GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR

LISA M. MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 11-095

ELLA MELLENIA JONES,

Claimant–Petitioner,

v.

HOWARD UNIVERSITY,

Self-Insured Employer–Respondent.

DEPT. OF EMPLOYMENT SERVICES
COMPENSATION REVIEW BOARD
2011 NOV 2 AM 11:26

Appeal from a Compensation Order of
Administrative Law Judge Joan E. Knight, AHD No. 10-494, OWC No. 649331

Matthew Peffer, Esquire, for the Petitioner

William H. Schladt, Esquire, for the Respondent

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

JEFFREY P. RUSSELL, for the Compensation Review Board.

DECISION AND ORDER

OVERVIEW

Claimant/Petitioner Ella M. Jones was employed as a budget manager for Employer/Respondent Howard University when, on March 5, 2008, she tripped over a loose brick on a sidewalk while transporting budget documents from one location on campus to another. Her right foot was bruised and swollen, and she sought treatment at Howard University Hospital two days later. On one of the intake forms that were filled out at that time Ms. Jones described the reason for her visit as being

[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).

"Right foot swollen from fall I had Wednesday night in the front of Howard University School of Business. Right side and lower back is sore and painful. I am a Howard University employee."

Although x-rays taken at that time were read as revealing no fracture, repeat x-rays taken at Reston Hospital on March 13, 2008 revealed a non-displaced linear fracture of the 5th metatarsal on the right foot.

Four days later Ms. Jones came under the care of Dr. B. Thomas Mazahery, an orthopedic specialist, who placed her in a walking boot and prescribed physical therapy. Ms. Jones continued to follow up with Dr. Mazahery while undergoing the therapy, seeing him on April 17, 2008 and on May 7, 2008, at which time he noted that, although her bone had not completely healed it was still healing, and he suggested that Ms. Jones only return to him on an "as needed" basis. She did not return to Dr. Mazahery for treatment.

Ms. Jones was seen by an orthopedist, Dr. Joel Fechter, on May 15, 2009 for the purpose of an independent medical evaluation (IME) to be used in support of her claim for a permanent partial disability award under the schedule. Dr. Fechter examined Ms. Jones and reviewed the treatment records from Howard University Hospital, Reston Hospital, and Dr. Mazahery. In the course of his evaluation he also obtained additional x-rays of the right foot, which he read as demonstrating "a healed fracture at the base of the fifth metatarsal." He opined in his IME report that Ms. Jones had sustained a 26% permanent partial medical impairment to her right foot as a result of the injury.

Ms. Jones was seen by Dr. Mazahery on January 13, 2011, at Howard University's request, for the purpose of obtaining his opinion regarding whether or not Ms. Jones had sustained any permanent partial impairment to her right foot as a result of the injury. He authored a report in which he stated that his assessment of Ms. Jones's right foot was "Base of 5th metatarsal fracture that has healed" and that "As far as her right foot is concerned, the patient has no permanent impairment."

A formal hearing was held on January 19, 2011 before an Administrative Law Judge (ALJ) in the Administrative Hearings Division (AHD) of the Department of Employment Services (DOES), following which the ALJ issued a Compensation Order on August 16, 2011. In that Compensation Order, the ALJ found that Ms. Jones had suffered no permanent partial impairment to her right foot, and denied the claim for a schedule award of disability.

Ms. Jones timely appealed the Compensation Order, which appeal Howard University has opposed.

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).

Thus, the only questions presented in this appeal are (1) whether a reasonable mind considering the record developed at the formal hearing (and specifically considering the evidence referred to by the ALJ in the Compensation Order in support of her factual findings) might have concluded that Ms. Jones has sustained no permanent medical impairment to her right foot as a result of the stipulated work injury, and (2) whether the other matters raised by Ms. Jones concerning the manner in which the ALJ addressed or failed to address matters relating to the weight or sufficiency of the evidence warrant reversal.

Given that the record contains the unambiguous opinion of the physician who treated Ms. Jones's right foot injury commencing less than two weeks after the injury occurred, and who oversaw her treatment and physical therapy, that she sustained a fracture that has fully healed and that "As far as her right foot is concerned, [Ms. Jones] has sustained no permanent impairment", the answer to the first question is undeniably yes.

Indeed, we are at a loss to understand the basis for the argument that appears to be at the heart of this appeal, that being "The ALJ found Ms. Jones did not suffer any permanent partial disability, and denied Ms. Jones' permanent partial disability. Ms. Jones appeals, contending that Dr. Mazahery never opined to her permanent partial disability and the specific opinion relied upon by and quoted by the ALJ does not appear anywhere in the record." Claimant's "Memorandum of Points and Authorities in Support of Application For Review" (Claimant's Memorandum), unnumbered page 3, and repeated in other form at unnumbered page 4 and 5.

Although not presented at the time of the formal hearing, EE 4, which indisputably contains precisely the opinion and quotation cited by the ALJ, was admitted post-hearing[2] on Howard University's unopposed motion filed at the time of and repeated orally at the formal hearing to submit the report late. HT 7 – 8. The basis of the motion was that the scheduled re-evaluation had been unexpectedly rescheduled by Dr. Mazahery's office, delaying the issuance of the report.

Regarding the second question, Ms. Jones argues that it was error for the ALJ to accept the opinion of the treating physician, Dr. Mazahery, because there is no specific reference to the American Medical Association Guides to the Evaluation of Permanent Impairment (the AMA Guides), or to the factors generally referred to in this jurisdiction as "the Maryland factors" or the "five factors". This argument is premised upon Ms. Jones's assertion that specific reference to the AMA Guides and the five factors is required because of the terms of D.C. Code § 32-1508 (3) (U-1), which provides that:

> In determining disability pursuant to subparagraphs (A) through (S) of this subsection, the most recent edition of [the AMA Guides] may be utilized, along with the following 5 factors:
> (i) Pain;

[2] The report is incorrectly dated "2010" rather than "2011", an error which the ALJ noted in footnote 2 of the Compensation Order.

(ii) Weakness;
(iii) Atrophy;
(iv) Loss of endurance; and
(v) Loss of function.

It is clear that, by utilizing the permissive "may" as opposed to the mandatory "shall", the legislature was authorizing but not requiring that the analysis of schedule award claims include specific reference to the AMA Guides and/or the five factors. Failure of the physician to employ them goes to the weight of the evidence, which is a matter for the ALJ to determine in the first instance, and to which determination we will yield in the absence of clear error. In this case, not only is there no error apparent in the ALJ's analysis, but it is also bolstered by her reference to the fact that Dr. Mazahery's opinion enjoys the status of treating physician opinion, which imbues it with a "strong preference" as compared to IME opinion such as that rendered by Dr. Fechter. 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*, *Short v. DOES*, 723 A.2d 845 (D.C. 1998), and *Stewart v. DOES*, 606 A.2d 1350 (D.C. 1992).

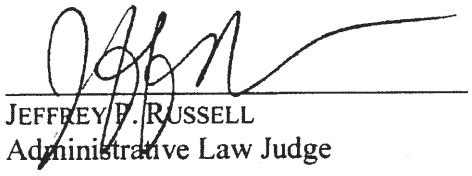
CONCLUSION

The determination that Ms. Jones has sustained no permanent partial medical impairment as a result of the stipulated work injury is supported by substantial evidence, and the denial of her claim for an award for permanent partial disability under the schedule to her right foot is in accordance with the law.

ORDER

The Compensation Order of August 16, 2011 is affirmed.

FOR THE COMPENSATION REVIEW BOARD:



JEFFREY P. RUSSELL
Administrative Law Judge

November 2, 2011
DATE