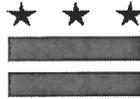


GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 15-068

**MARIA RODRIGUEZ,
Claimant-Petitioner,**

v.

**GRAND HYATT HOTELS AND GALLAGHER BASSETT SERVICES,
Employer/Third-Party Administrator-Respondent.**

Appeal from a March 26, 2015 Compensation Order by
Administrative Law Judge Donna J. Henderson
AHD No. 14-176, OWC No. 675848

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2015 JUL 31 AM 9 00

(Decided: July 31, 2015)

David J. Kapson for Claimant
Zachary L. Erwin for Employer

Before: JEFFREY P. RUSSELL, LINDA F. JORY, and HEATHER C. LESLIE, *Administrative Appeals Judges*

JEFFREY P. RUSSELL for the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

Claimant was injured on November 11, 2010 when she fell at work while employed in Employer's hotel kitchen. Employer made voluntary payments of temporary total disability and provided medical care November 12, 2010 through December 28, 2010 at which time she returned to work. She was treated by physicians in the office of Drs. Philips and Green, to whom she complained of upper, middle and low back pain, bilateral knee pain, and buttock pain. During the course of that treatment, Claimant underwent MRIs to her right knee, left hip, cervical spine and lumbar spine.

On June 12, 2013 she was evaluated by Dr. Joel Fechter at her own request for the purpose of an independent medical evaluation (IME). Dr. Fechter authored a report in which he opined that Claimant had sustained permanent partial impairments of 18% to the right leg and 14% to the left leg.

On December 16, 2013, an IME was performed by Dr. Louis Levitt at Employer's request. Dr. Levitt authored a report in which he opined that Claimant had sustained 0% impairments to both legs, having sustained a muscular strain which had completely resolved.

Claimant sought awards under the schedule of 18% permanent partial disability to the right leg and 14% permanent partial disability to the left leg at a formal hearing conducted before Administrative Law Judge (ALJ) David L. Boddie on May 6, 2014. ALJ Boddie left the Department of Employment Services (DOES) without issuing a Compensation Order, and the matter was set for a second hearing before a different ALJ, Donna J. Henderson, which occurred on January 22, 2015. The same documentary evidence, plus the transcript of the first hearing, were entered into evidence at the second hearing. Claimant also testified at the second hearing.

On March 26, 2015, ALJ Henderson issued a Compensation Order denying Claimant's requests for schedule awards. Claimant filed an Application for Review and Memorandum in support thereof (Claimant's Brief) with the Compensation Review Board (CRB), to which Employer filed an Opposition and Memorandum in support thereof (Employer's Brief). Claimant argues that the Compensation Order is unsupported by substantial evidence and should be reversed and remanded for further findings and an award. Employer argues that the Compensation Order is supported by substantial evidence, and should be affirmed.

Because the findings concerning the degree of disability are supported by substantial evidence, we affirm the Compensation Order.

ANALYSIS

The scope of review by the CRB is limited to making a determination as to whether the factual findings of the appealed 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. Code § 32-1521.01(d)(1)(A). Consistent with this standard of review, the CRB is constrained to uphold a Compensation Order 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 different conclusion. *Marriott International v. DOES*, 834 A.2d 882, 885 (D.C. 2003).

Claimant argues in this appeal that the finding that Claimant failed to meet her burden of proof establishing that she suffered a permanent partial disability to either leg is not supported by substantial evidence. In articulating her argument, Claimant recites her version and interpretation of the evidence she presented, and attacks the persuasiveness of Employer's evidence. The only specific alleged flaw identified by Claimant in Employer's evidence, however, is the assertion that:

Dr. Levitt appears to mischaracterize the findings on the MRI scans, especially with respect to the lumbar spine in formulating his opinion. According to Dr. Levitt, the MRI of the lumbar spine shows a small disk protrusion at L5-S1. EE 1. The radiologist report for the lumbar spine MRI describes the condition at that level as a disk herniation, not a protrusion. CE-4, pp. 6 – 7. Dr. Levitt states in his

“Assessment” section of the IME that Ms. Rodriguez [sic] the diagnostic testing failed to reveal any significant structural injury to the spine and does not manifest evidence of an acute lumbar radiculopathy. This is not an accurate representation of the findings demonstrated on MRI and Dr. Levitt does nothing to explain how diagnostic test results such as these yield a calculation of 0% permanent impairment.

Claimant’s Brief, p. 8.

In EE 1, Dr. Levitt’s report, Dr. Levitt wrote:

An MRI of the lumbar spine showed a small disc protrusion at L5-S1 with little impact on the spinal cord or nerve roots.

In CE 4, radiology report to which Claimant refers, the radiologist wrote under “Findings”, regarding the L5-S1 disk:

At L5/S1: There is a mild bilateral facet arthrosis and a disc bulge with superimposed minimal left paracentral extrusion-type disc herniation. No central canal foraminal narrowing is identified.

Under “Conclusion”, the radiologist wrote:

1. Multilevel lumbar spondylosis as detailed above, most significantly including a small paracentral L5/S1 extrusion type herniation.

Claimant is correct that the radiologist at one point describes what he interpreted as a “herniation”. However, he also describes the same condition as “a disc bulge”. In other words, the only difference between Dr. Levitt’s description and the radiologist’s is that while they both referred to the MRI as showing “a disc bulge”, the radiologist uses two terms for the condition, and Dr. Levitt only uses one, and the one he uses is the same as one of the two used by the radiologist.

Further, the term “protrusion” and “herniation” can refer to the same thing. See, DORLAND’S ILLUSTRATED MEDICAL DICTIONARY, 29TH ED., Douglas M. Anderson, Chief Lexicographer, W.B. Saunders Pub. Co. (2000), p. 526: “protruded d[isk]:herniation of intervertebral disk”

Therefore, we do not agree that there is any basis for concluding that there has been a “misreading” of the MRI report by Dr. Levitt.

Regarding the argument that Dr. Levitt “does nothing to explain how diagnostic test results such as these yield a calculation of 0% permanent impairment”, we will make three points.

First, Dr. Levitt does explain what medical significance this finding has when he includes that it has “little impact on the spinal cord or nerve roots.”

Second, Dr. Levitt's opinion does not purport to be based solely upon this finding in the MRI. Rather, his report details his physical findings on examining Claimant and his review of her medical records. All these appear to have been taken into account by Dr. Levitt in rendering his opinion.

Third, the medical evaluations in this case are each from non-treating IME physicians, and neither is entitled to any preference over the other. Thus, the ALJ's task was to assess the weight of each opinion, and it is not our role to re-weigh the evidence. The ALJ chose to accept the opinion of Dr. Levitt and that opinion constitutes substantial evidence supporting the ALJ's conclusion that Claimant suffers no compensable permanent partial disability to either leg.

The only other argument presented by Claimant in this appeal is that the ALJ's findings concerning Claimant's lack of credibility should be rejected because the ALJ's characterization of Claimant's testimony and demeanor as "evasive" is unfounded because Claimant testified through the use of an interpreter.

We must reject this argument as well. The assessment of a witness's credibility is something to which the fact finder is owed great deference. The ALJ identified and described what she viewed as incomplete responses, evasive responses, and conflicting responses.

We have reviewed the transcript portions to which the ALJ directs attention in the Compensation Order. While we may not have viewed the transcript from the first hearing to be as inconsistent as did the ALJ, we do accept her assessment particularly regarding the transcripts of the proceedings before her. Given the deference accorded to the fact finder on credibility issues, we will not substitute our judgment for that of the ALJ. The ability to assess appearance and demeanor are important reasons for according much deference to the person who heard the evidence, even if they are not the only reasons to do so. *See Dell v. DOES*, 499 A.2d 102 (D.C. 1985).

There may be substantial evidence in the record to support a conclusion other than the one reached by the ALJ; however, so long as the ALJ's findings of fact are supported by substantial evidence and the ALJ's conclusions of law rationally flow from those facts, "the CRB is without authority to re-weigh the evidence and reach a different, albeit plausible, result." *See Alston v. First Transit, Inc.*, CRB No. 14-083, AHD No. 13-248, OWC No. 691717 (October 10, 2014).

Having considered and rejected the only two arguments made by Claimant in this appeal, and in light of the medical report of Dr. Levitt being substantial evidence in support of the denial of an award under the schedule, we affirm the Compensation Order.¹

¹ It has not escaped our notice that the ALJ's concluding sentence in the "Findings of Fact" section of the Compensation Order appears to deal with an issue that was not before the ALJ, causal relationship. However, the matter was not raised by Claimant in this appeal, and Employer has not addressed it in their response. Accordingly we do not consider it. "Issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived." *Enders v. D.C.*, 4 A.3d 457, 471 n. 21 (D.C. 2010) quoting *McFarland v. George Washington University*, 935 A.2d 337, 351 (D.C. 2007); *see also Bardoff v. U.S.*, 628 A.2d 86, 90 n.8 (D.C. 1993) (arguments raised but not argued in briefing are treated as waived). Failure to raise an issue at all should be treated no differently. We express no view as to whether the inclusion of such a finding in this instance was error, or if erroneous, whether it was harmless in light of the other evidence in the record.

CONCLUSION AND ORDER

The finding that Claimant has not sustained a permanent partial disability to either leg in the stipulated work injury is supported by substantial evidence and is affirmed.

So Ordered.