

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 16-028

**FONDA C. MOORE,
Claimant-Petitioner,**

v.

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

Appeal from a Compensation Order issued January 28, 2016 by
Administrative Law Judge Douglas Seymour
AHD No. 15-435, OWC No. 671060

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2016 JUL 22 AM 11 01

(Decided July 22, 2016)

Krista DeSmyter for Claimant
Mark H. Dho for Employer

Before HEATHER C. LESLIE, LINDA F. JORY, and GENNET PURCELL, *Administrative Appeals Judges.*

HEATHER C. LESLIE for the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

Claimant is a train operator for the Employer. As described in the Compensation Order (CO) and uncontested by the parties:

Claimant, 55 years old, has worked for Employer since August 18, 2000, and has been a train operator since May 2009. As a train operator, Claimant, who uses her right arm to operate the train, has to pull the master control up and back to move the train forward, and has to move it back to stop the train. On June 4, 2010, while operating a train on the Red Line, the master controller on her train became stiff. As a result, Claimant felt pain in her in her right hand and right shoulder. After her injury, Claimant began treating with Drs. Samir Azer and Shaun Koshla, both board-certified orthopedic surgeons with Suburban Orthopedics. HT 22-28.

CO at 2.

Dr. Azer subsequently diagnosed Claimant with rotator cuff tendinitis due to the June 4, 2010 work injury. Dr. Koshla similarly diagnosed Claimant with right rotator cuff tendinitis with possible cervical radiculopathy. Claimant underwent conservative care and was out of work for a period of time. Claimant returned to work, full duty, in December 2010.

Prior to her June 4, 2010 injury, Claimant sustained a work-related injury to her right wrist and right shoulder in 2007. Claimant subsequently sustained another work accident in December of 2011, injuring her right shoulder and right wrist.

On April 9, 2012, Claimant was seen by Dr. Allan H. Macht for the purpose of an independent medical evaluation (IME) at the request of her counsel for an earlier injury sustained in January 2007. EE 5. Dr. Macht took a history of Claimant's 2007 injury, reviewed medical reports, and performed a physical examination. Dr. Macht opined Claimant had a 10% permanent impairment to her right wrist and hand due to the accident in December 2011.

On March 10, 2015, Claimant underwent another IME with Dr. Michael Franchetti. Dr. Franchetti took a history of Claimant's 2010 and 2011 injuries, summarized her medical treatment, and performed a physical examination. Dr. Franchetti opined Claimant suffered from a 32% right upper extremity impairment, equally apportioned between her 2010 and 2011 injuries and a 36% right hand impairment, also equally apportioned between her 2010 and 2011 injuries.

On April 14, 2015, at the request of Employer, Claimant underwent an IME with Dr. Louis Levitt. Dr. Levitt took a history of Claimant's 2007, 2010 and 2011 injuries. After reviewing medical reports and performing a physical examination, Dr. Levitt opined that as to Claimant's June 4, 2010 injury, Claimant suffered from no permanent impairment to her right upper extremity and right hand.

A full evidentiary hearing occurred on December 2, 2015. Claimant sought an award of 18% permanent partial disability to her right hand and 16% permanent partial disability to her right upper extremity, as well as interest. The issues presented for adjudication were the nature and extent of Claimant's disability related to her June 4, 2010 injury and whether Employer was entitled to a credit for permanent partial disability benefits paid to Claimant pursuant to an award in another jurisdiction. A CO was issued on January 28, 2016, denying Claimant's claim.

Claimant appealed. Claimant sole argument on appeal is that the CO is not supported by the substantial evidence in the record as the ALJ failed to consider material evidence, specifically the Claimant's testimony.

Employer opposes the appeal, arguing the CO is supported by the substantial evidence in the record and in accordance with the law.

ANALYSIS¹

Claimant argues that as the CO failed to address Claimant's testimony and the record of her subjective testimony when determining whether Claimant is entitled to any permanent partial disability, a remand is required. Claimant relies upon *Muhammad v. DOES*, 774 A.2d 1107 (D.C. 2001) and *Chaupis v. George Washington University*, CRB No. 11-094 (June 24, 2012) in support of her argument.

The CO includes the following findings of fact:

After the June 4, 2010 accident, Claimant was out of work for three months. Claimant first returned to light duty work and then returned to full duty work in December 2010. On December 11, 2011, Claimant sustained another work related injury, injuring her right shoulder and right wrist. On that date, Claimant slipped and fell on a board on the platform at the Greenbelt, Maryland Metro Station. Claimant injured her right shoulder, right arm and right wrist. Dr. Khosla also treated Claimant for that accident. Claimant has since returned to full duty work. HT 13, 29, 30, 38-40, 54.

During the period between these two accidents, Claimant experienced: pain shooting up her arm; weakness; difficulty opening and picking up jars; vacuuming; pain in her wrist; and, "pins and needles going through her hands". After she returned to her full duty work, Claimant experienced problems with her right hand and had to use her left hand to operate the train. Claimant also experienced pain and stiffness down from her neck into her shoulder and arm. Finally, Claimant experienced pain in her shoulder if she encountered a stiff master controller. HT 30-35.

CO at 3.

Contrary to Claimant's assertions that the ALJ failed to consider Claimant's testimony, the ALJ did consider Claimant's complaints after the 2010 injury, but before the subsequent December 2011 injury to the same body parts (the right upper extremity and right wrist)..

In tandem with Claimant's testimony, the ALJ also took into consideration the medical evidence submitted, including the IME opinions. The ALJ rejected Claimant's IME physician, Dr. Franchetti, because of the findings of that IME were unclear regarding the relationship between

¹ The scope of review by the CRB 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.

the 2010 work injury which was under consideration by the ALJ, and the 2011 injury. Instead, the ALJ found Dr. Levitt's opinion to be more persuasive. Specifically,

Employer relies on the findings of Dr. Louis E. Levitt, a board-certified orthopedic surgeon. In his report of April 14, 2015, Dr. Levitt found Claimant had reached maximum medical improvement. Dr. Levitt found with respect to the June 4, 2010 accident, that Claimant sustained no more than a simple strain to the shoulder and a simple strain to the wrist from overuse when operating the stiff master control. Dr. Levitt, noting that he had examined Claimant in September 2010, found then that there was no evidence of any active musculoskeletal process requiring further care. Dr. Levitt then opined" ... with confidence she sustained no permanent injury to the right upper extremity." EE 2

Dr. Levitt found that the diagnostic testing performed at that time, which included an MRI scan showing spondylosis, and electrical studies to the right upper extremity, failed to demonstrate any obstructive neuropathic process, either radicular or peripheral, secondary to Claimant's reported overuse. Dr. Levitt concluded that Claimant had fully recovered and could return to work full duty at that time, without restrictions. Accordingly, Dr. Levitt opined, utilizing the AMA Guidelines, 6th Edition, that Claimant had a 0% permanent partial disability impairment to her right wrist and a 0% permanent partial impairment rating to her right upper extremity as a result of the June 4, 2010 work accident. EE 2.

* * *

Upon review of the medical evidence, I give more weight to, and find persuasive, Dr. Levitt's conclusions, based on his well-substantiated and well-documented findings, that claimant sustained simple strains to her right shoulder and her right wrist on June 4, 2010. Accordingly, I find persuasive Dr. Levitt's conclusions that Claimant had a 0% permanent partial disability to her right upper extremity (right shoulder), and a 0% permanent partial disability to her right hand (wrist) as a result of her June 4, 2010 accident. EE 2 at 3.

CO at 6-7.

Claimant has not appealed the above conclusion and does not argue that the ALJ's reliance on Dr. Levitt's opinion is in error.

It is Claimant's burden to prove by a preponderance of the evidence her entitlement to the requested permanent partial disability benefits. This she failed to do. The ALJ did not find persuasive either the IME opinion of Dr. Franchetti, or that of Dr. Macht, who failed to mention the June 4, 2010 injury. Contrary to Claimant's argument, the ALJ did not discount Claimant's complaints *between* the 2010 and 2011 injuries.

Notwithstanding the ALJ's acknowledgement of Claimant's testimony and her *current* complaints, the ALJ relied upon the IME opinion of Dr. Levitt and determined Claimant failed to

establish, by a preponderance of the evidence, that she was entitled to permanent partial disability benefits for her right upper extremity and hand related to the June 4, 2010 accident. We find no error in the ALJ's analysis and conclude the CO is supported by the substantial evidence in the record and in accordance with the law.

CONCLUSION AND ORDER

The January 28, 2016 Compensation Order is AFFIRMED.

So ordered.