GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services
Labor Standards Bureau

Office of Hearings and Adjudication
COMPENSATION REVIEW BOARD

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CRB (Dir.Dkt.) No. 05-257

TAMEKA COOK,

Claimant–Petitioner,

v.

VERIZON,

Self-Insured Employer–Respondent.

Appeal from a Compensation Order of
Administrative Law Judge Amelia G. Govan
AHD No. 03-103B, OWC No. 582140

David M. Schloss, Esquire, for the Petitioner

Tiffany Sherrill, Esquire, for the Respondent

Before E. COOPER BROWN, *Chief Administrative Appeals Judge*, JEFFREY P. RUSSELL, and LINDA F. JORY, *Administrative Appeals Judges*.

JEFFREY P. RUSSELL, *Administrative Appeals Judge*, for the Compensation Review Panel:

DECISION AND ORDER

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board pursuant to D.C. Official Code §§ 32-1521.01 and 32-1522 (2004), 7 DCMR § 230, and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005). [1]

[1]Pursuant to Administrative Policy Issuance No. 05-01, dated February 5, 2005, the Director of the Department of Employment Services realigned the Office of Hearings and Adjudication to include, *inter alia*, establishment of the Compensation Review Board (CRB) in implementation of the District of Columbia Fiscal Year 2005 Budget Support Act of 2004, Title J, the District of Columbia Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, *codified at* D.C. Official Code § 32-1521.01. In accordance with the Director's Directive, the CRB replaces the Office of the Director in providing administrative appellate review and disposition of workers' and disability compensation claims arising under the District of Columbia Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §§ 32-1501 to 32-1545 (2005), and the District of Columbia Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Code Ann. §§ 1-623.1 to 1-643.7 (2005), including responsibility for administrative appeals filed prior to October 1, 2004, the effective date of the District of Columbia Workers'

BACKGROUND

This appeal follows the issuance of a Compensation Order from the Administrative Hearings Division (AHD) of the Office of Hearings and Adjudication (OHA) in the District of Columbia Department of Employment Services (DOES). In that Compensation Order, which was filed on August 17, 2005, the Administrative Law Judge (ALJ) denied Petitioner's claim for permanent partial disability to each arm under the schedule. Petitioner now seeks review of that Compensation Order.

As grounds for this appeal, Petitioner alleges as error that the ALJ's determination that Petitioner had not reached maximum medical improvement is unsupported by substantial evidence, and that the failure to make an award under the schedule was therefore not in accordance with the law.

Respondent did not participate in this appeal.

ANALYSIS

As an initial matter, the scope of review by the Compensation Review Board (CRB) and this Review Panel, 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 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 Ann. §32-1501 to 32-1545 (2005), at §32-1521.01(d)(2)(A). "Substantial evidence," as defined by the District of Columbia Court of Appeals, is such evidence as a reasonable person might accept to support a particular conclusion. *Marriott Int'l. v. Dist. of Columbia Dep't. of Employment Servs.*, 834 A.2d 882 (D.C. 2003). Consistent with this standard of review, the CRB and this Review Panel are 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.

Turning to the case under review herein, Petitioner asserts that the ALJ's decision is unsupported by substantial evidence, in that the ALJ made no award for permanent partial disability to either arm, despite the fact that there was no dispute at the formal hearing as to Petitioner's entitlement to some degree of permanent partial disability to both arms, with the only matters in dispute being the degree of such disability.

As an initial matter, although Petitioner and the ALJ couched the question of entitlement to an award under the schedule as concerning whether Petitioner had reached "maximum medical improvement", we note that the Court of Appeals has more specifically described the standard for assessing "permanency", explaining the triggering event for such disability awards as being the point in time when the condition has been of a "lengthy" duration and appears to be "of lasting or indefinite [future] duration, as distinguished from one in which recovery merely awaits a normal

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Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004.

healing period". *Logan v. District of Columbia Dep't. of Employment Serv's*, 805 A.2d 237 (D.C. 2002), at 241.

Regarding the specific objection raised by Petitioner, review of the record evidence reveals that the report of Dr. Raymond Drapkin, CE 3 and referred to at HT 7, dated September 5, 2003 contains a finding that Petitioner's condition had attained maximum medical improvement.

Further, we note that, while Petitioner sought an award to the *arms*, in closing argument (HT 34), both Dr. Drapkin's and Respondent's independent medical evaluator (IME), Dr. Steven Friedman (EE 3, April 7, 2004) ratings were to the *hands*, and not to the arms.

We note that the record contains no medical opinion in opposition to Dr. Friedman's November 10, 2003 (EE 1) and April 7, 2004 (EE 3) statements that, assuming Petitioner elects not to undergo surgery, she is maximally medically improved. While the last medical report from Petitioner's treating physician, Dr. Stephen F. Gunther, discusses possible future treatments, including surgery should "conservative" measures fail, that report is dated August 15, 2002. CE 2. And, the record is clear that Petitioner has decided not to proceed with a surgical option. HT 23.

We note further that the Court of Appeals, in a Memorandum Opinion and Order in *Scott v. District of Columbia Office of Workers' Compensation*, DCCA No. 96-AA-1153 February 5, 1997), affirmed a decision of the Director in which the Director affirmed the determination of an OHA ALJ that a claimant's condition had not attained "permanency" for schedule loss purposes, because the evidence did not support a finding that the claimant's condition had "stabilized as much as it ever will". Memorandum Opinion, page 1.

Based upon review of the record, and considering further the ALJ's reference in the Compensation Order to the above-referenced report from Dr. Drapkin, which contains his opinion that as of September 5, 2003, Petitioner had achieved maximum medical improvement (see, Compensation Order, page 2, "Background"), the finding that Petitioner had not reached maximum medical improvement is not supported by substantial evidence in the record. Rather, all evidence which addresses the question is contrary to the ALJ's holding. In that whether a claimant has achieved maximum medical improvement is obviously highly relevant to determining whether or not a claimant has attained legal "permanency" under *Logan*, an unsupported factual finding that that claimant has not achieved that status compels reversal.

Lastly, because no award was made, the Compensation Order did not address whether Petitioner's schedule award, if appropriate, is to the hands or to the arms, which issue was in dispute and which therefore must be addressed, if an award is made.

CONCLUSION

The Compensation Order of August 17, 2005 is not supported by substantial evidence in the record and is not in accordance with the law.

ORDER

The Compensation Order of August 17, 2003, is REVERSED AND REMANDED with instructions that the ALJ consider whether Petitioner's medical condition has attained the status of permanency under *Logan, supra*, and with such consideration taking into account the fact that Petitioner's medical condition is maximally medically improved on this record; and if upon such reconsideration it is determined that Petitioner's condition has attained permanency, the nature and extent of disability under the schedule must be determined, including a determination as to whether Petitioner's award is to the hands or arms, based upon the record evidence. If upon reconsideration the ALJ determines that, despite having attained maximum medical improvement, Petitioner has nonetheless not achieved permanent disability status, the ALJ must explain upon what factual and legal basis said conclusion is premised.

FOR THE COMPENSATION REVIEW BOARD:

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JEFFREY P. RUSSELL
Administrative Appeals Judge

_____November 10, 2005_____
DATE