

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. 07-018

JOHN B. HAMMOND,
Claimant–Petitioner,

v.

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,
Self-Insured Employer-Respondent.

Appeal from a Compensation Order of
Administrative Law Judge Fred D. Carney, Jr.
OHA/AHD No. PBL 06-010A, DCP Nos. 760002-0001-2005-0013

Benjamin T. Boscolo, Esquire, for Claimant-Petitioner

Pamela L. Smith, Esq., for Employer-Respondent¹

Before JEFFREY P. RUSSELL, LINDA F. JORY and SHARMAN J. MONROE, *Administrative Appeals Judges*.

JEFFREY P. RUSSELL, *Administrative Appeals Judge*, on behalf of a majority of the Review Panel:

DECISION AND 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).²

¹ Respondent was represented by Pamela L. Smith, Esquire, at the formal hearing, and filed a Motion for Enlargement of Time within which to file a response to Petitioner's Petition for Review. That motion was granted administratively on January 9, 2007, and Respondent was given until January 22, 2007 to file said response. No such response was filed by the time, and Respondent was given an additional 5 days for that purpose by administrative order issued January 23, 2007. No response was filed by the time that the matter was assigned to this review panel on February 8, 2007.

² Pursuant to Administrative Policy Issuance No. 05-01, dated February 5, 2005, the Director of the Department of Employment Services realigned the Office of Hearings and Adjudication to include, *inter alia*, establishment of the Compensation Review Board (CRB) in implementation of the D.C. Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, D.C. Official Code § 32-1521.01. In accordance with the Director's

BACKGROUND

This appeal follows the issuance of a Compensation Order by the Administrative Hearings Division (AHD) of the Office of Hearings and Adjudication (OHA). In that Compensation Order (the Compensation Order), which was filed on November 1, 2006, the Administrative Law Judge (ALJ) denied Petitioner's claim for a schedule award of permanent disability to the right hand.

In his Petition for Review, Petitioner alleges that the decision is "inconsistent with the substantial evidence in the record and the law applicable thereto", and that it is "arbitrary, capricious, unsupported by substantial evidence in the record and not in accordance with the law"³, and Petitioner seeks the vacating of that Compensation Order and an award by the CRB in the amount of 15% permanent partial disability to the right hand under the schedule, or alternatively, a remand to AHD for further consideration of the claim.⁴

Petitioner alleges that the ALJ committed error (1) by failing to consider the five "Maryland factors", and the effect of the injury upon Petitioner's industrial capacity, in rendering his decision, (2) because the ALJ's decision was based upon an improper substitution by the ALJ his judgment for that of an evaluating physician relating to whether Petitioner has been left with a loss of grip strength, (3) because the ALJ's determination as to the lack of such a loss of grip strength is unsupported by substantial evidence, rendering the denial based thereon contrary to law, (4) because the failure to specifically address, in the Compensation Order, the level of consideration given to the Maryland factors and the industrial impact of the claimed injury renders the Compensation Order legally inadequate, requiring a remand for further consideration and explication, and (5) because the failure to consider whether Petitioner had sustained some lesser disability than the 15% claimed renders the Compensation Order legally inadequate, requiring a remand for further consideration of such lesser disability.

Respondent did not file any response to Petitioner's assertions of error.

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

Directive, the CRB replaces the Office of the Director in providing administrative appellate review and disposition of workers' and disability compensation claims arising under the D.C. Workers' Compensation Act of 1979, as amended, D.C. Official Code § 32-1501 *et seq.*, and the D.C. Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Official Code § 1-623.1 *et seq.*, including responsibility for administrative appeals filed prior to October 1, 2004, the effective date of the D.C. Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004.

³ These characterizations are taken from "Claimant's Application for Review" and Petitioner's "Memorandum of Points and Authorities in Support of Application for Review", respectively. We note that, while the complaints that the Compensation Order is unsupported by substantial evidence and is not in accordance with the law accurately describe the appropriate legal standards for our review of the case, the other characterizations do not.

⁴ These various requests for relief are not stated by Petitioner as being made in the alternative, but rather are made at different points throughout Petitioner's pleadings.

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, Petitioner’s first assertion of error is that the ALJ failed to consider the five “Maryland factors”, and the effect of the injury upon Petitioner’s industrial capacity, in rendering his decision (error number (1) above), and the related assertion that the ALJ failed to specifically address, in the Compensation Order, the level of consideration given to the Maryland factors and the industrial impact of the claimed injury renders the Compensation Order legally inadequate, requiring a remand for further consideration and explication (error number (4) above). These allegations of error are premised at least in part upon the argument that the Compensation Order does not comport with the analytical framework as set forth by this Board in *Wormack v. Fishback & Moore Elect. Inc.*, CRB No. 03-159, AHD No. 03-151, OWC No. 456205 (July 22, 2005)⁵, which analytic approach was held to be applicable to public sector claims by the Board in *Larry Barron v. District of Columbia Dep’t. of Employment Serv’s.*, CRB No. 06-054, AHD No. PBL 05-010, DCP No. MDMPED-0004151 (September 6, 2006).

Without deciding that an ALJ is required, as suggested by Petitioner, to specifically address the Maryland factors or the impact of the claimed injury upon a claimant’s industrial capacity, we must reject Petitioner’s assertion that the ALJ in this case failed to discuss these matters. In fact, it is clear from the ALJ’s concluding paragraph in the “Discussion” portion of the Compensation Order that he did in fact consider such matters; similarly, the ALJ refers to them on page 4 in describing the findings of Dr. Gordon in connection with his independent medical evaluation (IME), and in

⁵ The *Wormack* approach is, in our view, identical to that adopted by the Court of Appeals in private sector cases in the recent case of *Negussie v. District of Columbia Dep’t. of Employment Serv’s.*, DCCA No. 05-AA-852, 2007 D.C. App. LEXIS 7, (January 25, 2007). We note also that the *Barron* case was not unanimous, with the dissent arguing that the difference in language between the private sector act, and the Act governing that claim (and this), render the *Wormack* (and by implication, *Negussie*) approach inapposite to claims under the Act. Indeed, our colleague in her concurrence makes this same argument in this case. We merely re-iterate that the concept of “disability” is not a medical one, at least not completely, whether under the Act or under the District of Columbia Workers’ Compensation Act, D.C. Code § 32-1501 *et seq.*, and we urge consideration of the opening section of the *American Medical Association Guides to the Evaluation of Permanent Impairment, 5th Edition*, Linda Cocchiarella and Gunnar B.J. Anderson, Editors, American Medical Association 2000, Chapter 1, Section 1.2, where the difference between disability and medical impairment is more fully explained than space allows here. In that reference guide, it is made explicitly clear that “The medical judgment used to determine the original impairment percentages could not account for the diversity or complexity of work ... [and] Work is not included in the clinical judgment for impairment percentages for several reasons ...”, and the conclusion that “As a result impairment ratings are not intended for use as direct determinants of work disability.” *Id.*, at 5 – 6. To use medical impairments as a “direct determinant” of work disability, as our colleague argues by implication if not explicitly, is contrary to the explicit intention and purpose of the impairment rating.

discussing the results of the grip strength testing performed by Dr. Minenberg in Petitioner's preferred IME. While the Compensation Order contains a minor factual contradiction relating to whether Petitioner missed any time from work due to the injury (stating that Petitioner missed "only a half day of work" in the "Background" section of the Compensation Order, while finding "claimant has missed no time from work due to the work injury" in the "Findings of Fact" section) this error is so small as to be rendered harmless. It is evident that the ALJ, as contemplated in *Wormack* and *Barron*, considered whether the work injury has any significant impact upon Petitioner's current work capacity, and concluded that it does not.

Petitioner asserts that "because of the difficulty he experienced with his right hand, he was not able to work during summer school. This caused him to lose significant income. The Compensation Order contains no findings on [Petitioner's] credibility". Petitioner's Memorandum, page 2. We take this to be an assertion that the ALJ's findings concerning Petitioner having experienced no significant time lost from work is erroneous, in the absence of an express finding by the ALJ about Petitioner's credibility or lack thereof.

However, review of Petitioner's testimony concerning the effect that this injury had on his work indicates that the ALJ was free to find as he did. The injury occurred when Petitioner pushed a toilet flush button with his middle finger on October 4, 2004 (HT 17); his treatment consisted primarily of wearing a splint on the middle finger for approximately 10 weeks (HT 21), during which time he continued to work because "the school year had just started and I didn't want to take off. He [his treating physician, Dr. Gunther] splinted it up, so I would write on the board like in a old case symbol because we have erasable markers, so I actually would write and my penmanship wasn't that good ..." (HT 22).⁶ The testimony concerning his summer employment followed at HT 30, where he testified "This is the first summer since I have been teaching that I have not worked this summer because of pain in my hand. I just needed to rest my hand this summer. And I really could use the extra income, but—you know, as a teacher, but I do not work this summer because I knew if – I just felt I just needed to rest my hand. So I did not work this summer." In response to his attorney's question, "Has any doctor told you you had to take the summer off?", he responded "No." HT 30 – 31.

The ALJ was free to accept this testimony as truthful, yet was not compelled to conclude from it that the injury *prevented* Petitioner from working during the summer. While Petitioner may have preferred that the ALJ draw such an inference from the testimony, such an inference is not required, and as with most evidentiary issues, an ALJ need not explain why he did or did not reach a particular inference given a particular piece of evidence.

Regarding the next two assertions of error, that the ALJ's decision was based upon an improper substitution by the ALJ of his judgment for that of an evaluating physician relating to whether Petitioner has been left with a loss of grip strength (error number (2) above), and the related complaint that the ALJ's determination as to the lack of such a loss of grip strength is unsupported by substantial evidence (error number (3) above), we again must disagree.

⁶ While we are not certain whether the hearing transcript garbled the actual testimony, nothing in the transcription as it exists suggests the likelihood that something was said that would change our analysis.

The ALJ wrote that Petitioner's IME physician, Dr. Minenberg, "noted when he tested claimant's grip strength in both hands that claimant's left grip strength results was 40 kg as opposed to 47 kg on the right. The results indicated claimant's right hand is still stronger than the left." Compensation Order, page 4. On that same page, the ALJ noted that in the opinion of Respondent's IME physician, Dr. Gordon, Petitioner's IME evidenced "no swelling, tenderness [or] instability or weakness". What the ALJ recited as his conclusion regarding grip strength is then set forth on page 6, in the final paragraph of the "Discussion" section, stating "the weight of the medical evidence indicates claimant has greater grip strength in his affected hand than his unaffected hand", a conclusion that is easily supportable based upon the evidence of the two IMEs. The ALJ made no finding that there had been no loss of grip strength from the accident (although such a conclusion could rationally follow from the evidence of the two IMEs), he merely concluded that the injury did not diminish the grip strength in the right hand to a degree that it was weaker than the left, a conclusion that, in concert with the other findings concerning a lack of ongoing medical palliative or restorative care, the lack of the need for ongoing pain medication, the ability to continue in his normal employment as a classroom math teacher, uninterrupted from October 5, 2004 through the summer recess in 2005, and a lack of time lost from work due to any physician imposed restrictions, along with the evaluation by Dr. Gordon and his assessment that Petitioner has sustained a "0% impairment of the right finger [sic]" (Compensation Order, page 4), supports the ALJ's conclusions that Petitioner has sustained no permanent partial disability from the work injury, within the *Wormack* analytic framework.

Regarding the final assertion of error, that the ALJ failed to consider whether Petitioner had sustained some lesser disability than the 15% claimed, while it could be argued that the ALJ could have used different language in explaining his conclusion, we detect no legal error in his characterizing his decision as a conclusion, again in the concluding paragraph of the "Discussion" section, on page 6, that "claimant has failed to present substantial evidence of a remaining impairment as a result of the October 4, 2004 work injury to his right middle finger", rather than concluding that Petitioner had sustained a 0% impairment (as found by Dr. Gordon). The ALJ did not fail to consider some lesser amount; it is evident that he considered the question of whether Petitioner has sustained *any* permanent partial disability to his finger, and concluded that he did not. That conclusion is supported by substantial evidence and is in all respects in accordance with the law.

CONCLUSION

The Compensation Order of November 1, 2006 is supported by substantial evidence and is in accordance with the law.

SHARMAN J. MONROE, *Administrative Appeals Judge*, concurring:

I concur in affirming the Compensation Order. However, I am compelled to write this separate opinion because the Petitioner cited *Wormack*, a decision in which I dissented, as a basis for his appeal.

The Petitioner herein sought a schedule award based a 15% permanent partial impairment to his right hand. In support of his request, he submitted the medical reports of Dr. Gunther, his treating physician, who released the Petitioner to work without restrictions on January 13, 2005 and the medical report of Dr. Minenberg, who opined that the Petitioner sustained a 15% permanent partial impairment to his right hand. The Respondent submitted the opinion of Dr. Gordon, the independent medical examiner, who opined that the Petitioner had sustained a 0% permanent partial impairment to his right hand. After determining that the Respondent's evidence rebutted the Petitioner's evidence, the ALJ, consistent with the law, weighed the record medical evidence. The ALJ rejected the opinion of Dr. Minenberg and set forth cogent reasons for so doing. The ALJ then accepted the opinion of Dr. Gunther under the "treating physician" preference in this jurisdiction and indicated that Dr. Gunther's opinion was consistent with that of Dr. Gordon. The ALJ did not award schedule permanent partial disability benefits.

Thus, based upon my reading of the Compensation Order, the ALJ analyzed this case in the manner outlined in my dissent in *Wormack*, *i.e.*, either accepting or rejecting the medical ratings submitted into evidence without adjustment. Indeed, the ALJ did not cite *Wormack* as a basis for his analysis of the evidence. It may be that the ALJ was, in fact, exercising the discretion given him via *Wormack*. However, as such exercise was not readily apparent, I affirm the Compensation Order.⁷

⁷ I am aware of the D.C. Court of Appeals recent ruling in *Negussie v. D.C. Department of Employment Services*, No. 05-AA-852 (January 25, 2007). This case, however, was brought under the D.C. Workers' Compensation Act of 1979 and the Court's finding that an ALJ may exercise discretion in awarding schedule awards was based upon an analysis of that Act, not upon an analysis of the Act at play herein.

ORDER

The Compensation Order of November 1, 2006 is affirmed.

FOR THE COMPENSATION REVIEW BOARD:

JEFFREY P. RUSSELL
Administrative Appeals Judge

March 1, 2007
DATE