

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR



F. THOMAS LUPARELLO
ACTING DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 14-066

**HENRIETA DZURIKANINOVA,
Claimant-Respondent,**

v.

**BARNES & NOBLE
and ACE/ESIS INC.,
Employer/Carrier-Petitioners.**

Appeal from a April 24, 2014 Compensation Order By
Administrative Law Judge Joan E. Knight
AHD No. 12-197B, OWC No. 682770

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2014 SEP 8 PM 12 46

Ashlee S. Turmelle for the Petitioner
Eric M. May for the Respondent

Before HEATHER C. LESLIE, MELISSA LIN JONES, and JEFFREY P. RUSSELL, *Administrative Appeals Judges.*

HEATHER C. LESLIE for the Compensation Review Board.

DECISION AND REMAND ORDER

OVERVIEW

This case is before the Compensation Review Board (CRB) on the request for review filed by the Employer - Petitioner (Employer) of the April 24, 2014, Compensation Order (CO) issued by an Administrative Law Judge (ALJ) in the Hearings and Adjudication Section of the District of Columbia Department of Employment Services (DOES). In that CO, the ALJ granted Claimant's request for permanent partial disability benefits to the right and left legs, as well as temporary partial disability benefits. We VACATE and REMAND.

BACKGROUND AND FACTS OF RECORD

Claimant was a café manager for the Employer. On October 25, 2010, the Claimant injured her back when lifting a box of frozen food. The Claimant came under the care of Dr. Corey J. Wallach. An MRI revealed a central disc herniation at L5-S1 with nerve root impingement. Claimant was placed off work and received conservative care for a period of time. When conservative care proved ineffective, Claimant underwent back surgery on September 6, 2011. After recovery, Claimant again underwent conservative care. A second back surgery was ultimately recommended which Claimant has declined.

It was determined that Claimant could no longer return to her pre-injury duties with the Employer. Vocational rehabilitation services were initiated and a functional capacity evaluation (FCE) performed. The FCE determined Claimant could return to work full time, but at a sedentary to light duty level.

During vocational rehabilitation services, Claimant secured part time employment as an administrative assistant with a business owned and operated by her boyfriend. Claimant earns \$400.00 per week.

On December 4, 2012, the Claimant underwent an independent medical evaluation (IME) at her request with Dr. Jeffrey Phillips. Dr. Phillips took a history of the Claimant's injury, performed a physical examination, and reviewed objective testing. Dr. Phillips opined the Claimant suffered a significant injury on October 25, 2010 and as a result has a permanent injury to her lower extremities. Dr. Phillips stated, based on the Fifth Edition of the AMA Guides to the Evaluation of Permanent Partial Impairment, Claimant suffered from a 12% impairment to the left lower extremity and a 28% impairment to the right lower extremity.

Claimant, at the request of the Employer, underwent an IME with Dr. Robert Gordon on August 1, 2012. After taking a history of the injury and treatment to date, Dr. Gordon opined that Claimant may have suffered a recurrence of her disc protrusion and was not at maximum medical improvement. Dr. Gordon opined Claimant was capable of only sedentary or very light duty work. In an addendum on November 12, 2012, Dr. Gordon reviewed a September 10, 2012 medical report from Dr. Wallach which indicated Claimant declined further surgery. Dr. Gordon opined Claimant was at maximum medical improvement and was capable of light or sedentary work.

On February 5, 2013, Dr. Gordon issued another addendum, wherein he opined that Claimant suffered from a 10% impairment to her right lower extremity and 5% to her left lower extremity.

A full evidentiary hearing proceeded on April 11, 2013. Claimant sought an award of temporary partial disability benefits from January 2, 2013 to the present and continuing, plus interest. Claimant also sought an award of 50% permanent partial disability to the right lower extremity and 12% permanent partial disability to the left lower extremity.¹ The issues to be adjudicated

¹ In the CO, under the claim for relief, the ALJ states Claimant sought 50% permanent partial impairment to the right lower extremity and 12% permanent partial impairment to the left lower extremity. We will assume the ALJ meant to say permanent partial *disability*, and shall treat the use of the term impairment as a typographical error.

were the nature and extent of Claimant's disability, if any, whether Claimant had voluntarily limited her income, and whether Claimant had failed to cooperate with vocational rehabilitation. A CO issued on April 24, 2014 granting Claimant's claim for relief, in part. The CO awarded Claimant 30% permanent partial disability to the right lower extremity and 14% permanent partial disability to the left lower extremity. The CO granted Claimant temporary partial disability from January 2, 2013 to the present and continuing, plus interest.

Employer timely appealed. Employer argues the CO erred in awarding temporary partial disability because Claimant had reached maximum medical improvement (MMI) and returned to work, entitling Claimant to permanent partial disability benefits based on wage loss. Employer further argues that Claimant failed to present any evidence to support an award of permanent partial disability based on wage loss as she has not submitted evidence to support any calculations, pursuant to D.C. Code § 32-1508(V)(ii). Finally, Employer argues the ALJ did not apply the proper analysis pursuant to *Logan v. DOES*, 805 A.2d 237 (D.C. 2002).²

Claimant opposes Employer's application for review. Claimant argues that eligibility for permanent partial disability does not disqualify an award of temporary partial disability. Claimant argues permanent partial disability benefits and temporary partial disability benefits can be paid concurrently, that Employer was wrong in asserting D.C. Code § 32-1508(V)(ii) applies, and Claimant did not voluntarily limit her income.

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 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 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.

DISCUSSION AND ANALYSIS

Employer argues Claimant is not temporary partially disabled but is permanent partially disabled and thus benefits should be awarded pursuant to D.C. Code § 32-1508(V)(i).³

² Employer did not appeal the CO's award of 30% permanent partial disability to the right lower extremity and 14% permanent partial disability to the left lower extremity.

³ D.C. Code § 32-1508(V)(i) states:

In other cases the employee shall elect:

- (I) To have his or her compensation calculated in accordance with the formula set forth in either subparagraph (ii)(I) or (II) of this subparagraph; and

The CO states several findings of fact, including Claimant's inability to return to her pre-injury employment because of her back injury, that she is no longer under active medical care, and that she has reached MMI. See CO at page 3. While another back surgery was recommended, Claimant does not want further surgery and is not actively seeking treatment.

After having found the Claimant was at MMI and could not return to work but without specifying the date the Claimant had reached MMI, the ALJ awarded the Claimant *temporary* partial disability. We note in argument both parties concede Claimant is at maximum medical improvement and her condition is permanent. Thus, it would seem that the parties agree to the *permanent* nature of Claimant's disability.

With the finding that Claimant will not improve and the parties agreement that this is indeed the case, we cannot say that the conclusion that Claimant is entitled to *temporary* partial disability is supported by the substantial evidence in the record or in accordance with the law and therefore must remand the case for further findings of fact and consideration. Upon remand, if the CO continues to award temporary partial disability, the ALJ is directed to provide findings of fact to support the conclusion of the temporary nature of Claimant's disability. If, on the other hand, the Claimant is found to be permanently partially disabled, the level of benefits to which she may be entitled must be determined. If the record does not contain sufficient evidence for a determination as to the appropriate compensation, in order to avoid a due process violation, the parties may seek to have the record re-opened for the receipt of additional evidence to determine which method of calculation the Claimant elects pursuant to §32-1508(V)(i).

Until such time as the ALJ reconciles the findings of fact and conclusions of law, we cannot say that the CO is supported by the substantial evidence in the record and in accordance with the law. Furthermore, it would be premature to address the Employer's remaining arguments.

(II) To receive the compensation at the time the employee returns to work or achieves maximum medical improvement.

(ii) The compensation shall be 66 2/3% of the greater of:

(I) The difference between the employee's actual wage at the time of injury and the average weekly wage, at the time of injury, of the job that the employee holds after the employee becomes disabled; or

(II) The difference between the average weekly wage, at the time the employee returns to work, of the job that the employee held before the employee became disabled and the actual wage of the job that the employee holds when the employee returns to work.

CONCLUSION AND ORDER

The April 24, 2014 Compensation Order is VACATED and REMANDED, consistent with the above discussion.

FOR THE COMPENSATION REVIEW BOARD:



HEATHER C. LESLIE

Administrative Appeals Judge

September 8, 2014

DATE