

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA MARÍA MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 12-180

BESSIE HILL,
Claimant–Petitioner,

v.

HOWARD UNIVERSITY,
Self-Insured Employer–Respondent.

Appeal from a Compensation Order on Remand of
Administrative Law Judge Anand K. Verma
AHD No. 10-117A, OWC No. 657973

Benjamin T. Boscolo, Esquire, for the Petitioner
William H. Schladt, Esquire, for the Respondent

Before JEFFREY P. RUSSELL, HEATHER C. LESLIE, *Administrative Appeals Judges*, and LAWRENCE D. TARR, *Chief Administrative Appeals Judge*

JEFFREY P. RUSSELL, for the Compensation Review Board.

DECISION AND REMAND ORDER

OVERVIEW

Following a formal hearing conducted on June 21, 2011, an Administrative Law Judge (ALJ) in the Department of Employment Services (DOES) issued a Compensation Order on July 21, 2011 in which the ALJ awarded Bessie Hill (Petitioner) 12% permanent partial disability (ppd) under the schedule to her left leg, for which Petitioner had sought an award of 29%, and denied any award to the right leg, for which Petitioner had sought an award of 7%.

Petitioner appealed both awards, arguing numerous errors on the part of the ALJ. The Compensation Review Board (CRB) rejected Petitioner’s contentions that the ALJ erred by failing to make specific findings as to each of the five “Maryland factors” denominated as being relevant to ppd awards in D.C. Code § 32-1508 (U-i).

However, relying upon then-current law, the CRB agreed that the ALJ erred by making an explicit finding that Petitioner had not suffered any actual loss of wages (or rather, wage earning capacity) as a result of her injuries, and relied upon that finding in considering the extent of Petitioner’s schedule disability. The CRB also agreed with Petitioner that the ALJ erred in denying any award to the right leg based upon the ALJ’s apparent determination that any claimed disability to that scheduled member was

not causally related to the work injury, in contravention of the stipulation of the parties to the issue of medical causal relationship.

The CRB vacated the awards on those grounds, and remanded the matter with instructions to reconsider the claim on the record as a whole but (1) without regard to the issue of medical causal relationship, and (2) without consideration of any actual specific wage loss that was or was not suffered by Petitioner as a result of the injuries. The first directive was premised upon the parties having stipulated to medical causal relationship, while the second directive was premised upon the CRB's application of the principals enunciated in *Corrigan v. Georgetown University Hospital*, CRB No. 06-094 (September 14, 2007), in which the CRB established the principal that it is reversible error for an ALJ to consider a claimant's comparative pre- and post-injury wages as part of the evaluation of the extent of a schedule disability.

On January 26, 2012, the ALJ issued a Compensation Order on Remand (COR), in which he made the same award, i.e., 12% to the left leg and no award to the right. Petitioner again appealed, which appeal is the matter presently before us.

In her appeal, Petitioner argued (1) that the ALJ erred in concluding that she was, from an evidentiary standpoint, bound by the opinion of her treating physician with regard to the extent of her medical impairment, (2) that the ALJ again improperly denied an award based upon a finding that there was no medical causal relationship between the right leg disability and the work injury, and (3) that even if the issue of medical causal relationship was properly before the ALJ, the finding that there was no such relationship is not supported by the record evidence.

Respondent opposed the appeal, arguing that the COR does not rely upon consideration of wage loss, and is not based upon a finding that the right leg disability, if any, is not medically causally related to the work injury, and that COR is therefore in accordance with the directive of the CRB in its Decision and Remand Order, and must be affirmed.

The CRB issued a Decision and Remand Order on September 5, 2012. In it, the majority declined to find the ALJ's reference to post-injury earnings to be erroneous, based upon the District of Columbia Court of Appeals (DCCA) decision in *Jones v. DOES*, 41 A.3d 1219 (D.C. 2012) and the CRB having determined in *Al Robaie v. Fort Myer Constr. Co.*, CRB No. 10-014, AHD No. 09-383, OWC No. 642015 (June 6, 2012) that *Jones* invalidated the previous view of the CRB that post-injury wage earning could not be considered in schedule award cases. The entire panel also agreed that the ALJ's failure to make explicit reference to the "five factors" set forth as being permissible for consideration under the schedule was not error. The CRB nonetheless vacated the COR for reasons that will be set forth in the following Decision and Remand Order, and gave explicit instructions concerning what was required on remand.

On October 5, 2012, another COR was issued in which the ALJ made the same award; it was appealed by Ms. Hill as being unsupported by substantial evidence, which appeal is opposed by Howard University Hospital.

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

The COR presently under review is a perplexing document. The ALJ commences his Analysis with a brief recitation of the burden of proof in cases involving the nature and extent of disability, an understandable starting point. However, he then, quite inexplicably, sets forth two paragraphs involving permanent partial disability wage loss benefits and cites the election of calculation method provisions in D.C. Code § 32-1508 applicable to non-schedule, partial wage loss claims. These provisions have absolutely nothing to do with the present claim, which is a claim for schedule awards to each leg.

The ALJ then proceeds to discuss and quote at length from numerous cases and Arthur Larson's treatise on workers' compensation on the subject of the relationship between a claimant's work injury and how the economic impact of the injury is relevant in determining the nature and extent of disability, apparently feeling that this discussion has some relevance to his (erroneous) point, contained, oddly enough, in the Findings of Fact, that "On remand the CRB alleges reliance upon the wage loss in determining the permanent partial disability benefits was in error." In reality, the prior Decision and Remand Order did exactly the opposite of what the ALJ asserted: the Decision and Remand Order was quite explicit that as a result of the DCCA case in *Jones*, the CRB has made clear that consideration of the effect of a work injury upon a claimant's wage earning ability by reference to actual wages earned post injury is permissible. What reason the ALJ had for including five paragraphs' on the subject is not evident.

Immediately following this exegesis, the ALJ states that "However, even without recourse to claimant's wage loss or loss of potential earning capacity, the record contains a preponderance of the evidence to support the schedule rating by claimant's treating physician, Dr. Bhattacharyya and negate the Dr. Phillip's [sic] rating solely based on his isolated October 5, 2010 IME." Thus, after spending two pages expounding upon the relevance of wage loss to schedule awards, the ALJ appears to assert that he will nonetheless not make "recourse" to it in this case.

However, in the closing paragraph of the Discussion, the ALJ reverses course again, concluding that "consistent with the Court's view in *Jones*, the fact-finder may appropriately consider the effects of claimant's injury on her actual post-injury earnings", a correct statement of the law, but one which is not in dispute in this case and which the CRB made clear in the prior Decision and Remand Order.

Despite spending most of the COR on this trip around Robin's barn, the COR never mentions a single *fact* concerning the effect of the injury upon Ms. Hill's earnings. True, he did write, in the final paragraph in the Findings of Fact that claimant's "post-injury earnings compared to the pre-injury earnings have not been compromised." However, he does not make any findings as to what the post-injury earnings are, or direct attention to anything in the record upon which he relies in making that finding, so there is no telling whether this conclusory statement is supported by substantial evidence.

The ALJ concludes in the Conclusion of Law stating that "The credible and reliable opinion of claimant's treating physician, Dr. Bhattacharyya clearly supports a 12% permanent partial impairment attributable to her lower extremity", and in the Decision he writes that Claimant is GRANTED 12% permanent partial disability benefits due to her left lower extremity and her claim for 7% permanent partial disability of her right lower extremity is DENIED."

This is problematic for numerous reasons: (1) the ALJ doesn't explain where the 12% "impairment" rating came from in the record; (2) he doesn't reference the fact that an impairment rating is not the same as a disability award; and (3) he doesn't explain why there is no award for the right leg.

We recognize that the ALJ purported to incorporate the findings of fact from the prior COR by reference. However, that COR was vacated in the prior Decision and Remand Order, in part because several findings were not supported by substantial evidence.

We are unable to carry out our review obligations when the Compensation Order we are to review is written in such a way that we are unable to glean what facts are being found, and what evidence is relied upon from the record to support those findings of fact. We can not guess which evidence cited in a vacated Compensation Order is being relied upon to support facts in a new Compensation Order.

The prior Decision and Remand Order went to great pains to be explicit in directing what was required on remand. The concluding portions of the Decision and Remand Order read as follows:

Lastly, we point out that the DCCA in *Jones* was critical of and reversed the CRB for affirming a schedule award that the court deemed inadequately explained. In order to withstand such a reversal in this case, the ALJ is urged to be as explicit as possible in making his findings of fact and legal conclusions on further consideration of this case.

In summary and so that there is no misunderstanding, on remand the ALJ is to make a specific finding as to the extent of disability to *each* of Petitioner's legs, not just the left leg, and is to identify the evidence upon which each such disability determination is based. In doing so, the ALJ is free to consider the extent to which the impairments to the legs have or have not affected Petitioner's actual earnings, insofar as such earnings correlate with and are indicative of the effect of the injuries upon Petitioner's wage earning capacity. The ALJ is *not* to deny an award to the right leg based upon a conclusion that any existing disability is not causally related to the work injury: medical causal relationship of any existing right leg disability to the workplace injury has been stipulated.

CONCLUSION

The denial of an award under the schedule to the right leg based upon a conclusion that any such disability is not causally related to the workplace injury is not supported by substantial evidence and is not in accordance with the law. The ALJ's characterization of the binding effect of a treating physician's opinion relating to the degree of medical impairment is not in accordance with the law.

ORDER

The Compensation Order on Remand of January 6, 2012 is vacated. The matter is remanded. On remand the ALJ is to make a specific finding as to the extent of disability to *each* of Petitioner's legs, not just the left leg, and is to identify the evidence upon which each such disability determination is based. In doing so, the ALJ is free to consider the extent to which the disabilities to the legs have or have not affected Petitioner's actual earnings, insofar as such earnings correlate with and are indicative of the effect of the injuries upon Petitioner's wage earning capacity. The ALJ is *not* to deny an award to the right leg based upon a conclusion that any existing disability is not causally related to the work injury: medical causal relationship of any existing right leg disability to the workplace injury has been stipulated.

With the exception of omitting from the present Compensation Order on Remand the ambiguous language concerning the "binding" nature of a treating physician's opinion, and the language suggesting that the decision to deny the right leg claim was premised upon an inference of a lack of causal relationship the ALJ has failed to carry out the specific directives, and has merely thrown together a hash of irrelevant and inexplicably unnecessary statements of law, and impermissibly "incorporated" wholesale the contents of a Compensation Order previously deemed to be legally inadequate.

We are left with no choice but to vacate the Compensation Order on Remand and remand the matter again, with the same instructions.

Again, in summary and so that there is no misunderstanding, on remand the ALJ is to make a specific finding as to the extent of disability to *each* of Petitioner's legs, not just the left leg, and is to identify the evidence upon which each such disability determination is based. In doing so, the ALJ is free to consider the extent to which the impairments, if any, to the legs have or have not affected Petitioner's actual earnings, insofar as such earnings correlate with and are indicative of the effect of the injuries upon Petitioner's wage earning capacity. The ALJ is *not* to deny an award to the right leg based upon a conclusion that any existing disability is not causally related to the work injury: medical causal relationship of any existing right leg disability to the workplace injury has been stipulated.

We urge the ALJ to begin with a clean slate, and we direct that all findings of fact upon which the ALJ bases the decision be explicitly set forth in the Compensation Order on Remand, and that the record evidence upon which they are based be specifically identified, not by incorporation but by specific identification by exhibit number, and/or hearing transcript page.

CONCLUSION

The Compensation Order on Remand fails to carry out the directives contained in the prior Decision and Remand Order.

ORDER

The Compensation Order on Remand of October 5, 2012 is vacated. The matter is remanded. On remand the ALJ is to make a specific finding as to the extent of disability to *each* of Petitioner's legs, not just the left leg, and is to identify the evidence upon which each such disability determination is based. In doing so, the ALJ is free to consider the extent to which the disabilities to the legs have or have not affected Petitioner's actual earnings, insofar as such earnings correlate with and are indicative of the effect of the injuries upon Petitioner's wage earning capacity. The ALJ is *not* to deny an award to the right leg based upon a conclusion that any existing disability is not causally related to the work injury: medical causal relationship of any existing right leg disability to the workplace injury has been stipulated.

FOR THE COMPENSATION REVIEW BOARD:

/s/ Jeffrey P. Russell
JEFFREY P. RUSSELL
Administrative Appeals Judge

March 27, 2013
DATE