

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services
Labor Standards Bureau

Office of Hearings and Adjudication
COMPENSATION REVIEW BOARD



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CRB No. 08-175

GERALDINE GEDDIE,

Claimant–Petitioner,

v.

DISTRICT OF COLUMBIA DEPARTMENT OF CHILD AND FAMILY SERVICES,

Employer/Carrier–Respondent.

Appeal from a Compensation Order of
Administrative Law Judge Joan E. Knight
AHD No. PBL 07-074A, DCP No. 760006-0002-2005-0026

Matthew Pepper, Esquire, for the Petitioner

Gail L. Elkins, Esquire, for the Respondent

Before JEFFREY P. RUSSELL, SHARMAN J. MONROE and FLOYD LEWIS, *Administrative Appeals Judges*.

JEFFREY P. RUSSELL, *Administrative Appeals Judge*, for the Compensation Review Panel:

DECISION AND REMAND ORDER

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board pursuant to D.C. Official Code § 1-623.28, § 32-1521.01, 7 DCMR § 118, and DOES Director's Directive Administrative Policy Issuance No. 05-01 (Feb. 5, 2005), by which the CRB replaces the Office of the Director in providing administrative appellate review and disposition of workers' and disability compensation claims arising under the District of Columbia Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Official Code § 1-623.1 *et seq.*, the Director's authority having been provided by D.C. Official Code § 1-623.02a, "Administration", which provides:

The Mayor shall administer and decide all questions arising under this chapter. The Mayor may delegate to the City Administrator any of the powers conferred on him or her by this chapter, except disability compensation hearings and adjudication

powers, pursuant to § 1-623.28, which shall be exercised by the Director of the Department of Employment Services.

OVERVIEW

This appeal, which was filed on June 10, 2008, follows the issuance of a Compensation Order from the Administrative Hearings Division (AHD) of the Office of Hearings and Adjudication (OHA) in the District of Columbia Department of Employment Services (DOES). In that Compensation Order, which was filed on May 21, 2008, the Administrative Law Judge (ALJ) denied Petitioner's request for an award of permanent partial disability under the schedule. Petitioner now seeks review of that Compensation Order.

As grounds for this appeal, Petitioner alleges as error that the ALJ's denial of an award was improper, given that the ALJ found that Petitioner had sustained a permanent partial disability to her foot, yet denied her an award solely because the record lacked a medical impairment rating for the foot in question, and that as a result the Compensation Order and is unsupported by substantial evidence, and is not in accordance with the law.

Respondent opposes this appeal, asserting that the denial of the claimed award is supported by substantial evidence given that it was Petitioner's burden to prove entitlement to the claimed award, including therein the burden to demonstrate the degree of medical impairment to the satisfaction of the fact finder.

Because the finding that Petitioner has sustained a permanent partial disability to her foot is supported by substantial evidence, we affirm that finding. Because the Act contemplates that injured workers who sustain a permanent partial disability under the schedule be granted compensation therefor, the denial of an award based upon the lack of evidence deemed useful or necessary by the ALJ to ascertain the extent thereof, without explanation as to why said evidence was not ordered by the ALJ to be procured, is not in accordance with the law, and is reversed.

ANALYSIS

As an initial matter, the scope of review by the Compensation Review Board (CRB) and this Compensation Review Panel, as established by the Act and as contained in the governing regulations, is 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. Comprehensive Merit Personnel Act of 1978, as amended, D.C. Official Code § 1-623.01, *et seq.*, at § 1-623.28 (a). "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 Int'l. v. District of Columbia Department of Employment Services*, 834 A.2d 882 (D.C. App. 2003). Consistent with this standard of review, the CRB and this Review Panel are constrained 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 reviewing authority might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

Turning to the case under review herein, review of the Compensation Order reveals that, although the ALJ was convinced that Petitioner had sustained a permanent partial impairment and a related schedule disability under the Act, she felt unable to determine the extent of that disability, because the medical impairment ratings which were proffered by Petitioner were ratings to the leg, while the ALJ felt that the appropriate body part under consideration was to the foot. In essence, she denied the claim for relief because Petitioner had failed to adduce sufficient evidence from which the ALJ could have reached a decision.

While, as a technical matter, we do not believe that the level of evidence adduced was inadequate, as a matter of law, to permit an ALJ to reach a rational conclusion respecting the degree or extent of disability to the foot under the schedule,¹ this does not mean that the ALJ in this case was obligated to proceed to make an award based upon the record before her, if she reasonably believed that there exists additional evidence that, if produced, would be useful to her in performing that task. We are faced with determining what an ALJ's options are, where the evidence is that an award under the schedule in some amount is appropriate, but insufficient evidence has been adduced to permit a finding of what that amount is.

On the one hand, a denial of the claim could be the required outcome, which is the route taken by the ALJ. In such a circumstance, we note that the denial could only legally be non-prejudicial to a claimant being permitted to renew the claim upon obtaining the additional evidence. To hold otherwise would be utterly dismissive of the legislative intent that is obvious by the very existence of a schedule disability statute: that a covered worker who sustains a permanent partial disability be compensated for that injury. This is not, however, the only possible outcome.

The Act, in the provision authorizing the formal hearing process, states as follows:

In conducting the hearing, the representative of the Mayor is not bound by common law or statutory rules of evidence, or by technical or formal rules of procedure, or by the provisions of the District of Columbia Administrative Procedure Act, except as provided by this subchapter, but may conduct the hearing in such manner as to best ascertain the rights of the claimant. For this purpose, he or she shall receive such relevant evidence the claimant adduces and *such other evidence as he or she determines necessary or useful in evaluating the claim.*

D.C. Code § 1-623.24 (b)(2) (emphasis added). We note that the private sector Workers' Compensation Act, D.C. Code § 32-1501, *et seq.*, similarly provides as follows:

In making an investigation or conducting a hearing the Mayor shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter, but may make such investigation or inquiry or conduct such hearing in such manner as to best ascertain the rights of the

¹ That is, we do not hold or suggest that an ALJ who reached a conclusion as to the degree of disability on this record would as a matter of law be in error, assuming that the ALJ's determination was supported by such evidence as a reasonable person might accept as supporting the award.

parties. Prior to the hearing before the Mayor the parties may conduct such discovery, including but not limited to the use of interrogatories and depositions as, in the opinion of the Mayor, will be helpful in determining the rights of the parties.

D.C. Code §32-1525 (a).

In regulations promulgated to effectuate the private sector Act's hearing provisions, the following is found:

If the Hearing or Attorney Examiner [now, ALJ] believes that there is relevant and material evidence available which has not been presented at the formal hearing, the [ALJ] may order the parties to acquire and submit the evidence. The [ALJ] may also continue the hearing to allow the parties to develop the evidence or, at any time prior to the filing of the compensation order, reopen for receipt of the evidence.

7 DCMR 223, "Conduct of Formal Hearings", at 223.4. The regulations for the public sector Act are not so explicit, but they do state as follows:

The hearing officer [now, ALJ], in his or her discretion, may leave the record open for a reasonable period subsequent to the hearing to receive any available evidence prior to making a recommendation to the Deputy Director [now, prior to issuing a Compensation Order].

7 DCMR 107, "Hearing Procedures", 107.8.

Although it is true that schedule awards are for disability, and are not made for the injury itself, we recognize that the degree of medical impairment represents a significant part of the equation. This is so under both the private sector act and the Act under which this claim has been brought.

Under both the public and private sector acts, where an ALJ feels that the evidence is inadequate to permit an evaluation of that part of the equation (that is, the medical impairment part), they and their relevant regulations provide a remedy, and that remedy is as outlined above: in order to fully consider a claim, the fact finder is given the authority to seek additional evidence not adduced by a party.

The ALJ did not have available to her what she clearly and reasonably deemed useful or necessary evidence, to wit, a medical impairment rating from Petitioner's treating physician of Petitioner's injured foot. While the ALJ's determination and finding that the claim presented entails an evaluation of the disability as a disability to the foot under the schedule, is supported by substantial evidence, the Act contemplates that such a disability be compensated under the schedule.

Both acts and their regulations empower ALJs to take affirmative steps to see to the acquisition of necessary evidence in order to make awards as are appropriate under their respective schemes. While taking such steps are not, by the language of the private sector act and regulations, mandatory, and are at the discretion of the ALJ, that discretion must be exercised in a non-arbitrary and non-capricious manner. Further, the language in the public sector Act is even stronger: "For this

purpose, he or she *shall* receive such relevant evidence the claimant adduces *and such other evidence* as he or she determines necessary or useful in evaluating the claim.” D.C. Code § 1-623.24 (b)(2) (emphasis added).

Accordingly, given the lack of discussion and consideration of the available further options, the Compensation Order does not include a full consideration of the claim, and the denial of the claim based upon lack of evidence, without more explanation, is not in accordance with the law.

On remand, the ALJ shall either avail herself of the procedures outlined in the Act and its regulations to obtain the additional evidence upon which an award can be based, or explain why such procedures are not appropriate in this case. Such explanation is required in order that a determination can be made in the eventuality of an appeal as to whether the decision to forego said procedures is or is not arbitrary or capricious.

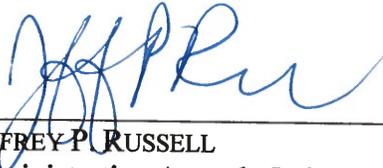
CONCLUSION

The finding that the disability at issue in this case is a disability to the foot, and that such a disability has been sustained, is supported by substantial evidence and is affirmed. The denial of an award for that disability based upon the lack of a medical impairment rating of the foot, without further consideration of additional steps to obtain that impairment rating, is not in accordance with the law.

ORDER

The determination by the ALJ that Petitioner's disability is a disability to the foot is supported by substantial evidence and is affirmed. The denial of an award under the schedule based upon the lack of a medical impairment rating, without consideration of the acquisition of additional available evidence, is reversed. The matter is remanded to AHD with instructions that on remand, the claim be considered further in a manner consistent with the foregoing.

FOR THE COMPENSATION REVIEW BOARD:



JEFFREY P. RUSSELL
Administrative Appeals Judge

September 11, 2008

DATE