

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 16-021

**EDWARD CURTIS,
Claimant-Petitioner,**

v.

**WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
Employer-Respondent.**

Appeal from a January 20, 2016 Compensation Order
by Administrative Law Judge Nata K. Brown
AHD No. 15-165, OWC No. 714607

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2016 JUN 22 AM 10 31

(Decided June 22, 2016)

Mark H. Dho for Employer
Danny R. Seidman for Claimant

Before GENNET PURCELL, LINDA F. JORY and JEFFREY P. RUSSELL, *Administrative Appeals Judges.*

GENNET PURCELL for the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

Edward Curtis (“Claimant”) has worked as a sheet metal technician for Washington Metropolitan Area Transit Authority (“Employer”) for over eight (8) years. Claimant's duties consist of sheet metal work, escalator panel installation and repairs, and moving of HVAC units, duct work, and metal fabrication. His employment duties require him to lift 50 pounds over his head, to push, pull, and use his upper extremities.

On March 21, 2014, Claimant was assisting a four man team as they lifted an air handling unit weighing between 600 and 800 pounds, when he suddenly felt throbbing pain in his right arm and right elbow. Claimant immediately sought emergency treatment at Southern Maryland Hospital where he was examined, prescribed cyclobenzaprine and ibuprofen, and issued an arm

slings to wear for approximately four (4) weeks. Claimant also was advised to follow up with an orthopedist for further assessment.

On or about March 27, 2014, Claimant came under the care of treating physician and orthopedic surgeon, Dr. Joseph Crowe, and was diagnosed with a partial bilateral bicep strain. Dr. Crowe instructed Claimant to rest, prescribed physical therapy and issued Claimant an arm brace for full-time use.

Dr. Crowe released Claimant to return to light duty work on April 24, 2014, with a 'no use' restriction on his right arm. On May 19, 2014, Dr. Crowe limited Claimant to lifting less than fifty (50) pounds. On July 7, 2014, Dr. Crowe opined that Claimant was able to work full duty, full time, without restriction.

In a final follow-up examination on August 11, 2014, Dr. Crowe noted that Claimant still complained of aching, which he described as "a little soreness" in his anterior forearm, when doing heavy lifting. There is no evidence that Dr. Crowe issued a permanent partial disability ("PPD") rating related to Claimant's partial bilateral bicep strain.

Claimant is back at work full-time; however, he takes extra breaks at work. Claimant is also willing to work overtime, but overtime hours are presently unavailable.

In preparation for a formal hearing at the Administrative Hearings Division ("AHD") of the Department of Employment Services ("DOES"), Claimant sought an independent medical evaluation ("IME") from orthopedic surgeon Dr. Harvey Mininberg. Dr. Mininberg opined that according to the American Medical Association Guides, 6th Edition ("AMA Guides"), Claimant is entitled to 15% PPD impairment of the right upper extremity as a result of his work-related injury of March 21, 2014.

At the request of the Employer, Claimant underwent an IME with orthopedic surgeon Dr. Marc Danziger. Dr. Danziger opined that Claimant was at maximum medical improvement ("MMI") as of July 7, 2014, and in accordance with the AMA Guides, he assessed Claimant to have 0% impairment of the right upper extremity as a result of his work injury of March 21, 2014.

At a formal hearing conducted on July 6, 2015 by an administrative law judge ("ALJ") in AHD Claimant sought a 15% PPD schedule award pursuant to the Act and as opined by Dr. Mininberg.

On January 20, 2016, the ALJ issued a Compensation Order ("CO") denying the Claimant's PPD claim, rejecting Dr. Mininberg's 15% PPD rating, and concluding that Claimant has a 0% PPD rating to his right arm.

Claimant timely appealed the CO to the Compensation Review Board ("CRB") by filing Claimant's Application for Review and Memorandum of Points and Authorities in Support of Application for Review ("Claimant's Brief"). In his appeal Claimant asserts that "there is not a

substantial basis for rejecting Dr. Mininberg's rating and accepting Dr. Danziger's rating while disregarding the Claimant's uncontroverted testimony." (Claimant's Brief, Argument 1, unnumbered page 6).

Employer opposed the appeal by filing Employer's Opposition to Claimant's Application for Review ("Employer's Brief"). In its opposition, Employer requests an affirmation of the CO and asserts that the CO is in accordance with prevailing law and is supported by substantial evidence.

ANALYSIS

The scope of review by the CRB as established by the District of Columbia Workers' Compensation Act ("Act") and as contained in the governing regulations is limited to making a determination as to whether the factual findings of a Compensation Order on appeal are based upon substantial evidence in the record, and whether the legal conclusions drawn from those facts flow rationally from those facts and are otherwise in accordance with applicable law. D.C. Code §32-1521.01(d)(2)(A). "Substantial evidence" as defined by the District of Columbia Court of Appeals ("DCCA"), is such evidence as a reasonable person might accept to support a particular conclusion. *Marriott Int'l. v. DOES*, 834 A.2d 882 (D.C. 2003) ("*Marriott*"). Consistent with this scope of review, the CRB is also bound 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 members of the CRB review panel considering the appeal might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

Claimant asserts in Claimant's Brief that the ALJ's decision to accept Dr. Danziger's PPD impairment rating of 0% was: (1) "without specific detailed findings to support the basis for disregarding the claimant's uncontroverted testimony," and; (2) "an unsupported basis upon which to discredit Dr. Mininberg's rating." Further, Claimant asserts that there is "limited explanation given by the ALJ as to why Dr. Danziger's opinion is more credible than that of Dr. Mininberg." (Claimant's Brief, Argument 1, unnumbered page 6).

In the CO, the ALJ made the following findings of fact:

On July 7, 2014, Dr. Crowe examined Claimant, and opined that he was able to work full duty without restriction. He noted that even though Claimant has full use of his arm, he still requires assistance from his co-workers at work. CO at 3.

In the final follow-up examination on August 11, 2014, Claimant was released by Dr. Crowe for full duty without restriction, but he noted that Claimant still complained of aching, that he described as a "little soreness," in his anterior forearm, at the elbow, when doing heavy lifting. CO at 3.

Presently, Claimant is back at work full-time; however, he takes extra breaks at work. Initially, he worked less by declining overtime due to the pain in his elbow. Claimant is now willing to work overtime, but overtime hours are presently unavailable.

CO at 3.

Claimant's argument that the ALJ accepted Dr. Danziger's rating of 0%, without making specific detailed findings to support the basis for disregarding the Claimant's testimony, is unfounded. In the CO, the ALJ acknowledges the testimony given by Claimant regarding his pain with use of his right arm and the ongoing "soreness" felt in his right arm. CO at 3. The ALJ also made findings regarding the extra breaks taken by Claimant at work, and his initial refusal to accept overtime. CO at 3.

Ostensibly, the ALJ believed these subjective findings to be *de minimis*, and otherwise counterbalanced by additional facts in the record including Claimant's willingness to work overtime, when available. As acknowledged by the ALJ, these same findings are made even more insignificant by Claimant's treating physician's opinion that the intermittent pain felt by Claimant is "more than likely due to his failure to fully rehabilitate with home stretching and exercise, to dissipate tightness." CO at 6, *see* CE 2, EE 2.

Claimant's argument also focuses on the ALJ's rejection of Dr. Mininberg's opinion. In asserting that "the only dispute was that of the degree of impairment or disability," Claimant argues that Dr. Mininberg's opinion, granting a 15% impairment rating to the right arm, is improperly discredited by the ALJ. (Claimant's Brief, Argument 1, unnumbered page 7). We also reject that argument.

Under the Act, there is a preference for the testimony of treating physicians over doctors retained for litigation purposes. *Canlas v. DOES*, 723 A.2d 1210 (D.C. 1999). Accordingly, in assessing the weight of competing medical testimony in workers' compensation cases, attending physicians are ordinarily preferred as witnesses to those doctors who have been retained to examine the claimant solely for purposes of litigation. *Stewart v. DOES*, 606 A.2d 1350 (D.C. 1992).

No preference was warranted in this case however because the treating doctor did not issue an opinion regarding the degree of impairment and, as such, the ALJ is not required to give reasons for rejecting medical evidence of one party that conflicts with medical evidence presented by another party. *See Marriott Int'l at 886; Washington Hosp. Ctr. v. DOES*, 821 A.2d 898, 904 (D.C. 2003).

The ALJ appropriately assigned equal weight to both Claimant's and Employer's IME medical opinions, citing that neither are Claimant's attending physician as both have been retained solely for the purpose of litigation. The ALJ stated legitimate reasons for not accepting Dr. Mininberg's opinion. The Claimant's attending physician, Dr. Crowe, supports Claimant's ability to return to

full time, full duty work placing Claimant at MMI, and releasing Claimant to full time, full duty work, without any restriction, and without assigning any loss of use, as of August 11, 2014.¹

Additionally, the ALJ refers to Dr. Mininberg's medical report and notes the general nature of his particular diagnosis of Claimant's injury as an "injury to [Claimant's] right elbow." The ALJ refers to Dr. Mininberg's descriptive vagueness by noting that Dr. Mininberg's diagnostic imprecision, as weighed against Drs. Crowe and Danziger, renders his assessment of Claimant's injury imprecise, or as the ALJ writes, "open to broad interpretation." CO at 6.

The ALJ also briefly alludes to inconsistency in Dr. Mininberg's opinion by measuring his 15% impairment rating against his assessment that "no other indication of present disability was noted other than Claimant's subjective complaints of pain with full mobility, or repeated use of his elbow." CO at 6. The ALJ also takes in consideration Dr. Mininberg's examination assessments noting "no inflammation or induration, no instability, neurovascular examination intact, [Claimant's] grip test using the dynamometer is symmetrical." CO at 4. The ALJ's review of Dr. Mininberg's opinion includes reference to Claimant's "conservative treatment" and to other "significant complaints and findings" however Dr. Mininberg's opinion is otherwise silent as to what, if anything, those significant complaints and findings are. CO at 5.

Given the totality and specificity of the findings made, and the mirrored findings of Claimant's treating physician Dr. Crowe, and Dr. Danziger, the ALJ sufficiently discredits Dr. Mininberg's opinion in this case. The rejection of Dr. Mininberg's PPD rating is affirmed as being supported by substantial evidence in the record.

We find no reversible error in the ALJ's analysis, and affirm the decision.

CONCLUSION AND ORDER

The finding that Claimant is not entitled to a permanent partial disability award of 15% for his right arm is supported by substantial evidence and is in accordance with the law. The Compensation Order is affirmed.

So ordered.

¹ Referring specifically to the ALJ's reference to *Corrigan v. Georgetown University*, CRB No. 06-094, (September 14, 2007) found at page 4 of the CO, while the issue of the effect of a work injury upon Claimant's actual earnings is not on appeal, *Corrigan*, prohibiting consideration of actual post-injury wage loss when assessing PPD schedule claims, no longer represents the applicable law with respect to schedule awards under the Act.