COMPENSATION REVIEW BOARD

CRB No. 12-145

ALLAN B. DOWNING,

Claimant–Petitioner/Cross-Respondent,

v.

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,

Employer–Respondent/Cross-Petitioner.

Appeal from an Administrative Action of
Administrative Law Judge Anand K. Verma
AHD No. PBL 11-015, DCP No. 30090824958-0001

Richard J. Link, Esquire, for the Petitioner/Cross-Respondent

Shermineh C. Jones, Esquire, for the Respondent/Cross-Petitioner

Before JEFFREY P. RUSSELL,[1] LAWRENCE D. TARR and MELISSA LIN JONES, *Administrative Appeals Judges*.

JEFFREY P. RUSSELL, for the Compensation Review Board.

DECISION AND REMAND ORDER

BACKGROUND

This is the third appeal in this case of a compensation order from the hearings section of the Department of Employment Services (DOES). The claim concerns Allan Downing's seeking to obtain temporary total disability benefits (ttd), and medical care for his left wrist, in the nature of carpal tunnel surgery.

[1] Judge Russell is appointed by the Director of DOES as a Board Member pursuant to DOES Administrative Policy Issuance No. 12-01 (June 20, 2012).

In the initial Compensation Order (CO 1) issued December 15, 2011, although Mr. Downing claimed ttd from April 17, 2011 through August 25, 2011, the Administrative Law Judge (ALJ) only awarded ttd from April 17, 2011 through May 24, 2011. The ALJ also awarded "causally related medical expenses, already incurred".

Both parties appealed, and on April 4, 2012, the Compensation Review Board (CRB) issued a Decision and Remand Order (DRO 1), in which the award of ttd was affirmed, but the denial of the remainder of the ttd claim was vacated because the ALJ had not made findings of fact concerning the physical requirements of the pre-injury job, rendering impossible the review of the denial which was based upon the treating physician's specific physical restrictions on activity. The CRB also vacated the award of medical care because the ALJ had erroneously stated that the parties had stipulated to the compensability of the left wrist injury, while the record did not support that finding. The matter was remanded to the ALJ for further consideration of these issues.

On April 27, 2012, the ALJ issued the second Compensation Order (CO 2), styled a Compensation Order on Remand. In CO 2, the ALJ again made the same award of ttd from April 17, 2012 through May 24, 2012, and specifically granted authorization for the left wrist carpal tunnel surgery. Both parties again appealed.

On August 3, 2012, the CRB issued a second Decision and Remand Order (DRO 2). In DRO 2, the CRB again vacated the denial of ttd from May 25, 2012 through August 25, 2011, because the ALJ again failed to do as directed in DRO 1 with respect to making findings of fact concerning Mr. Downing's pre-injury job duties, because the ALJ had failed to resolve the dispute between the parties concerning compensability of the left wrist, because the ALJ had not identified the evidence upon which he relied in finding the claimed carpal tunnel syndrome to be causally related to the work injury, and because the statutory utilization review procedures did not appear to have been undertaken. In a Decision and Order issued August 3, 2012 (DRO 2) the CRB directed that on remand, the ALJ:

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 conclusions of laws as to whether or not a final determination was issued regarding 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.

On August 13, 2012, the ALJ issued a new Compensation Order on Remand (CO 3), in which he found that the specific requirements of the pre-injury job exceeded the physical restrictions imposed upon him by his treating physician, and again awarded the requested carpal tunnel surgery, based upon his finding that there had been a final Notice of Determination denying the requested care and that AHD therefore had jurisdiction to consider the claim. However, he again limited the dates of the ttd award to April 17, 2011 through May 24, 2011. Both parties again appealed.

In his appeal, Mr. Downing alleges that in the award, the ALJ failed to address whether he is entitled to ttd for the period claimed after May 24, 2012, despite the CRB twice directing that he do so. In its cross-appeal, the employer argues that the ALJ erred in concluding that a final Notice of Determination had been issued concerning the left wrist, which in its view deprives AHD of jurisdiction to make the award, and further argues that the ALJ could not order the surgery in the absence of a utilization review process.

JURISDICTION AND STANDARD OF REVIEW

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 a written 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. Comprehensive Merit Personnel Act of 1978, as amended, D.C. Code § 1-623.01, *et seq.*, (the Public Sector Workers' Compensation Act (PSWCA)), at § 1-623.28 (a), and *Marriott International v. D.C. DOES*, 834 A.2d 882 (D.C. 2003).

DISCUSSION

We open by noting our concern over certain terminology employed by the ALJ in CO 3. On page 2, in the Findings of Fact section, he twice refers to "OWC", and in the Analysis section, he identifies OWC as "the Office of Workers' Compensation", and identifies that body as having done numerous things in this case, including issuing a Notice of Determination.

The Office of Workers' Compensation is a part of this Agency, DOES, and handles matters pertaining to private sector workers' compensation claims arising under the District of Columbia Workers' Compensation Act, D.C. Code §32-1501. That statute has no application to this claim, which as stated above arises out of the PSWCA.

Unlike private sector claims, in which injured private sector employees seek to obtain benefits mandated by law be provided by their employers, public sector act claims are payable as benefits to injured employees of the District of Columbia Government. Private sector claims are initially made to the employer or its insurer, and when disputes arise, such disputes can be brought by a party to this Agency, at either the OWC level, or the AHD level, depending on several factors. Sometimes such disputes are presented first to OWC, and when the parties do not agree upon the result recommended by OWC, the dispute can be brought to AHD *de novo*.

In contrast, in public sector claims, the employee's claim is presented to an arm of the Government of the District of Columbia as opposed to an insurance company. At all times relevant to this case, that government arm was the Office of Risk Management, or "ORM".

We would normally attribute the ALJ's erroneous acronym to unfortunate but harmless inattentiveness. However, that this is not a mere casual error is evident from the following passage found at page 4 - 5:

> Further, because the evidentiary hearing before OHA is conducted *de novo*, the record of proceedings before the OWC are not made part of the record. Nevertheless, a reasonable inference can be drawn that the OWC must have accepted Claimant's disability claim and made disability payments predicated on Dr. Azer's orthopedic report, which clearly diagnosed Claimant's carpal tunnel syndrome stemming from the August 26, 2009 work injury.

Whether the use of OWC instead of ORM by the ALJ was inadvertent, this passage evinces a basic and fundamental lack of understanding on the ALJ's part about the procedural aspects of a public sector claim under the PSWCA. There are no "proceedings" before ORM, nor is a "record" created.

The Decision and Remand Order under which the ALJ was conducting his further consideration in CO3 directed the ALJ on remand 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 conclusions of laws as to whether or not final determination was issued regarding 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.

DRO 2, Conclusion and Order.

The lack of understanding of the claims process on the ALJ's part would have no apparent effect on instruction number 1 above, and in regard to that directive we note that the ALJ made specific findings of fact concerning the duties of Mr. Downing's pre-injury job, determined that those duties exceeded the physical restrictions imposed upon him by his treating physician during the time for which benefits were at issue, and concluded that Mr. Downing was therefore disabled during that time period. The ALJ wrote at page 3 of CO3:

> Claimant's pre-injury employment, as a custodian of the elementary school, entailed prolonged standing, lifting, bending and climbing up the ladder in order to perform minor electrical and plumbing repairs. Claimant currently suffers from pain and tenderness over cervical and lumbar spines. He also has increasing pain [sic] numbness and weakness in the left hand due to carpal tunnel syndrome. As a consequence, Claimant cannot work in his pre-injury employment as a custodian- a physical job. (CE 3, p.50).

The referenced exhibit is the treating physician's note authorizing a return to work with restrictions against "bending, stooping, heavy lifting, prolonged standing or walking" and "pushing, pulling, lifting [and] overhead use" of his left arm.

Employer argues in the cross appeal that the ALJ failed to identify the record evidence upon which he made his findings that Mr. Downing's pre-injury job required "prolonged standing, lifting,

bending and climbing up the ladder to perform minor electrical and plumbing repairs". We agree that the ALJ does not specifically cite to the record evidence from which he made those findings, but we note that Mr. Downing included these types of activities as being part of his job in his direct testimony, at HT 14 -20.

These findings of fact are supported by substantial evidence. If they were in contest, and if the employer pointed to something in the record which contradicted either the findings as to the pre-injury duties or Mr. Downing's description of those duties, we would agree that the ALJ's failure to take the simple step of identifying where in the record he found support for his factual findings is error, and that such error would require yet another remand. However, there being no such assertion by employer in this appeal, we find the ALJ's error in failing to identify the record evidence upon which his findings are based, either specifically or even generally, to be harmless. We affirm the ALJ's findings of fact concerning the nature of Mr. Downing's pre-injury duties.

However, for reasons unknown, the ALJ once again failed to make an award for that period of time. This too, is error. However, in light of the findings that the ALJ made, there is but one possible outcome, and that is an award of the claim for relief as presented. Because the Court of Appeals has ruled that even in such situations as this the CRB may not itself order an award of compensation, but must remand with instructions that the ALJ do so, we take that step. The denial of the claim for relief from May 25, 2011 through August 25, 2011 is not in accordance with the law, given that the findings of fact as made by the ALJ compel such an award. Accordingly, we are compelled to remand this matter to AHD with instructions that an award be entered granting the ttd claim from May 25, 2011 through August 25, 2011.

Because the ALJ's lack of understanding of the claims procedure could impact the outcome of instruction 2 above, we will review the handling of that issue with somewhat greater detail than would otherwise be required.

The ALJ found as fact that the original claim was accepted and treatment authorized for several specific body parts (head, back, left arm, and right leg). He found as fact that Mr. Downing also complained of wrist pain from the very first doctor visit with his attending physician, and that it was treated on occasion by the physician, along with treatments for the back, head, left arm and right leg. This treatment was paid for by ORM.

The ALJ also found that the March 16, 2011 notice of "Final Determination" didn't reference any specific body parts; rather, it stated that "per Dr. Robert Gordon's Independent Medical Examination on January 20, 2011, you were allowed to return to work full duty with no further medical treatment necessary" and "Your public sector workers' compensation claim is hereby DENIED for any further medical treatment."

All these factual findings are supported by substantial evidence.

The ALJ therefore reasoned that, since the doctor had treated the wrist (to the point of where he now is recommending CTS surgery), and since the IME exam included an evaluation of the wrist (finding it to be in fine fettle and not needing surgery), and since the "Final Determination" is a

blanket denial of any future medical care, it constitutes a denial of the care for the wrist, and hence AHD has jurisdiction.

While we recognize that there has never been a specific acceptance of a compensable wrist injury explicitly, the injury that was accepted included the "left arm", which has been treated by the treating physician and the IME doctor as including the left wrist. As the ALJ notes, Mr. Downing, who was injured on August 26, 2009, was first seen by Dr. Rida Azer, his attending physician, on September 2, 2009, six days later. At that time Mr. Downing's "left arm" complaints were noted to include injuries to his "left forearm, wrist and hand". These described injuries were known to the Employer when, on March 23, 2009, it accepted as compensable the claim for injuries to Mr. Downing's "head, back, left arm and right leg". And, they were known by Employer's IME physician to include wrist complaints, as evidenced by his having included the wrist as part of his evaluation. That acceptance of the claim by the Employer was found by the ALJ to include the wrist, and that conclusion and finding is reasonable under the circumstances.

We also note, as did the ALJ, that Employer at the hearing never argued that the wrist complaints had never been part of this claim. Further, in the jointly executed Pre Hearing Conference Order the type of injury is described as follows:

> Neck, Left elbow, Left wrist, Right Knee. (contested)

Employer did not question whether Mr. Downing's claimed injuries included the wrist at the opening of the formal hearing, or in her closing argument. Rather, Employer repeatedly argued that whatever injuries had been sustained in the work injury had resolved, and that by logical implication any injuries Mr. Downing may now have are not causally related to the work injury.

Based upon the aforegoing record based facts as found by the ALJ, we conclude that the ALJ's finding that Employer (1) had accepted the wrist injury as part of the claim and (2) ORM's final Notice of Determination denying further ongoing medical care was a final determination covering the left wrist. Accordingly, the ALJ's conclusion that AHD had jurisdiction over the claim is in accordance with the Act.[2]

We turn now to a third matter that was part of the CRB's DRO 2, that being that "As utilization review (UR) was not undertaken by either party, the ALJ lacked authority to consider the reasonableness and necessity of the requested surgery." The CRB was referring, of course, the D.C. Code §1-623.23(a-2) through (a-2)(5), which provides that disputes concerning the reasonableness and necessity of medical care be submitted to a UR process described therein.

The inclusion in the DRO of the reference to UR was the result of the phraseology employed by the ALJ in making the award of carpal tunnel surgery, and his stating in that award that the surgery was "reasonable and necessary". The ALJ's insertion of that phrase was unnecessary and beyond the scope of the issues presented to him for resolution. Reasonableness and necessity for carpal tunnel

[2] It should be born in mind that the question being posed in this case is not whether the wrist is part of the hand for the purposes of a schedule award under the PSWCA. It is not. It is part of the hand.

surgery was never identified as an issue in contest, and was not before the ALJ at the time of the formal hearing.

CONCLUSION AND ORDER

The ALJ's determination that the physical requirements of Mr. Downing's pre-injury job exceed the physical restrictions imposed by his treating physician for the period claimed, and his finding that Mr. Downing is as a result of those restrictions and his ongoing complaints unable to perform the duties of the pre-injury job, are supported by substantial evidence, and compel and award of temporary total disability benefits for the period claimed. The failure to award the temporary total disability benefits for the period claimed is error. The matter is hereby remanded to the hearings section of DOES with instructions that an award be entered granting Mr. Downing's claim for temporary total disability from May 25, 2011 through August 25, 2011.

The finding that there has been a final Notice of Determination denying Mr. Downing's request for further medical care for his left wrist is supported by substantial evidence, and is affirmed.

The ALJ's determination that the left wrist injury is causally related to the work injury is supported by substantial evidence and is affirmed.

FOR THE COMPENSATION REVIEW BOARD:

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JEFFREY P. RUSSELL
Administrative Appeals Judge

_____November 28, 2012_____
DATE