

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA M. MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 10-071

CHERIE KANE,

Claimant-Petitioner,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,

Self-Insured Employer-Respondent.

Appeal from a Compensation Order of
Administrative Law Judge Melissa Lin Jones, AHD No. 09-483, OWC No. 639914

Michael J. Kitzman, Esquire, for the Petitioner

Sarah O. Rollman, Esquire, for the Respondent

Before JEFFREY P. RUSSELL,¹ HENRY W. MCCOY, and LAWRENCE D. TARR, *Administrative Appeals Judges*.

JEFFREY P. RUSSELL, for the Compensation Review Board.

AMENDED DECISION AND REMAND ORDER

OVERVIEW

The Claimant-Petitioner, Cherie Kane, was employed by the Employer-Respondent, WMATA, as a station manager. She sustained an injury to her left arm and shoulder on April 20, 2007, when she was pushing and pulling an iron, accordion-style gate.

Ms. Kane came under the care of an orthopedic surgeon, Dr. Joel Fechter, who recommended conservative care including physical therapy, modified activities limiting use of the shoulder and

¹ Judge Russell has been appointed by the Director of DOES as an interim CRB member pursuant to DOES Policy Issuance No. 11-03 (June 23, 2011).

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arm, and medication. This treatment lasted approximately four months. At that time her symptoms had improved and she was discharged from further medical care.

On November 27, 2007, WMATA had Ms. Kane evaluated by Dr. Jeffrey Lovallo for the purpose of an independent medical evaluation (IME). At that time he diagnosed her condition as chronic impingement syndrome of the left shoulder, and he opined that her prognosis was excellent. On January 14, 2008, in response to a facsimile from WMATA's third party administrator, and without an additional examination, Dr. Lovallo indicated that in his opinion Ms. Kane had sustained a 3% permanent partial medical impairment to her left shoulder. His opinion was expressed by writing the words "3% ppd left shoulder" on the original facsimile sent to him requesting the rating, signing the fax, and returning it to the third party administrator. He gave no rating with respect to the left arm.

In May 2008, Ms. Kane retired from WMATA on regular, non-disability retirement. The injury never caused Ms. Kane to be unable to perform her usual work.

On May 1, 2009, Dr. Fechter evaluated Ms. Kane to determine the degree of permanent medical impairment that she sustained as a result of the injury. In his report, Dr. Fechter opined that Ms. Kane had sustained a 2% permanent partial impairment to her left arm under the American Medical Association Guides to the Evaluation of Permanent Impairment, and he further opined that, considering the additional five factors enunciated as being permissible considerations in assessing schedule disability under the Act, Ms. Kane had sustained an additional medical impairment of 13%, yielding a total impairment of 15% to the left arm.

WMATA and Ms. Kane were unable to agree upon the extent of her disability under the schedule, and she sought a formal hearing to resolve the dispute. Following the hearing, a Compensation Order was issued on January 26, 2010, in which the Administrative Law Judge (ALJ) made an award of 1% permanent partial disability to the left arm. Ms. Kane filed a timely appeal and WMATA opposed the appeal in a timely fashion.

DISCUSSION

The scope of review by the CRB, as established by the Act and as contained in the governing regulations, 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. "Substantial evidence" is such relevant evidence as a reasonable mind might accept to support a conclusion. *Canlas v. DOES*, 723 A.2d 1210 (D.C. 1999).

Ms. Kane voices her complaints concerning the alleged errors in the Compensation Order in various ways, but they can be summarized quite simply: Ms. Kane claims that the ALJ (1) improperly

considered the fact that Ms. Kane never missed any time from work, and (2) improperly failed to explicitly “consider” the “five factors” enunciated in D.C. Code § 32-1508 (3) (U-i), at (i) through (v). It is Ms. Kane’s contention that the District of Columbia Administrative Procedure Act, D.C. Code § 2-509 *et seq.*, in its requirement that Agency decisions make factual findings on “each contested issue”, requires findings of fact on each of the five factors, requires a finding of fact relating to medical impairment, and requires findings of fact on industrial capacity. Failing to make specific findings on each and every one of these specific areas renders the Compensation Order unsupported by substantial evidence, in her view. She also asserts that CRB decisions, including *Wormack v. Fishback and Moore*, CRB No. 03-159, AHD No. 03-151 (July 22, 2005) mandate specific findings on these three matters.

Ms. Kane misconstrues the APA and CRB precedent. 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. *Canlas, supra*, and *Marriott, supra*.

In this case, the ALJ clearly “considered” the medical evidence, but she found none of it convincing or persuasive. She rejected Dr. Fechter’s medical impairment rating because it was rendered long after the treatment had been completed, and because his rating report appeared to her eyes to be inconsistent with the treatment reports, in that the rating report ascribes to Ms. Kane a loss in range of motion and the presence of the subjective “five factors” that is not prominent in the treatment reports. Thus, it is inaccurate to say that the ALJ didn’t *consider* the evidence; rather, she considered and rejected it.

However, we are compelled to note that the ALJ, in rejecting the opinion of Dr. Fechter, was rejecting the opinion of the treating physician, whose opinions under the treating physician rules are entitled to great weight, and which if rejected, must be done for “persuasive reasons”.

It is well established that, under the law of this jurisdiction, the opinions of a treating physician are accorded great weight, and are generally to be preferred over a conflicting opinion by an IME physician. *See, Butler v. Boatman & Magnani*, OWC No. 044699, H&AS No. 84-348 (December 31, 1986), *Short v. DOES*, 723 A.2d 845 (D.C. 1998), and *Stewart v. DOES*, 606 A.2d 1350 (D.C. 1992). The rule is not absolute, and where there are persuasive reasons to do so, IME opinion can be accepted over that of treating doctor opinion, with sketchiness, vagueness, and imprecision in the treating physician’s reports having been cited as legitimate grounds for their rejection, and personal examination by the IME physician, as well as review of pertinent medical records and diagnostic studies, and superior relevant professional credentialing as reasons to support acceptance of IME opinion instead of treating physician opinion. *Erickson v. Washington Metropolitan Area Transit Authority*, OWC No. 181489, H&AS No. 92-63, Dir. Dkt. No. 93-82 (June 5, 1997).

In this case, the ALJ failed to acknowledge the treating physician preference, which failure would not be fatal to the decision if she nonetheless had identified specific, record-based reasons for rejecting it. Unfortunately, she did not.

The two reasons she gave were that the evaluation report was performed long after treatment ended, and that “Dr. Fechter’s treatment reports do not support the limited range of motion and some of the subjective factors noted in his rating report”. CO, page 3.

The ALJ did state her reasons for finding Dr. Fechter’s opinion was not credible because of the length of time between releasing the patient and issuing the rating evaluation. It is clear from the evaluation report that Dr. Fechter performed a contemporaneous physical examination at the time he prepared the evaluation report. Since the fact that it was performed when it was would have no bearing on either the findings on the examination or the fact that Dr. Fechter had rendered treatment for the injury, and hence was a treating physician, the CRB cannot find that the CO is supported by substantial evidence or is in accordance with the law without more specific analysis by the ALJ.

For a similar reason, the CRB cannot affirm the second basis for rejecting the treating physician’s opinion, that Dr. Fechter’s treatment reports do not support the limited range of motion and “some of the objective findings”. Without identifying the inconsistencies or discrepancies in Dr. Fechter’s reports, we cannot tell from the Compensation Order what evidence the ALJ relied upon in reaching the conclusion that the treating physician’s opinion was to be rejected, and thus we cannot determine whether her decision to do so is supported by substantial evidence.

As to the remaining arguments raised in this appeal, there is no support for Ms. Kane’s argument that a schedule award analysis requires that the ALJ make a finding concerning the specific degree of medical impairment. While it is true that there must, by definition, be a medical impairment of some degree in order for there to be a schedule disability,² there is no legal requirement that the degree of that impairment be determined in order to assess the degree of disability, because as has now become entrenched in our workers’ compensation jurisprudence, the extent of a schedule “disability” is not a medical question, but it is rather a legal and economic one. *Negussie v. DOES*, 915 A.2d 391 (D.C. 2007). While the existence of a medical impairment is required for there to be a disability, the exact degree of that medical impairment, while potentially relevant, is not a necessary element in assessing the loss of industrial use of a schedule body part.

And, nothing in the Act requires that in considering the medical evidence, the ALJ must consider the “five factors”, or even the AMA Guides. The statute reads “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.” The permissive “may” as opposed to the mandatory “shall” make clear that the ALJ has the discretion to employ these aides as the ALJ deems useful or advisable, at his or her discretion.

Ms. Kane also posits error in the ALJ’s reference to and consideration of the fact that Ms. Kane missed no time from work in the Compensation Order, and presumably took that into account in reaching the decision to award 1% under the schedule. In support of this argument she cites *Negussie* and *Smith v. DOES*, 548 A.2d 95 (D.C. 1988). In framing the argument, however, Ms.

² This is because the Act defines “disability” as “physical or mental incapacity that results in wage loss”, and if there is no “incapacity”, there is no disability. D.C. Code § 32-1501 (8). While “impairment” and “incapacity” are not universally synonymous, in this instance they can only mean substantially the same thing, an inability to fully use the schedule member.

Kane mischaracterizes what the ALJ actually did. The ALJ noted that the injury never had a sufficiently significant effect upon Ms. Kane's *functional capacity* to inhibit her from performing the *physical tasks* of her pre-injury employment. The ALJ made absolutely no mention of the degree or lack thereof of any *wage loss* suffered or not suffered by Ms. Kane. In essence, the ALJ at least in part, used the ability to perform these functions as a proxy for the five factors: there was, the ALJ found, insufficient pain, weakness, atrophy, or loss of function to effect her ability to do those things that she did to perform gainful employment in the past, and that is not error.

CONCLUSION

The ALJ's failure to identify the record evidence upon which she relied in rejecting the opinion of the treating physician regarding Petitioner's degree of medical impairment renders the rejection thereof unsupported by substantial evidence.

ORDER

The award of 1% for the permanent partial impairment of the left arm is vacated, and the matter is remanded for further consideration in a manner consistent with the foregoing Decision and Remand Order.

FOR THE COMPENSATION REVIEW BOARD:



JEFFREY P. RUSSELL
Administrative Law Judge

November 8, 2011
DATE