

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 15-166

CATHERINE HUBBARD,
Claimant-Respondent,

v.

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,
Employer-Petitioner.

Appeal from an September 11, 2015 Compensation Order on Remand
by Administrative Law Judge Fred D. Carney, Jr.
AHD No. PBL. 12-008, DCP No. 76000600012007104-0001

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2016 MAR 28 PM 2 08

(Decided March 28, 2016)

Harold L. Levi for the Claimant
Andrea G. Comentale for the Employer¹

Before HEATHER C. LESLIE, LINDA F. JORY, and JEFFREY P. RUSSELL, *Administrative Appeals Judges*.

HEATHER C. LESLIE, 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 (DRO1) 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

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

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.

On January 2, 2007, Claimant experienced a worsening of her symptoms in her right hand and wrist while writing on a blackboard. 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.

DRO1 at 1 – 3.

After reviewing the evidence, the CRB concluded the Administrative Law Judge (ALJ) only had jurisdiction to consider Claimant's injuries to her right hand, wrist, arm and both lower legs based upon the two Notice of Determinations (NOD) issued. The CRB concluded:

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 injuries 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.

DRO1 at 6.

On October 27, 2014, the ALJ issued a Compensation Order on Remand (COR1), which the Employer timely appealed. After considering the parties' arguments and reviewing COR1, the CRB issued a Decision and Remand Order (DRO2) on May 12, 2015, concluding a remand was necessary,

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.

DRO2 at 7.

A Compensation Order on Remand (COR2) was issued on September 11, 2015. In the COR2, the ALJ, after weighing Claimant's testimony and the evidence of record, concluded Employer had not

proven, by a preponderance of the evidence, that Claimant could return to work. The ALJ awarded Claimant disability and medical benefits.

Employer appealed. Employer argues, 1) some of the COR2's findings of fact are unsupported by the evidence in the record; 2) the ALJ erred in concluding Claimant satisfied her burden of producing reliable and relevant evidence that Claimant remains disabled because of her work-injury; and, 3) the COR2's conclusion that Employer failed in its burden to show by a preponderance of the evidence that Claimant's work injury had resolved is not supported by the substantial evidence in the record.

Claimant opposes Employer's appeal. Claimant argues the COR2 is supported by the substantial evidence in the record and is in accordance with the law and should be affirmed.

ANALYSIS²

We first address Employer's argument that some of the findings of fact are unsupported by the substantial evidence in the record. Employer specifically points this panel to the following statement:

Subsequent to Dr. Johnson's 2007 IME, ORM referred Claimant to Dr. Patrick Fasusi, a pain management specialist, in 2007 for her complaints of symptoms in her neck and hands. Dr. Fasusi opined that Claimant's bilateral carpal tunnel syndrome was the result of her fall in 2003.

COR2 at 4.

Employer states the above statement is incorrect as the record does not contain a 2007 IME from Dr. Johnson. We agree. As we stated in our DRO1, a "2007 AME of Dr. Johnson was not submitted into evidence" and the only reference to a 2007 AME report was in a Claims Review Report. DRO1 at 5. As we are remanding the case, the ALJ is to refer and rely upon the evidence in the record.

Employer argues Dr. Fasusi did not opine in any of his reports that Claimant's bilateral carpal tunnel syndrome was the result of her work injury, contrary to the ALJ's finding. Employer also contends that since Dr. Fasusi has not treated Claimant since 2009, his opinion cannot be deemed relevant to establish Claimant's current condition has not changed.

Similarly, Employer argues that Claimant failed in her burden, as outlined in *Mahoney v. D.C. Public Schools*, CRB No. 14-067 (November 12, 2014), of showing through reliable and relevant evidence that the Claimant remains disabled because of the medically causally related work injury

² 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.

as none of the medical records relied upon state that the conditions Claimant suffered from were medically causally related to the work injury.

In the COR2, the ALJ determined Claimant satisfied her burden, stating:

At the second step, Claimant must produce reliable and relevant evidence that the accepted conditions have not changed sufficiently to warrant a termination of benefits. Claimant introduced her testimony and medical reports. Claimant produced evidence of a recurrent right thumb locking and recurrent soreness in the right upper extremity. Claimant appeared to attribute the sensation of tingling, diminished grip strength, and pain to her right hand. With this evidence, Claimant satisfied her burden of showing reliable and relevant evidence that she remains disabled because of her right arm, right wrist, and right hand.

COR2 at 7.

COR2 fails to identify with sufficient specificity what medical evidence the ALJ is relying upon when determining Claimant had produced reliable and relevant evidence that the right thumb condition, right arm, hand and wrist are medically causally related to the work injury and that Claimant remains disabled because of this work injury. Without more, the finding that “Claimant *appeared* to attribute the sensation of tingling, diminished grip strength, and pain to her right hand” does not express a cogent statement that we can understand.

We also agree with Employer that in determining that Claimant’s current condition is medically causally related to the work injury and is potentially still disabling, medical reports which are old and therefore not reflective of Claimant’s current condition cannot be deemed to be reliable or relevant. Thus, Dr. Fasusi’s 2009 opinion, without more, cannot be considered as relevant or reliable when determining if Claimant satisfied her *Mahoney* burden.

In a case such as that before us, where Claimant has multiple complaints to multiple body parts, some of which were not accepted as work related, it is incumbent on the ALJ to reference the specific medical evidence in the record to support whether a medical condition is medically causally related to the work injury and remains disabling. In this case, the medical conditions the ALJ can consider are limited to the right hand, right arm, right wrist and both lower legs. If the right thumb condition is a result of the hand injury, then it may be compensable, however such conclusions must be supported by the evidence. As we have stated:

It is settled that ALJ’s cannot substitute a legal opinion for a medical opinion. We point out the above statements as after reviewing those particular reports, we conclude there is some merit to the Employer’s argument. We are quick to note this conclusion is not meant to sway the ALJ’s ultimate conclusion, only that the ALJ must base any conclusions, even those related to medical opinions, upon the evidence and not just conjecture. (Footnote omitted.)

Abu-Bakr v. D.C. Dept. of Public Works, CRB No. 14-042 (December 10, 2014).

Such is the case before us. We are forced to remand the case again, with directions for the ALJ to reference specific reliable and relevant medical evidence that Claimant has produced to satisfy her burden at the second *Mahoney* step which show the Claimant is disabled from performing her job and that such disability is medically causally related to her work injury.

If the ALJ determines, through the medical evidence in the record that Claimant has satisfied this burden, then the ALJ should then weigh the evidence to determine whether employer met its burden of proving by a preponderance of the evidence that Claimant's benefits should be modified or terminated.

CONCLUSION AND ORDER

The September 11, 2015 Compensation Order on Remand is not supported by the substantial evidence in the record and in not 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.