

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR



F. THOMAS LUPARELLO
INTERIM DIRECTOR

Compensation Review Board

CRB No. 13-121

CATHERINE HUBBARD,
Claimant–Respondent,

v.

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,
Employer–Petitioner.

An Appeal from a September 4, 2013 Compensation Order by
Administrative Law Judge Fred Carney
AHD No. PBL. 12-008, DCP No. 76000600012007104-0001

Harold Levi, for the Claimant
Andrea Comentale, for the Employer¹

Before: HEATHER C. LESLIE, MELISSA LIN JONES, *Administrative Appeals Judges* and LAWRENCE D. TARR, *Chief Administrative Appeals Judge*

HEATHER C. LESLIE, *Administrative Appeals Judge*, 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 September 4, 2013 Compensation Order (CO) issued by an Administrative Law Judge (ALJ) in the Office of Hearings and Adjudication of the District of Columbia Department of Employment Services (DOES). In that CO, Claimant's request for reinstatement of temporary total disability benefits from December 16, 2011 to the present and continuing, medical treatment to wrists, right shoulder, and neck was granted. We VACATE and REMAND.

FACTS OF RECORD AND PROCEDURAL HISTORY

On November 18, 2003, Claimant was employed as a teacher. On that day, Claimant tripped and fell over a bench, injuring her right hand and arm, and hit both lower legs against the bench.

¹ The Employer was represented by Pamela Smith at the Formal Hearing.

Claimant subsequently filed a claim with the Office of Risk Management (ORM) for an injury to her right hand and arm, and both lower legs. Claimant was diagnosed with a right upper extremity contusion and right carpal tunnel syndrome (CTS). The Employer accepted the injury to her right hand and arm, and both lower legs. Claimant continued to work and continued to seek medical treatment.

On January 2, 2007, Claimant experienced a worsening of her symptoms in her right hand and wrist while writing on a black board. The Employer accepted her claim for her right wrist CTS.

Claimant also sought treatment for neck pain. Claimant was treated by Dr. Patrick Fasusi, a pain management specialist, who opined the Claimant needed epidural injections or steroid ganglion blocks. Dr. Fasusi also recommended Claimant refrain from working beginning December 17, 2008. The Employer denied the request for neck treatment. Claimant did not appeal this denial.

Dr. Fasusi referred Claimant to Dr. Robert Wilson for right CTS release which was performed on April 30, 2009. Claimant also underwent left CTS surgery. Claimant subsequently began to treat with Dr. Wilson's colleague, Dr. Rankin. Dr. Rankin opined the Claimant had cervical disc disease and recommended an MRI, therapy, and a referral to a neurologist. The Employer denied these requested medical treatments.

The Employer sent the Claimant for an additional medical evaluation (AME)² with Dr. David C. Johnson on August 4, 2011. Dr. Johnson took a history of the injury, reviewed medical records and performed a physical examination. Dr. Johnson was unable to determine whether or not Claimant's neck symptoms were related to any underlying disc disease which may have been aggravated by the work injury, stating not enough information was in the record to make a determination. Dr. Johnson did opine that as it relates to both hands, the Claimant was at maximum medical improvement and that the left hand is unrelated to the January 2, 2007 injury. Dr. Johnson opined the Claimant could return to work as a teacher.

On October 23, 2011, the D.C. Office of Risk Management (ORM), the administrator for the Public Sector Workers' Compensation Program (PSWCP) issued a Notice of Intent to Terminate Public Sector Workers' Compensation Payments (NOI) based upon the AME of Dr. Johnson. The Claimant was notified in the NOI that her disability benefits would be terminated. The Claimant timely requested a reconsideration of the NOI. The Final Decision on Reconsideration upheld the NOI.

The Claimant timely filed for a Formal Hearing, seeking reinstatement of temporary total disability benefits from December 16, 2011 to the present and continuing and authorization for medical treatment based on injuries to the neck, hands, and right upper extremity. A CO was issued on September 4, 2013, awarding the Claimant's request. The ALJ concluded that the Claimant's current symptoms to both hands, both wrists, neck, and right shoulder were caused by the work injuries of 2003 and 2007.

² We note that the title of the document generated by Dr. Johnson is an "Additional Medical Evaluation". The ALJ refers to the evaluation as an independent medical evaluation or IME, a term more commonly used in private sector cases. Keeping in line with terminology utilized in public sector cases as well as the title of the document, we will refer to Dr. Johnson's examination as an AME.

The Employer appealed. The Employer argues the CO is not supported by the substantial evidence in the record and is not in accordance with the law. Specifically, the Employer argues that ALJ did not have jurisdiction to award benefits for injuries other than what was related to the right CTS relying on the CRB's reasoning in *Minter v. District of Columbia Office of the Chief Medical Examiner*, CRB No. 11-024 and 11-035, AHD No. PBL 073A (December 15, 2011). The Employer also argues the ALJ was in error in relying, in part, upon an AME not in the record, that the ALJ's conclusions regarding causal relationship were not supported by the evidence in the record, and that many of the statements made in the CO's statements of fact are unsupported by the evidence in the record.

The Claimant, in opposition, argues that the CO is supported by the substantial evidence in the record and in accordance with the law.

STANDARD OF REVIEW

The scope of review by the CRB, 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 on Remand 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), and *Marriott International v. DOES*, 834 A.2d 882 (D.C. 2003).

Consistent with this standard of review, the CRB is 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.

ANALYSIS

The Employer's first argument is that the ALJ did not have jurisdiction to consider any other injury other than the accepted right CTS condition, relying on the CRB's rationale in *Minter*. The Employer states that the evidence shows that ORM "never issued a decision either accepting or denying a claim for neck or left hand injuries." Employer's argument at 9. At the hearing, Claimant's counsel conceded that the Employer did not accept the neck. Hearing transcript at 22. We must agree with the Employer.

As the Employer correctly notes, *Minter* states that only issues related to an NOD can be considered by the ALJ. Specifically,

As a general principle, the only matters that DOES has authority to review are matters upon which PSWCP has rendered a decision, and it is that decision that is reviewed by DOES.

Minter, supra.

We have recently reaffirmed this rule, stating

The employer is correct that as a general rule, OHA does not have jurisdiction to determine a claim for injury to a specific body part unless the employer has issued a determination denying liability for that body part. In several recent decisions, the CRB overruled *Tellish v. D.C. Public Schools*, CRB No. 07-001, AHD No. PBL 05-028A, DCP No. DCPS 007013 (February 16, 2007) and held that the plain language of D.C. Code § 1-623.24 (b)(1) requires that the employer make a determination with respect to a claim before an injured worker may obtain a formal hearing. *Sisney v. DCPS*, CRB No. 08-200, AHD No. PBL08-066, DCP No. DCP007970 (July 2, 2012), *Brooks v. DCDMH*, CRB No. 10-062, AHD No. PBL 96-065B, DCP No. 7610100001199-0016 (August 16, 2012, *Newby v. DCPS*, CRB No 10-162, AHD No. PBL 01-064D, DCP No. LT-PARK001712 (September 11, 2012).

Jackson v. District of Columbia Housing Authority, CRB No. 12-104, AHD PBL No. 11-022A, (October 11, 2012).

A review of the record before us reveals two NOD's, an NOD dated November 18, 2003 which accepted the right hand, right arm and both lower leg injuries³ and an NOD dated July 5, 2007 which accepted the Claimant's claim of CTS to the right wrist.⁴ Thus, the ALJ's jurisdiction extended only to the right hand, wrist, arm and both lower legs and what benefits Claimant may be entitled to as it relates to these body parts. Based upon the record before us, an NOD has not been issued addressing any other body part, including the right shoulder or neck. Thus, it was in error for the ALJ to consider these body parts and award benefits based upon them. Upon remand, the ALJ is to re-evaluate the Claimant's claim for relief considering only the right hand, right arm, right wrist and both lower legs, the claims properly before AHD. Until such time as Claimant requests a NOD regarding the compensability of the neck and left wrist, AHD is precluded from rendering a decision.

The Employer also argues that the ALJ's finding that Dr. Johnson's 2011 AME report contradicted an earlier 2007 report of Dr. Johnson is not supported by the substantial evidence in the record as the 2007 report is not in the record. The Employer notes the only evidence in the record of a 2007 AME is in Claimant's exhibit 5, consisting of two documents titled "Claims Review Report." The first "Claims Review Report" is unsigned. The second document is signed by Kelly Valentine on October 21, 2009. In those documents, a reference is made to an AME of Dr. Johnson's dated April 4, 2007 wherein he purportedly causally related Claimant's neck and right CTS.

A review of the CO reveals the ALJ concludes,

Dr. Johnson's 2011 IME even contradicts his earlier 2007 IME in which he found Claimant suffered an injury to her neck.

³ Claimant's exhibit 2.

⁴ Employer's exhibit 1.

We agree with the Employer that this statement is in error. A 2007 AME of Dr. Johnson was not submitted into evidence for the ALJ to determine whether or not the AME was consistent with the 2011 AME. The ALJ used one sentence, recited identically in two documents (one unsigned), to determine that the entirety of the report referenced was contradictory to the 2011 AME. It was in error to accept the assertion in the Claims Review Report without seeing the entire 2007 AME to determine whether or not the documents contradicted each other. To use the statement in the Claims Review Report, without more, as a reason to find the 2007 and 2011 AME's contradict themselves is in error and cannot be a basis to reject the report of Dr. Johnson's opinion. Upon remand, the ALJ is to reconsider Dr. Johnson's opinion based upon the record evidence.

In light of our decision, the Employer's remaining arguments are rendered moot by our decision that the ALJ did not have jurisdiction over any claim other than the ones accepted and addressed by the NOD's.

We must address Claimant argument, in its opposition to the Application for Review, that the CO's reasoning for accepting the video surveillance and the AME's of Dr. Johnson over the objections of counsel was in error. A review of the hearing transcript shows the ALJ excluded Employer's Exhibit 6, the MSS Solutions Peer Review Report. See hearing transcript at 57. However, the ALJ, over Claimant's objections, did admit the AME and addendum, as explained in the CO. However, despite having excluded the MSS report, the ALJ then commented upon the report as support for the termination of Claimant's benefits. CO at page 7. This is in error. As we are remanding, the ALJ is directed to strike any references to excluded exhibits.

Claimant argues that it was in error for the ALJ to admit these documents based upon the Employer's failure to provide them in discovery as well as the Employer's failure to provide the 2007 AME of Dr. Johnson, and that the ALJ's reasoning, that the evidence was highly probative of the issues and that "taken to its logical end, this reasoning suggests that the more probative Petitioner's evidence is, the more abusive and outrageous Petitioner may become in violating its discovery obligations and the less justification the ALJ has for punishing Petitioner's discovery abuses."

We decline to follow the rationale Claimant's counsel urges us to do, that the "logical" end of the ALJ's reasoning will lead to further discovery abuses. This highly speculative line of reasoning is rejected in its entirety.

We note that the Public Sector Act and regulations are silent as to what the hearing officer shall or may do in discovery disputes. D.C. Code §1-623.24(b)(2) (states,

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 Act (D.C. Code, §2-501 et seq.), 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 as the claimant adduces and such other evidence as he or she determines necessary or useful in evaluating the claim.

By the broad language of the regulations and Act to be applied, the ALJ is given much leeway to conduct hearings in a manner the ALJ deems “necessary or useful in evaluating the claim.” Bearing the above in mind, it was not in error for the ALJ to accept the 2011 AME, the basis for terminating Claimant’s disability benefits, evidence the ALJ noted the Employer relied upon to terminate Claimant’s benefits. Moreover, it was not in error for the ALJ to admit the surveillance evidence, evidence he ultimately rejected.

While we do reject the Claimant’s arguments, we are compelled to add that we in no way condone any party failing to respond to discovery requests. However, until such time as the statute and regulations address discovery disputes, as long as the ALJ finds evidence necessary or useful in evaluating the claim, we will not disturb this finding.

CONCLUSION AND ORDER

The Compensation Order of September 4, 2013 is not supported by the substantial evidence in the record and in accordance with the law. It is VACATED and REMANDED. Upon remand, the ALJ is to reconsider Claimant’s request for disability benefits, based upon injuries to her right hand, right arm, right wrist and both lower legs. Any other injuries, including to the neck and right shoulder, is not properly before AHD. Finally, the ALJ is directed to exclude references to the MSS Peer Review Report.

FOR THE COMPENSATION REVIEW BOARD:

HEATHER C. LESLIE
Administrative Appeals Judge

January 27, 2014
DATE