# Compensation Review Board

**CRB No. 12-099**

**HARRIETT KENNEDY,**
**Claimant–Petitioner,**

**v.**

**WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,**
**Self-Insured Employer-Respondent**

Appeal from a Compensation Order on Remand by
The Honorable Anand K. Verma
AHD No. 11-150, OWC No. 618906

Timothy J. Driscoll, Esquire, for the Claimant/Petitioner
Mark H. Dho, Esquire, for the Self-Insured Employer/Respondent

Before: HENRY W. MCCOY, HEATHER C. LESLIE,[1] AND LAWRENCE D TARR, *Administrative Appeals Judges*.

HENRY W. MCCOY, *Administrative Appeals Judge*, for the Compensation Review Board.

## DECISION AND REMAND ORDER

### JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board (CRB) pursuant to D.C. Official Code §§ 32-1521.01 and 32-1522 (2004), 7 DCMR § 230, *et seq*., and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005).

[1] Judge Leslie has been appointed by the Director of the DOES as an interim CRB member pursuant to DOES Administrative Policy Issuance No. 12-02 (June 20, 2012).

## OVERVIEW

This appeal follows the issuance on May 31, 2012 of a Compensation Order on Remand (COR) from the Hearings and Adjudication Section, Office of Hearings and Adjudication in the District of Columbia Department of Employment Services (DOES). In that COR, Claimant was again denied a schedule award of 28% permanent partial disability to her right foot. For the reasons stated below, we again vacate and remand the COR.

## BACKGROUND FACTS OF RECORD AND PROCEDURAL HISTORY

Claimant was working as a train operator on September 11, 2005 when in the process of stepping off the train she fell injuring her right foot. Claimant was initially treated with a cast, followed by an ankle brace. Subsequent treatment in April 2006 by Dr. James Rosen at Kaiser Permanente revealed that Claimant had sustained a stress fracture of the third metatarsal of the right foot that had healed. There is no further record of treatment until 2009 when Claimant saw Drs. Michael Smith and Stephen Ross at Kaiser, with Dr. Ross ultimately releasing her to full duty on October 6, 2009.

Claimant underwent an independent medical evaluation (IME) by Dr. Michael Franchetti on November 30, 2010. After a physical examination, using the 4th Edition of the AMA Guides to the Evaluation of Permanent Impairment, and taking into consideration pain, loss of endurance and loss of function, Dr. Franchetti determined that Claimant had a 28% permanent partial impairment to her right foot. At Employer's request, Claimant was seen by Dr. Clifford Hinkes for IMEs on April 24, 2006 and February 4, 2011 wherein he maintained the consistent opinion that Claimant retained no permanent impairment as a result of her work injury.

To resolve the difference in opinions, Claimant filed for a formal hearing seeking an award for 28% permanent partial disability to the right foot in keeping with Dr. Franchetti's opinion. On August 31, 2011, a Compensation Order (CO) was issued denying the claim for relief in its entirety as the ALJ found Dr. Hinkes more persuasive than Dr. Franchetti.[2] Claimant appealed and on May 22, 2012, the CRB vacated and remanded the CO.[3]

In a Decision and Remand Order (DRO) dated May 22, 2012, the CRB vacated and remanded primarily for the ALJ to apply the correct provision of the statute applicable to a request for a schedule award, *i.e.*, D.C. Code § 32-1508(3)(A-U); as opposed to the statutory provision allowing for recovery other than those under the schedule, D.C. Code § 32-1508(3)(V)(ii). In addition, the ALJ was questioned as to his recitation of the treating physician preference when Claimant's treating physician did not render a permanency rating. Finally, the CRB determined the ALJ also committed error by not determining the economic impact of Claimant's impairment, if any, in keeping with the D.C. Court of Appeals recent decision in *Jones v. DOES*, A.3d (D.C. 2012).

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[2] *Kennedy v. WMATA*, AHD No. 11-150, OWC No. 618906 (August 31, 2011).

[3] *Kennedy v. WMATA*, CRB No. 11-108, AHD No. 11-150, OWC No. 618906 (May 22, 2012).

In response to the CRB's remand, the ALJ issued a Compensation Order on Remand (COR) on May 31, 2012. After mistakenly stating no discussion of the economic impact of Claimant's injury as the only ground upon which the CO was remanded, the ALJ again repeated his misapprehension of the applicable statutory provision and the superfluous mention of the treating physician preference before endeavoring to address the economic impact to again deny Claimant's claim for relief.[4] Claimant has timely appealed with Employer filing in opposition.

On appeal, Claimant argues that the ALJ's determination on remand is not supported by substantial evidence in the record because findings of the treating physicians' reports of pain and swelling in the right foot find were subsequently disregarded when similarly stated in Dr. Franchetti's rating report. In addition, Claimant argues the ALJ did not follow the CRB's instruction to evaluate the claim using the proper provision of the statute. Employer argues that the ALJ's conclusions flow rationally from the findings and should be affirmed.

## 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 are based upon substantial evidence in the record, and whether the legal conclusions drawn from those facts are in accordance with applicable law.[5] *See* D.C. Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §§ 32-1501 to 32-1545 (2005), at § 32-1521.01(d)(2)(A). 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.

Prior to addressing the merits of Claimant's arguments on appeal, we again find it necessary to point out the ALJ's apparent confusion as to the correct section of the statute to be applied in light of the claim for relief. While this confusion was addressed by the CRB in the May 22, 2012 DRO as the initial ground for vacating and remanding the CO, the ALJ on remand has repeated his error verbatim; either oblivious to the error or in flagrant disregard to it being pointed out to him or that he has committed one. As it remains a clear demonstration of the misapplication of the correct section of the statute, we are constrained again to note this apparent misapprehension on his part.

Claimant is seeking a schedule award for a permanent impairment to the right foot, which is governed by D.C. Code § 32-1508(3)(A-U), and more specifically as it is a scheduled body part, subsection (D). For some unknown reason, the ALJ continues under the misapprehension that

[4] *Kennedy v. WMATA*, AHD No. 11-150, OWC No. 618906 (May 31, 2012) (COR).

[5] "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 International v. D.C. Dept. of Employment Services*, 834 A.2d 882 (D.C. 2003).

because Claimant has attained MMI and returned to work that D.C. Code § 32-1508(3)(V)(ii) is the more relevant provision.

The D.C. Court of Appeals has previously noted that the Act distinguishes permanent partial disability schedule awards from non-schedule awards based, in part, on the fact that the Act provides for a fixed payment for schedule disabilities, whereas non-schedule permanent partial disability awards require consideration of the impact of the injury upon one's wage earning capacity:

> The statute that provides for payments for permanent partial disabilities divides such disabilities into two categories: "schedule" and "non-schedule." D.C. Code § 36-308(3)(A)-(M) [now D.C. Code § 32-1508(3)(A)-(U)] lists certain parts of the body which, if permanently disabled, entitle the worker to disability payments equal to the number of weeks' compensation listed for that body part in the schedule. D.C. Code § 36-308(V) [§ 32-1508(V)] provides a formula for compensating disabilities that are not expressly set out in the schedule, measured in terms of actual wages lost as a result of the disability.[6]

In the COR, the ALJ has made no finding of wage loss. To the contrary, the ALJ found that Claimant now earns more than she did pre-injury. Therefore, we are at pains to comprehend why the ALJ continues under the apparent misapprehension that the non-schedule provision of the statute is the most relevant in this case. However, as the ALJ's subsequent analysis references the intended purpose of a schedule award[7], we are able to conclude that while his reference to the non-schedule provision is confusing and previously warranted remand for lack of any further clarification, he has now analyzed Claimant's claim pursuant to the appropriate provision applicable to a schedule award, in this case the right foot, and thus no error is found.

We also note that the ALJ again has inexplicably referenced the treating physician preference when none of the Claimant's treating physicians has rendered a permanency rating; rather, all of the ratings were rendered by independent medical evaluators (IME). As also previously noted, while the ALJ may rely upon the treatment records and weigh them accordingly, it was deemed to be error on his part to reference the treating physician preference when the treating physician did not render a decision on the issue to be decided.

In addition to the erroneous reference to the treating physician preference, the ALJ has compounded his error by evaluating Claimant's IME permanency rating by Dr. Franchetti through the lens of that preference. In beginning his analysis of Dr. Franchetti's report, the ALJ states

> The IME opinion of Dr. Franchetti, who evaluated her on November 30, 2010 at referral from her counsel is not reliable for a number of reasons.[8]

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[6] *Morrison v. DOES*, 736 A.2d 223, 225 (D.C. 1999).

[7] COR at p. 7.

[8] *Id*. at 6.

This statement is similar to the reservation observed when evaluating competing medical opinions where one of those opinions is that of the treating physician and in order to reject the treating physician's opinion, specific reasons must be given.[9]

The ALJ then proceeds to state his reasons for rejecting Dr. Franchetti's IME, basically as if his opinion rating Claimant's permanent impairment was that of a treating physician. After giving those reasons, the ALJ concludes by stating

> Hence, premised on the reasons articulated above, the undersigned is not persuaded by the IME's ratable impairment of 28% attributable to claimant's right foot and rejects it as unworthy of any evidentiary value. Also, predicated on the cumulative medical evidence, undersigned finds claimant's right foot infirmity caused by the September 11, 2005 work accident has resolved without any sequelae.[10]

The ALJ has evaluated Dr. Franchetti's IME as if it were a treating physician's opinion, when it is not. This is error on his part and, on remand, the ALJ shall delete all reference to the treating physician preference and evaluate the competing IME opinions equally on their own merits.

The ALJ also concludes that Claimant's right foot "infirmity" has resolved without any sequelae. This conclusion is not supported by substantial evidence in the record. Claimant's treating podiatrist's November 28, 2005 report, upon which the ALJ relies, did find that her pain had decreased approximately 98%. However, he also found mild swelling and that Claimant was to wear a comfortable shoe with a stiff sole and revert back to a CAM walker if symptoms develop. Supportive shoes were also recommended to be worn indefinitely by another treating podiatrist in 2009. Dr. Franchetti also found mild swelling in his 2010 IME examination. As Claimant has not been found to be incredible, there is substantial evidence in the record to show she retains residual symptoms from her work accident. On remand, the ALJ shall factor this in when evaluating the competing IME opinions to determine the level of Claimant's impairment.

## CONCLUSION AND ORDER

The ALJ's confusing reference to the provisions of the statute for both schedule and non-schedule awards is found not to be in error as he further clarifies that the claim for relief was analyzed under the provision for a schedule award. The ALJ's reference to and application of the treating physician preference when the treating physician has not rendered an opinion on the issue to be decided is not in accordance with the law. The conclusion by the ALJ that Claimant suffers no sequelae from her work injury is not supported by substantial evidence in the record is REVERSED. The Compensation Order on Remand of May 31, 2012 is REMANDED for further consideration consistent with this Decision and Remand Order.

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[9] *Mexicano v. DOES*, 806 A.2d 198, 205 (D.C. 2002) (quoting *Olson v. DOES*, 736 A.2d 1032, 1041 (D.C. 1999).

[10] COR at 7-8.

FOR THE COMPENSATION REVIEW BOARD:

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HENRY W. MCCOY
Administrative Appeals Judge

September 11, 2012
DATE