such complaint. Rather, inasmuch as the COR is fatally defective for the reasons stated above, we vacate it in its entirety, and remand for further consideration.

CONCLUSION AND ORDER

Because the finding that jurisdiction is limited to the "issue of the right wrist only" is in direct conflict with the mandate of the CRB in the DRO, the Claim for Relief, Conclusions of Law and Order are internally inconsistent, the Findings of Fact contain factually inconsistent and contrary findings on relevant and material issues, and it is not possible to determine what benefits the COR purports to award or deny, we vacate the COR and remand for further consideration.

FOR THE COMPENSATION REVIEW BOARD:

JEFFREY P. RUSSELL
Administrative Appeals Judge

May 12, 2015
DATE