

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA M. MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 12-081

ALLAN B. DOWNING,
Claimant–Petitioner/Cross-Respondent,

v.

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,
Self-Insured Employer—Respondent/Cross-Petitioner

Appeal from a Order by
Administrative Law Judge Anand K. Verma
AHD No. PBL 11-015, DCP No. 30090824958-0001

Richard J. Link, Esquire, for the Petitioner
Shermineh C. Jones, Esquire, for the Respondent

Before: HEATHER C. LESLIE,¹ HENRY W. MCCOY, and MELISSA LIN JONES, *Administrative Appeals Judges*.

HEATHER C. LESLIE, *Administrative Appeals Judge*, for the Compensation Review Board.

DECISION AND REMAND ORDER

OVERVIEW

This case is before the Compensation Review Board (CRB) on the request for review filed by the Employer and the cross appeal filed by the Claimant of the April 27, 2012, Compensation Order on Remand (COR) issued by an Administrative Law Judge (ALJ) in the Office of Hearings and Adjudication of the District of Columbia Department of Employment Services (DOES). In that COR, the ALJ granted, in part, the Claimant’s request for disability benefits as well as authorization for carpal tunnel surgery and casually related medical expenses. We REVERSE and VACATE.

¹ Judge Leslie has been appointed by the Director of DOES as an interim CRB member pursuant to DOES Policy Issuance No. 11-03 (June 13, 2011).

PROCEDURAL HISTORY AND FACTS OF RECORD

Claimant, who was employed as a custodian, suffered a work-related injury on August 26, 2009 when he fell off a ladder onto his left side. The Disability Compensation Program (DCP)² accepted Claimant's claim for injuries to his head back, upper left extremity, and right leg and awarded wage loss and medical benefits.

On March 16, 2011, the PSWCP issued Claimant a notice of intent to terminate his benefits effective April 16, 2011 citing a change in his condition based on a January 20, 2011 independent medical evaluation (IME) by Dr. Robert Gordon. Claimant timely filed a request for a formal hearing.

At the October 13, 2011 formal hearing in this matter, Claimant requested the reinstatement of temporary total disability benefits from April 17, 2011 to August 25, 2011.³ The ALJ denied disability benefits after May 24, 2011. However, the ALJ awarded Claimant TTD benefits from April 17, 2011 through May 24, 2011, with causally related medical expenses already incurred. Claimant timely appealed on January 5, 2012, with Employer filing a cross appeal on January 20, 2012.

In a Decision and Remand Order⁴ (DRO), the CRB found while not explicitly stated, the Employer met its burden in showing a change of condition had occurred through the IME of Dr. Robert Gordon. The CRB noted the ALJ then proceeded to determine if the Claimant met his burden in showing his condition had not changed such that a modification or termination of benefits was warranted. The CRB determined the CO was supported by the substantial evidence in awarding temporary total disability from April 17, 2011 through May 24, 2011 and affirmed this finding. However, the CRB held the ALJ had not made appropriate findings of fact when denying the Claimant's request for temporary total disability after May 24, 2011. Specifically, the CRB stated that the ALJ had failed to analyze whether or not the restrictions imposed by Dr. Azer rendered the Claimant incapable, or capable, of performing his pre-injury job. The CRB remanded the case for further findings of fact,

As to whether Claimant's physical condition has changed such that he is able to return to his former pre-injury employment without restrictions, based upon the weighing of the totality of the record.⁵

A Compensation Order on Remand⁶ (COR) issued on April 27, 2012. In that COR, the ALJ found the Claimant's left wrist condition causally related to the work accident of August 26, 2009 and that

² Effective October 1, 2010, the Disability Compensation Program's name was changed to the Public Sector Workers' Compensation Program (PSWCP).

³ The Claimant returned to full duty work by August 25, 2011.

⁴ *Downing v. DC Public Schools*, CRB No. 12-004, AHD No. PBL 11-015, DCP No. 30090824958-0001 (April 4, 2012).

⁵ *Id* at 4, quoting *Logan v. DOES*, 805 A.2d 237 (D.C. 2002).

surgery as recommended by Dr. Azer is necessary. The ALJ again denied the Claimant temporary total disability benefits from May 25, 2011 to August 24, 2011.

The Employer timely appealed on May 29, 2012 with the Claimant opposing and filing a cross-appeal on June 13, 2012. The Employer argues: 1) the finding that the left wrist condition is causally related to the work injury is not supported by the substantial evidence in the record as the Dr. Azer did not provide rationalized medical opinion evidence; 2) the ALJ improperly rejected the opinion of the IME physician; and 3) the Employer did not stipulate that the Claimant injured his left wrist on August 26, 2006. The Claimant argues: 1) the ALJ's causal relationship finding is supported by the substantial evidence of the record; 2) the ALJ correctly rejected the opinion of the IME physician; 3) the ALJ did not find that the parties had stipulated to the left carpal tunnel syndrome; and 4) the ALJ failed to follow the directions of the CRB's decision and remand order and failed to adequately explain why the Claimant was not temporarily and totally disabled after May 25, 2011.

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 evidence⁷ in the record and whether the legal conclusions drawn from those facts are in accordance with the applicable law.⁸ Consistent with this standard of review, the CRB must uphold a Compensation Order that is supported by substantial evidence, even if there is substantial evidence in the record to support a contrary conclusion, and even where the CRB might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

DISCUSSION AND ANALYSIS

We first note that the ALJ analyzed whether the Employer submitted evidence to support a termination of the Claimant's benefits. The ALJ stated,

To meet the requisite burden, employer principally relies upon the IME opinion of Dr. Gordon who, upon his evaluation of claimant, observed no objective evidence of carpal tunnel syndrome since January 20, 2011. It was on that basis, he found no connection of the carpal tunnel syndrome with the August 26, 2009 injury. Although in his addendum to his July 15, 2011 IME, Dr. Gordon referenced the left wrist EMG study, there is no indication in his IME report that he actually reviewed it before rendering an opinion regarding the absence of an objective finding confirming claimant's carpal tunnel syndrome. In fact, recourse to the June 5, 2010 EMG/nerve

⁶ *Downing v. DC Public Schools*, AHD No. PBL 11-015, DCP No. 30090824958-0001 (April 27, 2012).

⁷ 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 International v. District of Columbia Department of Employment Services*, 834 A.2d 882 (D.C. 2003).

⁸ Section 1-623.28(a) of the District of Columbia Government Merit Personnel Act of 1978, as amended, D.C. Official Code § 1-623.1 *et seq.* ("Act")

conduction study reveals an abnormal finding in that claimant had left carpal tunnel syndrome with evidence of chronic denervation. Thus, with this unambiguous objective EMG finding, Dr. Gordon's opinion, predicated on his one-time IME that claimant's left wrist symptom lacked an objective finding, cannot be accorded any significant weight and is rejected. Hence, inasmuch as employer has failed to sustain its requisite burden of proof warranting termination of benefits, the burden of production does not shift to claimant.

However, assuming, *arguendo*, that employer did adduce sufficient evidence to support termination of benefits, there is ample evidence in the record on behalf of claimant to refute employer's IME findings. The multiple reports from claimant's treating physician, Dr. Azer, who extensively provided claimant conservative treatment, squarely challenge Dr. Gordon's findings.

COR at 3.

We are uncertain why the ALJ engaged in this analysis as it was determined in our DRO, while not explicitly stated in the original CO, that the Employer had presented persuasive evidence sufficient to substantiate the termination of the Claimant's benefits. This finding is the law of the case and the determination that the Employer did not adduce sufficient evidence to support the termination of benefits is in error.⁹ However, we find this error harmless as it is evident the ALJ does later analyze whether or not the Claimant has proven entitlement to temporary total disability from May 25, 2011 through August 25, 2011. The ALJ states

Now, turning to the inquiry of whether claimant could return to his pre-injury employment with restrictions, Dr. Azer certified his disability from performing his duties until May 24, 2011. In the subsequent examination on June 3, 2011, Dr. Azer did not complete paragraph 3 of the disability certificate; rather, he left it blank. Instead, he completed paragraph #2 indicating he was to avoid bending, stooping, heavy lifting & overhead use of left upper extremity (ies) from June 3, 2011 until next evaluation on July 1, 2011. Inasmuch as, the paragraph #1 of this disability certificate refers only return to full duties, paragraph #2, specifying physical restrictions, can reasonably be presumed to be a reference to light or modified duty accommodating those restrictions. (CE 3, pp 50-52). If Dr. Azer wanted to continue claimant on full disability, he would have said so by completing the paragraph #3 of the disability certificate as he had done previously on December 22, 2010 and April 18, 2011. Thus, claimant has not met his burden in presenting a preponderance of the evidence of his entitlement to temporary total disability benefits beyond May 24, 2011.

COR at 4.

⁹ The law of the case doctrine recognizes that "once the courts has decided a point in a case, that point becomes and remains settled unless it is reversed or modified by a higher court." *Kristidimas v. Sheskin*, 411 A.2d 370, 371 (D.C. 1980).

The ALJ's conclusion with respect to Claimant's entitlement to temporary total disability benefits is in error as it does not follow the instructions the CRB enunciated in the prior DRO:

Dr. Azer's treatment report of June 3, 2011 specifically states that "Because of his work injury, this patient should avoid any activities that involve bending, stooping, kneeling, squatting, pushing, pulling and lifting heavy objects, unprotected heights and objects heavier than 15 pounds."

While "activities" to be avoided could include work activities and there is no specific reference to work activities in either the disability certificate or the treatment report, it must be assumed that the ALJ considered the reference was implied. However, while it is reasonable to assume that these restrictions imply a release to light duty, it is not reasonable to conclude that these imposed restrictions render Claimant capable of performing his pre-injury work duties. Accordingly, we are constrained to remand this case back to the ALJ for further findings of fact as to whether Claimant's physical condition has changed such that he is able to return to his former pre-injury employment without restrictions, based upon the weighing of the totality of the medical and other relevant evidence of record.

DRO at 6

We must remand the case back to the ALJ for specific findings of fact as previously stated by the CRB above. For the benefit of the ALJ and to avoid further remands, the following question should be answered: Are the duties of the Claimant's pre-injury employment -- regardless of the restrictions Dr. Azer imposed -- such that the Claimant still cannot return to work as bending, stopping, kneeling, squatting, pushing, etc, are an integral part of his pre-injury job, as a custodian? If so, then the Claimant is entitled to temporary total disability until August 25, 2011. If not, and the restrictions imposed on the Claimant do not inhibit him from returning to work, then he is not entitled to temporary total disability.

The Employer also argues the ALJ erroneously found the parties had stipulated to the left wrist injury occurring on August 26, 2009. A review of the COR reveals that the ALJ stated that the "parties stipulated that claimant's injury to his left wrist occurred on August 26, 2009." COR at 2. We agree with the Employer that this was in error. Our prior decision and order stated,

As supported by the hearing transcript, that Employer considered whether Claimant's carpal tunnel syndrome was medically causally related to the work accident to be a contested issue.¹⁰

DRO at 5.

More problematic than the erroneous stipulation to the wrist injury, however, is the lack of any finding or discussion on whether or not the Employer issued a final determination accepting or rejecting the left wrist injury.¹¹ As the prior DRO states,

¹⁰ HT, pp. 49 – 51.

As Employer continued to assert in its closing argument that the left wrist was not an accepted injury and thus the diagnosed carpal tunnel syndrome could not be related to the work injury, it was incumbent upon the ALJ to correct counsel at the hearing or resolve the matter in the CO.

DRO at 5.

A review of the COR is silent as to whether or not the left wrist injury was accepted or not, forcing us to remand this case again for further findings of fact and discussion as directed in the prior DRO.

The CRB has held the issuance of a Final Determination is a jurisdictional prerequisite for a Formal Hearing.¹² As discussed in *Sisney*, the plain language of §1-623.24(b)(1) of the Act requires “the issuance of a decision” by PSWCP before an injured worker may request a formal hearing:

The authority of this Agency to review disputes arising out of the Public Sector Workers’ Compensation Act is wholly governed by the terms of that Act. D.C. Code §1-623.24(b)(1) provides for an appeal or review of a final decision of PSWCP Determinations by an ALJ in DOES. As a general principle, the only matters that DOES has authority to review are matters upon which PSWCP has rendered a decision, and it is that decision that is reviewed by DOES. In the absence of an operative decision, there is nothing for DOES to review and rule upon.^[13]

The Act is clear that the actual issuance of a Final Determination as to whether or not the claim for the left wrist is accepted or denied is a prerequisite to the jurisdiction to deny or award the request for benefits:

While the courts have broad grants of authority to adjudicate matters, the adjudicatory authority of an administrative agency is limited by an enabling act. Under the Act governing this matter, a claim for benefits for a work-related injury must first be made to the Public Sector Division of the Office of Workers’ Compensation, that is, the OBA. See D.C. Official Code §1-623.24 (a); 7 DCMR §§104, 105, 106, 199. The OBA, now the TPA, is responsible for conducting necessary investigations into an injured worker’s claim and then making an initial determination either to award or deny disability compensation benefits for that claim. It is only if the injured worker is dissatisfied with the determination the worker can request a hearing before the ALJ. See D.C. Official Code §1-623.24 (b)(1). Thus, an ALJ is without ancillary authority

¹¹ The Employer accepted injuries to the Claimant’s head, back, left arm, and right leg. Hearing transcript at 49. Employer’s Argument at 7.

¹² *Sisney v. D.C. Public Schools*, CRB No. 08-200, AHD No. PBL 08-066 (July 2, 2012),

¹³ *Minter v. D.C. Office of the Chief Medical Examiner*, CRB Nos. 11-024 and 11-035, AHD No. PBL073A, DCP No. 761035-0001-2006-0014 (December 15, 2011) at 5-6.

to adjudicate claims for compensation that have not been first presented to the OBA, or the TPA, for investigation and resolution.")¹⁴

On the record before us, we cannot determine whether or not a notice of determination regarding the Claimant's left wrist was issued. As such, that portion of the order is vacated. Upon remand, the ALJ is instructed to make further findings of fact and conclusion of law regarding whether or not the Hearings and Adjudications has jurisdiction to determine whether the left wrist injury is causally related to the work injury.¹⁵

Finally, in an effort to avoid further delay, if the ALJ determines that he has jurisdiction to consider the left wrist claim, we must comment on other fundamental errors the ALJ makes when determining the causality of the left wrist.

The ALJ noted,

On the issue of causality of claimant's left wrist syndrome, Dr. Azer in his initial orthopedic evaluation of September 2, 2009 noted multiple injuries, including injury to claimant's left upper and right lower limbs in his diagnosis and referred him for an x-ray coupled with an EMG/nerve conduction study of the upper and lower limbs. Finding causal connection of the accepted conditions, including the left wrist sprain/strain to the work injury of August 26, 2009, Dr. Azer noted positive Tinel's sign over the left median nerve and hypoesthesia over the left median nerve distribution and as a measure of conservative treatment, he injected the left wrist with DepoMedrol and Xylocaine on September 8, 2009. Thereafter, in his subsequent follow up on September 25, 2009, Dr. Azer pertinently observed marked tenderness over the first dorsal compartment with positive Finkelstein's sign, placed claimant in a thumb spica synthetic cast and injected his left wrist again with DepoMedrol and Xylocaine as part of the conservative treatment. To alleviate claimant's continued left wrist symptoms, causally related to the August 26, 2009 work injury, Dr. Azer maintained the conservative treatment protocol, including the steroid injections of the left wrist, however, when that helped little to resolve claimant's symptoms, decompression of the left carpal tunnel syndrome with excision biopsy synovium flexor tendons of the left wrist and hand and release of the first dorsal compartment of the left wrist were recommended on an in and out basis.

The record evidence also consists of Dr. Becker's February 3, 2010 examination of claimant's left wrist with his findings of positive Phalen's and Tinel's signs over the left wrist. These findings were consistent with Dr. Azer's findings. Dr. Becker did not specifically comment on the causal connection of the left wrist condition. Predicated on his evaluation, Dr. Becker opined claimant was fit to return to light duty work with restrictions of bending/stooping, kneeling, crawling, climbing and heavy lifting of 20 lbs.

¹⁴ *Burney v. D.C. Public Service Commission*, CRB No. 05-220, OHA No. PBL97-016A, DCP No. 345126 (June 1, 2005) (Emphasis added.)

¹⁵ This may entail the ALJ re-opening the record for receipt of further evidence.

Accordingly, even without attaching the treating physician's preference to Dr. Azer's opinion, Dr. Gordon's IME opinion is deficient and cannot be credited with any significant weight insofar as the causality of the left wrist to the August 26, 2009 work injury. Premised on the foregoing, employer has not offered a rebuttal of the medical connection between claimant's left wrist condition and the original work injury.

COR at 3-4.

A review of the medical evidence shows that Dr. Azer consistently references a diagnosis of a left wrist sprain/strain as an "accepted" condition, presumably caused by the "work injury of 8/26/09." While the ALJ references many findings of physical examination, and references the Claimant's left wrist "condition" no discussion ensues regarding whether or not the Claimant's left carpal tunnel syndrome is casually related to the work injury of August 26, 2009 until the very end of the COR when the ALJ concludes, without citing to any record evidence or medical opinions, that the carpal tunnel syndrome is causally related. Especially in light Dr. Gordon's opinion who, contrary to the conclusion made by the ALJ, states the Claimant does not suffer from carpal tunnel syndrome related to the work injury, we cannot ascertain what medical evidence or opinion, the ALJ is relying on in concluding the carpal tunnel syndrome is causally related to the work injury. If there is evidence in the record to support the ALJ's conclusions, the ALJ remains free to cite that evidence in support of those conclusions.

Finally, the COR also awards the Claimant's request for authorization for surgery to the left wrist per the recommendation of Dr. Azer deeming the requested surgery reasonable and necessary. This is in error as no utilization review was submitted by the parties to address whether the requested surgery was reasonable or necessary.

D.C. Code § 1-623.23 provides,

Any medical care or service furnished or scheduled to be furnished under this subchapter shall be subject to utilization review. Utilization review may be accomplished prospectively, concurrently, or retrospectively

As utilization review was not undertaken by either party, the ALJ lacked authority to consider the reasonableness and necessity of the requested surgery. The section of the order granting surgery is vacated.

CONCLUSION AND ORDER

The Compensation Order on Remand of April 27, 2012 is not supported by substantial evidence in the record and is not in accordance with the law. That portion of the COR denying temporary total disability from May 25, 2011 through August 25, 2011 is VACATED. That portion of the COR which finds the left wrist condition to be causally related to the work injury and authorizing surgery to the left wrist is VACATED.

On remand the ALJ is directed to

1. Make further findings of fact and conclusion of law as to whether Claimant's physical condition has changed such that he is able to return to his former pre-injury employment without restrictions, based upon weighing the totality of the medical and other relevant evidence of record; and
2. Make further findings of fact and conclusion of law as to whether or not a Final Determination was issued regarding the Claimant's left wrist condition. If the ALJ determines a Final Determination has not issued, then the ALJ lacks jurisdiction to adjudicate any issues regarding the left wrist.

FOR THE COMPENSATION REVIEW BOARD:

HEATHER C. LESLIE
Administrative Appeals Judge

August 3, 2012
DATE