GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR

F. THOMAS LUPARELLO
DIRECTOR

COMPENSATION REVIEW BOARD

CRB 14-086

KEISHA HUDSON,
Claimant-Respondent,

v.

ALLIED BARTON SECURITY and ESIS,
Employer/Third-Party Administrator-Petitioners.

DEPT. OF EMPLOYMENT SERVICES
COMPENSATION REVIEW BOARD
2014 DEC 16 AM 9 27

Appeal from a June 9, 2014 Compensation Order by
Administrative Law Nata K. Brown
AHD No. 10-357C, OWC No. 670768

Krista N. DeSmyter, for the Respondent
Anthony Zaccagnini, for the Petitioners[1]

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

HEATHER C. LESLIE, for the Compensation Review Board.

DECISION AND ORDER

This case is before the Compensation Review Board on the request for review filed by the Employer of the June 9, 2014, Compensation Order (CO) issued by an Administrative Law Judge in the Administrative Hearings Division (AHD) of the District of Columbia's Department of Employment Services (DOES). In that CO, the ALJ granted Claimant's request for temporary total disability benefits from April 15, 2013 to the present and continuing and for permanent partial disability benefits to both the left and right upper extremities in the amount of 30% each. We AFFIRM.

[1] At the Formal Hearing, Employer was represented by Tony Torain, II a member of the same firm as Mr. Zaccagnini. On July 10, 2014, Ms. Mary Weidner entered her appearance as counsel for Employer.

BACKGROUND FACTS OF RECORD AND PROCEDURAL HISTORY

Claimant worked as a Supervisory Special Police Officer for the Employer. On June 5, 2010, Claimant injured her right wrist, left knee and low back when a heavy metal fire door fell on her. Claimant came under the care and treatment of Dr. Fredric Salter and Dr. Richard Meyer.

Claimant was diagnosed with acute dorsal and lumbosacral strains, a right forearm contusion, a right wrist sprain, and contusion/mild internal derangement of the left knee. Dr. Meyer recommended a course of conservative treatment which included medications and physical therapy. Claimant was released to light duty on June 16, 2011.

On November 16, 2011, a CO was issued which concluded that Claimant could not perform her pre-injury duties and awarded Claimant temporary total disability benefits from April 27, 2011 to the present and continuing. Subsequently, on February 3, 2012, pursuant to the parties' Consent Motion to Modify the November 16, 2011 Compensation Order, an Order was issued which ended Claimant's entitlement to temporary total disability benefits effective December 2, 2011 as Claimant returned to light duty employment. The Order further stated:

> The parties expressly state that their Motion is not intended to modify nor shall be construed as modifying in any fashion the Finding, set forth the in the Compensation Order, that Claimant is unable to perform her usual work duties as a Supervisory Special Police Officer in that she is no longer able to run, stand, or walk for long periods, use a firearm, or restrain a subject. Employer/Insurer reserve the right to seek modification of that Finding in the future, as the evidence may warrant.

Since the 2011 Formal Hearing, Claimant has continued to treat with Dr. Meyer for her work injury. Dr. Meyer has opined Claimant still is under light duty restrictions and cannot return to work full duty. Claimant's light duty job terminated on or around April 15, 2013. Claimant has also undergone multiple Functional Capacity Evaluation's (FCE) to determine work capacity and an Independent Medical Evaluation (IME) with Dr. David Johnson.

A full evidentiary hearing occurred on August 22, 2013[2]. Claimant sought an award of temporary total disability benefits from April 15, 2013 to the present and continuing and permanent partial disability benefits of 30% to her left lower extremity and 30% to her upper right extremity. The sole issue raised was the nature and extent of Claimant's disability.[3] A CO was issued on June 9, 2014 wherein the ALJ granted the Claimant's claim for relief.

Employer timely appealed. Employer first argues that the CO's legal conclusion that the Claimant is entitled to temporary total disability benefits is not in accordance with the law as the Claimant was medically cleared to perform her pre-injury job. Second, Employer argues the

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[2] The CO erroneously refers to the date of the Formal Hearing as occurring on August 22, 2014.

[3] There was also a discussion regarding whether or not monies paid out of a grant to Claimant's non-profit business received in 2013 constituted wages. The CO determined that it did not constitute wages as defined by the Act. Employer has not appealed this finding.

ALJ erred in awarding permanent partial disability benefits as the ALJ failed to address the "complete medical evidence." Employer's argument at 9.

Claimant opposes Employer's appeal, stating the CO is supported by the substantial evidence in the record and is in accord with the law.

THE STANDARD OF REVIEW

The scope of review by the CRB is limited to making a determination as to whether the factual findings of the appealed CO are based upon substantial evidence in the record and whether the legal conclusions drawn from those facts are in accordance with applicable law. "Substantial evidence" is relevant evidence a reasonable person might accept to support a conclusion. *Marriott International v. DOES*, 834 A.2d 882, 885 (D.C. 2003) and §32-1521.01(d) (2) (A) of the D.C. Workers' Compensation Act of 1979, as amended (Act).

Consistent with this standard of review, the CRB is constrained to uphold a CO that is supported by substantial evidence, even if there also is contained within the record under review substantial evidence to support a contrary conclusion and even if the CRB might have reached a contrary conclusion. *Marriott, supra.*

DISCUSSION

Employer first argues that the award of temporary total disability benefits is in error as the ALJ failed to reference Claimant's August 12, 2013 FCE in the CO which released Claimant to a sedentary physical demand level. Employer argues Claimant's previous employment requires a light physical demand level and thus, Claimant's injuries do not prevent her from engaging in gainful employment for which she is qualified and she is no longer disabled. We reject Employer's argument.

We note that per the prior CO and the subsequent Order, the Claimant is unable to perform her pre-injury job. The subsequent Order wherein the parties agreed Claimant's entitlement to benefits ended when she returned to light duty work specifically noted the parties also agreed:

> Claimant is unable to perform her usual work duties as a Supervisory Special Police Officer in that she is no longer able to run, stand, or walk for long periods, use a firearm, or restrain a subject.

As the Order further stated, the Employer reserved the right to seek modification of that Finding in the future. The controlling statutory provision dealing with modification of final decisions under the Act, D.C. Code § 32-1524, which provides in pertinent part:

> (a) . . . at any time prior to 1 year after the after the date of the last payment of compensation or at any time prior to 1 year after the rejection of a claim. . . the Mayor may, upon his own initiative or upon application of a party in interest, order a review of a compensation case pursuant to the procedures provided in § 32-1520 where there is reason to believe that a change of conditions has occurred which raises issues concerning:

(1) The fact or degree of disability or the amount of compensation payable pursuant thereto; or

(2) The fact of eligibility or the amount of compensation payable pursuant to § 32-1509.

(b) A review ordered pursuant to subsection (a) of this section shall be limited solely to new evidence which directly addresses the alleged change of conditions.

(c) Upon the completion of a review conducted pursuant to subsection (a) of this section, the Mayor shall issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation . . . .

A review of the administrative file reveals that Employer has not sought a modification of the CO's finding that Claimant cannot return to her pre-injury job. Until such time as the Employer seeks modification under § 32-1524, the law of the case is that Claimant cannot return to her pre-injury job duties. While it was in error for the ALJ to address whether the Claimant could return to work in her pre-injury job, it was harmless error as the ALJ ultimately determined Claimant could not. We affirm this conclusion.

Turning to Employer's second argument, Employer contends argues that as the ALJ failed to address the complete medical evidence in coming to her determination in awarding Claimant permanent partial disability benefits of 30% to her left lower extremity and 30% to her upper right extremity, the CO is not in accordance with the law. Employer takes issue with the ALJ failing to address why Dr. Meyer's opinion was not discounted as he did not take into consideration the April 2013 FCE. Further, the Employer argues the ALJ erred in failing to fully address the April 2013 FCE and August 2013 FCE, stating that both FCEs indicate the Claimant can return to work full duty.

When analyzing Dr. Meyer's medical opinions, the ALJ noted:

> Claimant submits the expert medical opinions of Dr. Meyer. On August 27, 2012, Dr. Meyer, upon examination, found that Claimant still had tenderness and spasm in the lumbar and paralumbar area mostly on the left side. Her forward flexion is 25-30°, and her right lateral bending is restricted. Straight leg raising and Lasegue's maneuver are positive on the left. She has L4-5 weakness and L3- 4, L4 -5 hypesthesia on the left. Gate is mildly left antalgic. Dr. Meyer diagnosed Claimant with acute dorsal strain, moderate; acute lumbrosacral strain, moderate; contusion of the right forearm; sprain of the right wrist; contusion/mild internal derangement of the left knee; headaches; difficulty sleeping; lumbrosacral spine strain, chronic; and internal derangement of the right wrist. (CE 5, p.28)
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> On September 20, 2012, Dr. Meyer examined Claimant to determine a disability rating for her right upper extremity and her left lower extremity. With respect to Claimant's left lower extremity, Dr. Meyer opined, pursuant to the Fifth Edition of the AMA Guides for the Evaluation of Permanent Impairment (hereinafter, AMA

> Guides), Table 17-37, that Claimant has a 10% impairment to the left leg. In addition, Dr. Meyer opined, pursuant to the Maryland Five Factors (hereinafter, Five Factors), that Claimant was entitled to a 5% impairment for pain; a 5% impairment for weakness; a 5% impairment for loss of function, and a 5% impairment for loss of endurance. When combined, Claimant's total permanent partial impairment to her left leg is 30%. (CE 3, pp.14-15)
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> With respect to Claimant's right upper extremity, Dr. Meyer opined, pursuant to the AMA Guides, Table 16-34, that Claimant has a 20% impairment to her right arm. He also opined that, pursuant to the Five Factors, that Claimant has a 10% loss of function to her right arm. When combined, Claimant's total permanent partial impairment to her right arm is 30%. (CE 3, pp.14-15)

CO at 7.

The ALJ, noting that Dr. Meyer is the treating physician[4], found Dr. Meyer's opinion more reliable. Contrary to Employer's argument, the ALJ was not required to address why Dr. Meyer's opinion was not discounted or rejected. As noted by the District of Columbia Court of Appeals, it is only with respect to treating physicians that reasons for rejecting a physician's opinion must be explained.[5] An ALJ is not required to explain why a treating physician's opinion is *not* rejected. The ALJ's determination to accord Dr. Meyer the treating physician preference, and to then rely on his opinion, is in accordance with the law and is affirmed.

Moreover, we reject Employer's contention that the CO in not in accordance with the law in its failure to address the April 2013 and August 2013 FCE. As the Employer notes, the ALJ did rely upon the April 2013 FCE. Employer's argument at 10. The April 2013 FCE was recommended by Dr. Meyer, as the findings of fact note. And while the ALJ did not specifically mention the August 2013 FCE, the ALJ did state in footnote 1,

> While each documentary exhibit received in evidence is not specifically reference in the discussion, all evidence of record was reviewed as part of this deliberation.

CO at 4.

Contrary to Employer's argument, the ALJ is not required to inventory all the evidence. As the Court of Appeals has stated:

> Our decisions do not require hearing examiners to inventory the evidence and explain in detail why a particular part of it is accepted or rejected.[6]

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[4] It has been repeatedly held, consistent with prevailing case law, that in situations where there are conflicting medical opinions, the opinion of the treating physician is preferred over those of physicians retained simply to examine the claimant for the purposes of litigation. *Stewart v. DOES*, 606 A.2d 1350 (D.C. 1992).

[5] *Washington Hospital Center v. DOES and Paul A. Thielke, Intervenor*, 821 A.2d 898 (2003).

We conclude the CO's reliance on Dr. Meyer's medical opinion which utilized the AMA Guidelines to Permanent Impairment as well as the Five Factors, to conclude the Claimant was entitled to 30% to her left lower extremity and 30% to her upper right extremity is supported by the substantial evidence in the record and is in accordance with the law.

CONCLUSION AND ORDER

The June 9, 2014 Compensation Order is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

HEATHER C. LESLIE
Administrative Appeals Judge

December 16, 2014
DATE

[6] *Sturgis v. DOES,* 629 A.2d 547, 554 (D.C. 1993); see *Citizens Ass'n of Georgetown v. District of Columbia Zoning Comm'n*, 402 A.2d 36, 47 (D.C. 1979)(when findings are supported by sufficient evidence, an agency is not "required to explain…why it favored one witness….over another").