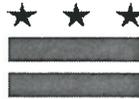


GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 15-176

**KIMBERLY TOMLIN,
Claimant–Petitioner**

v.

**DISTRICT OF COLUMBIA PUBLIC SCHOOLS,
Employer–Respondent**

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2016 APR 11 AM 10 04

Appeal from a October 5, 2015 Compensation Order
by Administrative Law Judge Fred D. Carney, Jr.
AHD No. PBL 12-013A, DCP No. 30080945683-0001

(Decided April 11, 2016)

Krista N. DeSmyter for Claimant
Andrea G. Comentale for Employer

Before LINDA F. JORY, HEATHER C. LESLIE, *Administrative Appeals Judges* and LAWRENCE D. TARR, *Chief Administrative Appeals Judge*.

LINDA F. JORY for the Compensation Review Board.

DECISION AND REMAND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

Claimant worked for employer as a dedicated aide. On September 4, 2008, Claimant tripped over a cord and fell, causing her knees to hit a wall and the back of her head to strike a concrete floor. On October 7, 2008, Claimant’s claim for concussion with strains and bruising of the cervical/lumbar spine and left buttock and strain of the left shoulder and right knee was accepted by the Office of Risk Management/Public Sector Workers’ Compensation Program (PSWCP).

X-rays of the cervical spine did not reveal disc herniation on September 4, 2008. However on December 29, 2008 an MRI revealed a herniated disk at the C4-C5 level which slightly impinged on the ventral aspect of the spinal cord. On October 6, 2010, Dr. Richard M. Restak, a neurologist examined Claimant and found decreased sensation of the upper right extremity and decreased vibratory sense at the ankles. On December 17, 2010, another neurologist, Dr. Michael Batipps diagnosed posttraumatic cervical disc herniation and posttraumatic right rotator cuff tear.

As arranged by Employer, Claimant was examined by Dr. Louis Levitt, an orthopedic surgeon on May 6, 2014. On August 7, 2014, PSWCP issued a NOD terminating Claimant's compensation and medical benefits, based on a report of Dr. Levitt that stated Claimant could return to work.

The parties proceeded to a formal hearing on November 25, 2014. In a Compensation Order (CO) dated October 5, 2015, an administrative law judge (ALJ) denied Claimant's claim for relief as he determined the Administrative Hearings Division (AHD) lacked jurisdiction to adjudicate the claim.

Claimant appeals the CO, asserting it is not in accordance with the law. Employer requests the Compensation Review Board (CRB) affirm the Compensation Order.

ISSUE ON APPEAL

Whether AHD's determination that it lacked jurisdiction to decide the issue of Employer's termination of Claimant's benefits is in accordance with the law.

ANALYSIS¹

Claimant asserts:

Here, the ALJ erred as a matter of law in determining that the administrative court lacked jurisdiction over her claim for temporary total disability benefits where her disabling condition is causally related to her claimed body parts. She continues to need treatment and suffers from symptoms and physical impairment for her concussion, one of her claimed injuries. *See* CE 1 at 8-12. She continues to need treatment and suffers from symptoms and physical impairment for her cervical spine, one of her claimed body parts. *See* CE 1 at 3, 5. She continues to need treatment and suffers from symptoms and physical impairment for her lumbar spine, one of her claimed body parts. *See* CE 1 at 3, 5. She continues to need treatment and suffers from symptoms and physical impairment for her shoulder, one of her claimed body parts. *See* CE 1 at 3, 5. She continues to need treatment and suffers from symptoms and physical impairment for her knee, one of her

¹ The scope of review by the Compensation Review Board (CRB) and this Review Panel (hereafter, the Panel) as established by the District of Columbia Comprehensive Merit Personnel Act of 1978, as amended D. C. Code § 1-623.0, *et seq.*, (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. D. C. Code § 1-623.28(a). "Substantial evidence", as defined by the District of Columbia Court of Appeals (DCCA), is such evidence as a reasonable person might accept to support a particular conclusion. *Marriott Int'l. v. DOES* 834 A.2d 882 (D.C. 2003) (*Marriott*). Consistent with this scope of review, the CRB and this panel are bound 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.

claimed body parts. See CE 1 at 3, 6-7, 13. There is no legal reason why AHD did not have jurisdiction to issue a decision as to whether or not Ms. Tomlin remains disabled due to the concussion and due to the injuries to her cervical spine, her lumbar spine, her left shoulder, and her right knee when these body parts were part of her initial claim. *Ashton [infra]* does not apply to Ms. Tomlin's pending claim. Ms. Tomlin requested a continuation of her temporary total disability benefits based, at least in part, to the continued disability caused by the injured body parts that were claim (sic) and initially accepted by the Employer.

Claimant's Brief at 4, 5.

In support of its position that AHD does not have jurisdiction with regard to Claimant's claim Employer asserts:

Regarding the cervical spine injury, the accepted injury to the cervical spine was strain and bruising only. Employer-Respondent presented unrefuted medical records showing that any accepted strain and bruising to the cervical spine has resolved. EE 1. While Claimant-Petitioner continues to complain of cervical pain, her ongoing cervical complaints have been related to a herniated disc and/or an impinged nerve in her neck. CE 1-4; CO 4. However, neither of those conditions was accepted by the PSWCP. EE 7.

Regarding the lumbar spine injury, again, the accepted injury to the lumbar spine was strain and bruising only. Employer-Respondent presented unrefuted medical records showing that any accepted strain and bruising to the lumbar spine has resolved. EE 1. While Claimant-Petitioner continues to complain of lumbar pain, there are no diagnostic tests or objective measures of pathology to support her continued complaints as a result of the September 4, 2008 fall. EE 1 & 6; CE 4 at 124-135, 145-150.

As for Claimant-Petitioner's shoulder, the accepted injury was a strain of the left shoulder. While her most recent Kaiser Permanente medical records reflect "shoulder region pain" and aggravation of . . . shoulder condition", these records do not reflect which shoulder is allegedly still causing Claimant-Petitioner pain. CE 1 at 3, 5. Additionally, a review of all of the submitted medical records reveals that Claimant-Petitioner's primary complaints of shoulder pain since the 2008 injury have involved her right shoulder, a body part that was not accepted. CE 1-4; EE 7. Additionally, the 2010 diagnosed rotator cuff tear that Dr. Batipps causally related to the 2008 fall is also to Claimant-Petitioner's right shoulder, a body apart that was not accepted. *Id.*

Finally the accepted knee injury resulting from Claimant-Petitioner's 2008 fall was for a strain of the right knee. Again, while her most recent Kaiser Permanente records reflect treatment for "arthritis of knee" and "osteoarthritis of bilateral knees", these records clearly reflect that in 2014 Claimant-Petitioner was

primarily complaining of left knee pain and was treated with an injection in the left knee. CE 1 at 3, 6-7, 15. The left knee is not an accepted injury. EE 7.

Employer's Brief at 4-6.

We are mindful that AHD only has jurisdiction over what PSWCP denied, not all that was claimed as injured. We have recently taken guidance from an unpublished DCCA memorandum opinion on this issue. The DCCA held that AHD could not exercise jurisdiction over a claim for an injury for which a claimant has not filed a specific claim, and for which a specific denial has not been issued by the PSWCP. Despite being an unpublished Memorandum Opinion and Order, it is instructive of the court's views, and we adopt those views on this subject. *D.C. Housing Authority v. DOES*, No. 12-AA-1824, Mem. Op. & J. (D.C. March 31, 2014) (*Jackson*). See also *Reyes v. D.C. Dept. of Mental Health*, CRB No. 14-158, (May 13, 2015) (*Reyes*); *Powell v. OSSE*, CRB No. 15-165 (March 8, 2016) (*Powell*).

However, we do not agree that AHD lacks jurisdiction to hear the instant matter because the NOD stated it was accepting a strain only to the cervical and lumbar areas and the medical evidence has demonstrated a cervical disc herniation. Acceptance of an injury to the cervical area as a body part is sufficient to vest AHD with jurisdiction over the NOD which terminated Claimant's benefits. As we have stated before, a subsequent diagnostic test taken after acceptance of the injury by the PSWCP, demonstrating the injury is more severe than originally thought, does not render it a new or different injury See *Glover v. D. C. Public Schools*, CRB No. 15-127 (January 15, 2016).

We further note that, as Claimant points out, the evidence of record demonstrates Claimant continues to treat for headaches which she relates to the physicians at Kaiser Permanente to the concussion she sustained on September 4, 2008. We agree with Employer that some of the injuries, i.e., right shoulder, left knee, Claimant recently complained of were not to body parts accepted in the original NOD, which we note has not been made part of this record. We do not agree, however, that Employer's mere assertion that Claimant's cervical strain and concussion resolved precludes the medical causal relationship issue from being adjudicated by AHD.

Neither *Jackson*, *Reyes*, *Powell* or the case relied upon by the ALJ, *Ashton v. D.C. Dep't of Motor Vehicles*, CRB No. 10-193 (Jul 7, 2011) involve a body part that was actually accepted as in the instant matter, and these decisions do not support of the ALJ's conclusion AHD lacked jurisdiction, therefore we cannot conclude the ALJ's denial is in accordance with the law.

CONCLUSION AND ORDER

The conclusion of the October 5, 2015 Compensation Order that AHD lacks jurisdiction to rule on Claimant's claim for relief is not in accordance with the law and is therefore VACATED. This matter is REMANDED to AHD to conduct a Formal Hearing to determine if Claimant remains unable to return to work due to the injuries to her cervical and lumbar spine and the concussion she sustained on September 4, 2008, consistent with the prevailing case law in *Mahoney v. D.C. Public Schools*, CRB No. 14-067 (November 12, 2014).

So ordered.