

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. 06-064

KENNETH HANNAH,

Claimant–Petitioner,

v.

DISTRICT OF COLUMBIA WATER AND SEWER AUTHORITY,

Self-Insured Employer–Respondent.

Appeal from a Compensation Order of
Administrative Law Judge Linda F. Jory
AHD No. 04-098, OWC No. 581554

Danny R. Seidman, Esquire, for the Petitioner

Douglas A. Datt, Esquire, for the Respondent

Before E. COOPER BROWN, *Chief Administrative Appeals Judge*, JEFFREY P. RUSSELL, and FLOYD LEWIS, *Administrative Appeals Judges*.

JEFFREY P. RUSSELL, *Administrative Appeals Judge*, for the Compensation Review Panel:

DECISION AND ORDER

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board pursuant to D.C. Official Code §§ 32-1521.01 and 32-1522 (2004), 7 DCMR § 230, and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005).¹

¹Pursuant 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 District of Columbia Fiscal Year 2005 Budget Support Act of 2004, Title J, the District of Columbia Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, *codified at* D.C. Official Code § 32-1521.01. In accordance with the Director's 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 District of Columbia Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §§ 32-1501 to 32-1545 (2005), and the District of Columbia Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Code Ann. §§ 1-623.1 to 1-643.7 (2005), including responsibility for

BACKGROUND

This appeal follows the issuance of a Supplemental Compensation Order from the Administrative Hearings Division (AHD) of the Office of Hearings and Adjudication (OHA) in the District of Columbia Department of Employment Services (DOES). In that Supplemental Compensation Order (the Compensation Order), which was filed on May 31, 2006, the Administrative Law Judge (ALJ) awarded Petitioner 5% permanent partial disability to the left foot. Petitioner now seeks review of that Compensation Order.

As grounds for this appeal, Petitioner alleges as error that the decision of the ALJ, which was based upon acceptance of the opinion of a physician who performed an independent medical evaluation (IME) at Respondent's request and the concomitant rejection of the opinion of Petitioner's treating physician, is not supported by substantial evidence and is not in accordance with the law.

Respondent opposes the appeal, arguing that the ALJ's decision was based upon substantial evidence in the form of the IME report, and that the rejection of the treating physician's opinion was in accordance with the law, in that the treating physician's report assigned the impairment to the right foot, rather than the left foot.

ANALYSIS

As an initial matter, the scope of review by the Compensation Review Board (CRB) and this Review Panel, 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. *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). "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. Dist. of Columbia Dep't. of Employment Servs.*, 834 A.2d 882 (D.C. 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.

As an initial matter, we note that, although Petitioner attached a document to the Memorandum of Points and Authorities in Support of Application for Review, and refers to it in that memorandum, Petitioner has filed no Motion to Adduce Additional Evidence as contemplated and governed by 7

administrative appeals filed prior to October 1, 2004, the effective date of the District of Columbia Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004.

DCMR 264², and no remand for the purpose of re-opening the record pursuant to those regulations has been made. In that the document attached to the memorandum was not before the ALJ, is not in the record before us, and is subject to no proper motion to re-open, it will not, and indeed, can not, be considered by us.

As is discussed in the Compensation Order, Petitioner had previously presented a claim for a schedule award under the Act to an ALJ in AHD related to this claim, and that claim had been denied due to the failure of the Petitioner to supply a medical impairment rating to the appropriate body part, being the left foot, because Petitioner had submitted a medical impairment rating to the left leg. Rather than denying the claim outright, however, the ALJ directed that the parties submit additional reports, relating to the correct schedule member, the left foot. In response, Respondent submitted an IME report ascribing 5% permanent partial disability to Petitioner's left foot. However, Petitioner submitted an evaluation which referred only to the right foot, and not the left.

The ALJ thereupon awarded Petitioner the schedule amount of 5% to the left foot, rejecting the opinion of the treating physician as contained in the evaluation report referencing the right foot. In rejecting that opinion, the ALJ wrote:

Dr. DiLallo's [the treating physician] identity of the extremity to be rated as the right causes concern. Had he misidentified it only once, it would be reasonable to infer that his error was simply an oversight. However his failure to correct himself and [to] again indicate the impairment is to the right ankle as well as counsel's failure to note this error causes greater concern.

Compensation Order, page 3. The ALJ then proceeded to note that the IME report and its rating of 5% was "consistent with claimant's abilities to return to his full duties as of December 17, 2001". *Id.* Then, returning to her evaluation of the treating physician's opinion, she wrote:

In evaluating the medical evidence of record, the testimony of a treating physician is ordinarily preferred over that of a physician retained solely for litigation purposes. *Harris v. Department of Employment Services*, 746 A.2d 297, 302 (D.C. 2000); *Stewart v. Department of Employment Services*, 606 A.2d 1350, 1353 (D.C. 1992). It must be noted that claimant has essentially been given a second opportunity to establish his entitlement to benefits. Following the formal hearing, the undersigned determined that he had not met his burden of proof as he had not proffered a rating to this left foot. Instead of denying his claim for PPD [permanent partial disability] benefits outright, claimant was afforded another opportunity to return to his treating physician to obtain the impairment rating to the PROPER body part, i.e., the left foot. As a result, Dr. DiLallo's blatant error cannot be overlooked and his opinion cannot be afforded more weight than Dr. Farber's who did provide a rating of the correct body part.

² The statutory provisions regarding motions to re-open the record while a matter is pending agency review were eliminated with the repeal of D.C. Code § 32-1522 (2), which was replaced by § 32-1522 (2A), the provision creating the CRB, which contains no provisions regarding such motions.

Notwithstanding this preference for the testimony of a treating physician over that of a physician hired to evaluate a workers' compensation claim, an administrative law judge may reject the testimony of the treating physician and credit the opinion of another physician when there is conflicting evidence. In doing so, the fact-finder must give reasons for rejecting the testimony of the treating physician. *Canlas v. Department of Employment Services*, 723 A.2d 1210, 1211 – 12 (D.C.1995). In the instant matter, the treating physician's disregard for his past treatment records especially his most recent permanent impairment rating *to the left lower extremity* and his repeated reference to the wrong body part warrants disregard for his opinion in favor of that of the examining physician.

Supplemental Compensation Order, pages 3 – 4. Every aspect of the ALJs recitation of fact concerning the evaluation by Dr. DiLallo is supported by the record, and none is challenged by Petitioner in this appeal. Petitioner's sole contention before us appears to be that the errors recited by the ALJ are so insignificant as to have no bearing upon the level of credence that an ALJ could give to the opinion of the treating physician.

We disagree. Despite the fact that there may be no real question as to whether the 40% rating was meant to be to the left foot as opposed to the right foot, we do not take the ALJ in this matter to have rejected the opinion because the doctor actually examined and evaluated the wrong foot and ankle in preparing his supplemental report. Rather, we view this as a case where the ALJ considered that the repeated inattentiveness of the physician to the details of the case, including twice referencing the wrong foot or ankle in the same report, and failing apparently to review his own treatment records (which refer to the correct foot) in the process of rendering the evaluation, seriously called into question the quality of the opinion. This, coupled with the specific strengths that the ALJ identified in the IME report (it's being consistent with the fact of an unrestricted return to work for three years before retiring, and Petitioner's testimony that he had no trouble with regular on the job or off the job walking, and having the advantage of actually referring to the correct body part) made acceptance of the IME preferable to the ALJ. We discern no error in this.

CONCLUSION

The Supplemental Compensation Order of May 31, 2006 is supported by substantial evidence in the record and is in accordance with the law.

ORDER

The Supplemental Compensation Order of May 31, 2006 is hereby affirmed.

FOR THE COMPENSATION REVIEW BOARD:

JEFFREY P. RUSSELL
Administrative Appeals Judge

August 9, 2006
DATE