

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 15-105

**LASHARN EASLEY,
Claimant-Respondent,**

v.

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

Appeal from a May 29, 2015 Compensation Order by
Administrative Law Judge Amelia G. Govan
AHD No. 12-138A, OWC No. 681987

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SERVICES
COMPENSATION REVIEW
BOARD
2015 NOV 4 AM 9 20

(Decided November 4, 2015)

Matthew J. Peffer for Claimant
John P. Rufe 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

LaSharn Easley (Claimant) was employed as a Special Police Officer for Allied Barton Security (Employer). On July 7, 2011, Claimant slipped and fell, injuring her neck and back. A cervical MRI ordered by treating physician, Joel D. Fechter, revealed herniated discs at four levels of Claimant's cervical spinal column, all of which were pressing on her spinal cord/theal sac. Employer scheduled Claimant for an independent medical evaluation (IME) with Dr. Mark Rosenthal on October 6, 2011. Claimant's condition was found to have reached maximum medical improvement by July 31, 2013 by Dr. Joel Fechter, who provided schedule permanent partial disability (PPD) ratings of 19% of the right leg, 18% of the left leg and 16% of the left arm. This is mentioned after next sentence.

Claimant injured her chest and right knee in a motor vehicle accident on October 17, 2013. Claimant has worked on a regular basis, with another security company since March of 2014.

A full evidentiary hearing occurred on April 22, 2015.

Claimant sought PPD awards of 19% of the right leg, 18% of the left leg and 16% of the left arm extremity. A Compensation Order (CO) issued on May 29, 2015 which award Claimant's claim for relief.

Employer timely appealed. Employer asserts that the Administrative Law Judge (ALJ) did not consider substantial evidence relevant to the determination of the issue of PPD and did not address any of the arguments set forth by Employer.

Claimant responded asserting the CO is in accordance with the applicable law and should be affirmed. Alternatively, Claimant's asserts that Employer has improperly asked the CRB to consider the medical causal relationship issue which was not before the ALJ.

ISSUE ON APPEAL

Is the April 30, 2015 Compensation Order supported by substantial evidence and in accordance with the law?

ANALYSIS¹

Is the ALJ's conclusion that Claimant sustained a permanent partial impairment of 19% of the right leg 18% of the left leg and 16% of the left arm extremity supported by substantial evidence?

Employer did not specifically identify which argument the ALJ disregarded. The Panel further notes that while Counsel for Employer was provided the opportunity to submit its closing argument in writing in lieu of orally at the formal hearing, statements made in a closing argument are not evidence on the merits of a case. They are merely a presentation of evidence in a light most favorable to a party's position. The ALJ's failure to consider the Employer's closing argument is harmless error. *See Joyner v. General Maintenance Service*, Dir. Dkt. No., 99-66, OHA No. 98-355, OWC No. 299992 (March 2001).

However, we do find merit in Employer's assertion that the ALJ's findings of fact with regard to the motor vehicle accident of October 2013 are not supported by substantial evidence. While we

¹ The scope of review by the Compensation Review Board (CRB) is generally limited to making a determination whether the factual findings of the Compensation Order are based on substantial evidence in the record, and whether the legal conclusions drawn from those facts are in accordance with applicable law. D.C. Code § 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. DOES* 834 A.2d 882 (D.C. App. 2003). 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

acknowledge that the motor vehicle accident occurred subsequent to the PPD evaluation, the ALJ relied on Claimant's testimony of her current symptoms i.e., persistent pain, numbness and tingling in the affected extremities without specifying the etiology of those symptoms, in awarding the claim. CO at 4.

Employer asserts:

Claimant testified at Hearing to multiple complaints which were not documented by Dr. Fechter in July 2013. Their alleged existence *after* the motor vehicle accident of October 2013 raises a substantial question as to the source of those complaints. These include legs giving out, limping and utilizing a cane. Claimant had been working full time without medical treatment for nearly a year prior to the motor vehicle accident.

Claimant testified at Hearing that she did not injure her neck or back in the motor vehicle accident. However, substantial evidence in the record flatly contradicts this testimony. Claimant herself claimed injuries to her neck and back in the motor vehicle accident in her handwritten application for benefits. Claimant's treating physician for the motor vehicle accident, Dr. Pour, confirmed such injuries and diagnoses in his written reports.

Contrary to the administrative law judge's conclusion of radiculopathy in the left upper extremity and lower extremities, this is, upon the evidence not mentioned or considered, much less clear than stated. Indeed the radiculopathy determination by Dr. Fechter to the left arm was based entirely on subjective complaints by Claimant, which is in addition related to credibility also at issue in other portions of Claimant's testimony. As to the legs, evidence in the record not mentioned or considered included no finding of radiculopathy on clinical straight leg raise examination.

Employer's Brief at 2, 3.

The ALJ initially found;

Claimant's testimony regarding the severity of her post-injury symptoms and the effect of those symptoms on her physical capabilities to be credible.

CO at 2. With regard to the post-injury motor vehicle accident, the ALJ found:

Claimant was involved in a motor vehicle accident on October 17, 2013. In that accident, she injured her chest and right knee.

CO at 3.

A review of the evidence presented to the ALJ supports Employer's assertions. ER 1 includes "Claimant's Application for Benefit – Personal Injury Protection" which includes Claimant

description of her injuries as: “chest hit steering wheel hard, chest pain, right knee cap fracture, bruises, back and neck pain”. ER 1 at 2. Also included in ER 1 are the reports of Dr. E. Masoud Pour who treated Claimant after the MVA. Dr. Pour reported on October 28, 2013:

The patient is complaining about neck pan (sic), upper back pain, chest and rib pain, knee pain, bruise in the left knee, and swelling as a result of holding the steering (sic) too tight at the time of accident. she states. (sic)

ER 1 at 4. Dr. Pour’s Impression was:

1. Acute cervical/strain/cervical radiculopathy.
2. Acute upper back strain.
3. Contusion of the chest and sternum.
4. Contusion of left knee with ecchymosis.
5. Internal derangement, right knee.
6. Sprain/strain, hands.

ER 1 at 5.

Given Dr. Pour’s stated “Impression”, the ALJ’s finding of fact that Claimant injured only her chest and right knee in MVA is reversible error. We further note the record contains Claimant’s lumbar MRI wherein the Impression is “The lumbar spine appears unremarkable”. We cannot ascertain how Dr. Fechter could conclude that Claimant has PPD to either the left or the right leg as the record does not support any permanent injury to the lower extremities.

In a contested case, in order to conform to the requirements of the District of Columbia Administrative Procedure Act, D.C. Code § 2-501 (APA) an agency's decision must (1) state findings of fact on each material issue in contest, (2) those factual findings must be supported by substantial evidence, and (3) the conclusions of law must flow rationally from those factual findings. The failure to satisfy these requirements renders an agency decision unsupported by substantial evidence. *Perkins v. DOES*, 482 A.2d 401 (D.C. 1984).

As the ALJ’s findings of fact are not supported by substantial evidence we cannot make a determination that the ALJ’s conclusions have followed rationally from the findings of facts. In so concluding, we are mindful that we 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, supra* at 885. However, given the mischaracterization of the evidence by the ALJ we cannot conclude the CO is supported by substantial evidence and must reverse the ALJ’s PPD award.

On remand, the ALJ is reminded that the DCCA issued a decision that while not limiting the ALJ’s discretion in determining the amount of PPD awards, has cautioned that in making a legal determination of disability, the ALJ should not arrive at an arbitrary amount but should come to a conclusion based on a complex of factors, taking into account physical impairment and potential for wage loss. *See Jones v. DOES*, 41 A.3d 1219 (D.C. 2012) (*Jones*) *Negussie v.*

DOES, 915 A.2d 391 (D.C. 2007) (*Negussie*); *Bowles v. DOES*, No. 14-561 (D.C. August 6, 2015).

CONCLUSION AND ORDER

The ALJ's conclusion that Claimant's July 7, 2011 injury to her neck and back has resulted in permanent partial impairment of 19% of the right leg, 18% of the left leg and 16% of the left arm is not supported by substantial evidence and is accordingly VACATED. The matter is **REMANDED** for further fact finding and analysis consistent with this decision.

So ordered.