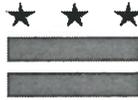


GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



ODIE A. DONALD II
ACTING DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 16-133

MARSHA KARIM,
Claimant-Respondent/Cross-Petitioner,

v.

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,
Employer-Petitioner/Cross-Respondent.

Appeal from a September 9, 2016 Compensation Order
by Administrative Law Judge Gwenlynn D'Souza
AHD No. PBL 16-021, DCP No. 0468-WC-09-0501243

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2017 FEB 3 PM 10 35

(Decided February 3, 2017)

Robert Taylor for Claimant
Milena Mikailova for Employer

Before HEATHER C. LESLIE, LINDA F. JORY, and GENNET PURCELL, *Administrative Appeals Judges.*

HEATHER C. LESLIE for the Compensation Review Board.

DECISION AND PARTIAL REMAND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

Claimant was employed as a teacher for Employer. Claimant injured her right shoulder, neck and low back on August 21, 2009 in an automobile accident. On October 1, 2009, Employer accepted Claimant's claim for disability compensation under the District of Columbia Comprehensive Merit Personnel Act, D.C. Code § 1-623.01, *et seq.* (the "Act").

Claimant was diagnosed with a torn rotator cuff and underwent extensive treatment, including an MRI arthrogram, physical therapy, medication, and surgery to her right shoulder. Claimant has also sought and received treatment for her neck and back. Dr. Harmid Quraishi determined on April 26, 2012, Claimant was no longer capable of performing the duties of a teacher.

On April 25, 2014, Dr. Jeffrey Sabloff, who had been treating Claimant since the 2009 injury, opined Claimant suffered from a 50% permanent partial impairment to her right upper extremity “based on the fact that she has an untreated rotator cuff tear with adhesive capsulitis, as well as significant pain and lack of endurance.” Claimant exhibit 27.

On December 29, 2015, Employer sent Claimant for an independent medical evaluation (“IME”) with Dr. Stanley Rothschild. Dr. Rothschild, after reviewing the history of the injury, treatment and then performing a physical examination, opined Claimant suffered from a 14% permanent partial impairment to the right upper extremity due to the August 21, 2009 injury.

On June 14, 2016, Dr. Sabloff opined Claimant suffered from a 45% permanent partial impairment to her right upper extremity. Dr. Sabloff also attributed an additional 10% impairment to her right upper extremity due to cervical radiculopathy.

On March 23, 2016, the Program issued an “Amended Notice of Determination” (“NOD”) terminating temporary total disability benefits and awarding Claimant 14% permanent partial disability to the right upper extremity based upon Dr. Rothschild rating.

The Claimant appealed and requested a Formal Hearing, pursuant to the instructions of the program contained in the NOD. A full evidentiary hearing occurred on June 22, 2016. Claimant sought an award of 50% permanent partial disability benefits to the right upper extremity, plus interest. As outlined in the Compensation Order (“CO”), the issues to be adjudicated were:

1. Whether this administrative court has jurisdiction over a claim for permanent partial disability benefits after the issuance of a notice of decision?
2. Whether the disability to claimant’s upper right extremity is casually related to August 21, 2009 right shoulder injury?
3. What is the nature and extent of any disability to Claimant’s upper right extremity?
4. Whether Claimant is entitled to interest?

CO at 2.

A CO was issued on September 9, 2016. Claimant was awarded a 27% permanent partial disability to her right upper extremity plus interest from October 20, 2014.

Employer appealed. Employer argues first, the Department of Employment Services (“DOES”) did not have jurisdiction to adjudicate the matters decided in the March 23, 2016 NOD. Second, Employer argues the Administrative Law Judge (“ALJ”) did not sufficiently explain the basis for the permanent partial disability (“PPD”) award. Third, Employer argues the ALJ’s conclusion that Claimant was entitled to 4% compound interest is not in accordance with the applicable law.

Employer also filed a Motion to Stay the Compensation Order, with Claimant opposing.

Claimant opposed Employer’s appeal and filed a cross-application for review on October 26, 2016. In opposing Employer’s appeal, Claimant argues DOES has jurisdiction over the March

23, 2016 NOD; the ALJ sufficiently explained the award of PPD to the right upper extremity, and; Claimant conceded that pursuant to the CRB's recent decision in *Harrison v. D.C. Department of Corrections*, CRB No. 16-084 (October 20, 2016) ("*Harrison*"), compound interest is not in accordance with the law. Claimant argued, however, that the CRB was not constrained to wait for an enactment of legislation to award compound rather than simple interest. Claimant urges this panel to reject the rationale enunciated in *Harrison* that the Act does not allow compound interest.

Claimant's cross-appeal argues that the ALJ erred in determining Claimant's cervical radiculopathy is not related to the work injury and the ALJ erred in failing to accept the treating physician's ratings.

ANALYSIS¹

We note that recently, the CRB issued *Harrison* which addresses Employer's first and third arguments. Regarding Employer's first argument, *Harrison* dispelled Employer's assertion that,

Chapter XXIII of the District of Columbia Government Comprehensive Merit Personnel Act confers jurisdiction on DOES over three distinct types of decisions; (1) utilization review; (2) initial acceptances or denials of claims for workers' compensation benefits; and (3) modifications of compensation awards based on changed condition. *See* D.C. Official Code § 1-623.01 *et seq.*

Employer's brief at 6.

In a very thorough and lengthy analysis, the CRB in *Harrison* rejected the above argument. We need not reiterate the reasoning here, but point the parties to *Harrison*. Employer's first argument is rejected, pursuant to *Harrison*.

Turning next to Employer's third argument and Claimant's argument that the CRB does have authority presently to award compound interest, we again point the parties to *Harrison*. *Harrison* addressed whether the ALJ's finding that Claimant is entitled to 4% compound interest on accrued benefits is not in accordance with the applicable law. After analyzing *Rastall v. CSX Transportation*, 697 A.2d 46 (D.C. 1997), *Burke v. Groover Christie & Merritt*, 26 A.3d 292,

¹ The scope of review by the Compensation Review Board ("CRB") and this Review Panel as established by the District of Columbia Comprehensive Merit Personnel Act of 1978, as amended, D.C. Code § 1-623.01, *et. seq.*, 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, supra*, 834 A.2d at 885.

301 & n. 11 (D.C. 2011) and *Clark v. Verizon Commc'ns.*, OHA No. 92-793B, Dir. Dkt. 03-92 (February 10, 2004), the CRB concluded:

It has been the announced, expressed and applied interpretation of this agency at least since 2004 that the interest payable upon accrued benefits are subject to interest calculated on a simple and not a compound basis.

Harrison at 19.

As such, we remand the case with instructions to the ALJ to enter an award using simple interest.

Employer next argues the ALJ failed to explain her decision to increase Claimant's PPD award relying on *Jones v. DOES*, 41 A.3d 1219 (D.C. 2012).² Employer specifically takes issue with the increase in the award for 2% for pain, 4% for weakness, 2% for loss of endurance, and 2% for loss of function.³ Employer argues that as neither Dr. Sabloff nor Dr. Rothschild rendered any impairment rating based on these factors, "it is unclear what evidence the ALJ relied upon when making her assignments." Employer brief at 10.

In addressing Claimant's entitlement to an award, the ALJ stated:

In addition to the impairment assigned pursuant to Table 15-34, the undersigned assigns an impairment of 2% for pain, 4% for weakness, 2% for loss of endurance, and 2% for loss of function, particularly when combining abduction and internal or external rotation. These factors relate to a significant loss of industrial use, particularly the Claimant's ability to lift, carry, push or pull when using her arm.

CO at 10.

We must disagree with the Employer. The ALJ noted specifically that the additional amounts awarded took into consideration abduction and internal or external rotation. A review of Dr. Rothschild IME shows a detailed analysis of abduction, as well as internal and external rotation and included the amount attributable to abduction and internal or external rotation. While we are cognizant that Dr. Rothschild included these numbers in his permanent impairment rating, they are certainly a specific basis on which to increase the permanent partial disability rating and to

² Employer does not appeal the ALJ's determination that the factors are relevant to the award as they related to "a significant loss of industrial use, particularly the Claimant's ability to lift, carry, push or pull when using her arm." CO at 10. See *Lawson v. M.C. Dean*, 14-056 (R) (January 11, 2017) ("*Lawson*"). In *Lawson*, the CRB concluded "use of one or more of the 5 factors to deviate from the medical impairment found requires an identifiable nexus between the factor or factors and a claimant's wage-earning capacity. Stated another way, when determining a schedule award, it is improper to consider any of the five factors in the abstract but that any of the five factors may be relevant to the award if such factor is shown to affect a claimant's earning capacity or other economic impairment." *Id.* at 15.

³ Employer did not appeal any other facet of the ALJ's award, including the ALJ's determination that Claimant is entitled to 17% permanent partial disability pursuant to Table 15-34 of the American Medical Association Guides to Permanent Impairment and the opinions of Dr. Sabloff and Dr. Rothschild.

satisfy the need for specific evidence on which to rely upon when increasing a permanent partial impairment award. We affirm the 27% permanent partial disability award to the right upper extremity.

Turning to the remaining issues raised in Claimant's cross-appeal, Claimant argues the ALJ erred in concluding she failed to prove that her cervical radiculopathy is related to the work injury. In so arguing, Claimant points this panel to several reports outlining testing and treatment relating to her cervical radiculopathy and states that payment for these treatments, "suggests that DCP^[4] had accepted the causal connection based on the same evidence submitted to ALJ D'Souza." Claimant's brief at 14. We disagree.

We have previously held that payment of medical bills related to a condition does not mean Employer accepted an injury nor does payment "suggest" acceptance. *Powell v. D.C. Office of the State Superintendent of Education*, CRB No. 15-165 (March 21, 2016). Claimant's assertion that DCP accepted her cervical radiculopathy is rejected.

When addressing the medical causation of Claimant's cervical condition, the ALJ stated:

Claimant also contends that the August 21, 2009 injury to the neck caused cervical radiculopathy, which impairs her right arm. After review of MRI results, Dr. Gordon determined that Claimant's neck condition was unrelated to the August 21, 2009 injury, and was related to obesity and underlying degenerative disease. CE 19; EE 3. While Drs. Thompson, Rothschild, and Sabloff discuss the level of permanency related to the cervical spine, none of them expressly relate the neck condition to the August 21, 2009 injury. They do not discuss how any nerve root impingement was the result of the August 21, 2009 injury. Therefore, the undersigned finds that Claimant has failed to produce evidence proving the cervical radiculopathy is related to the August 21, 2009 injury.^[5]

CO at 8.

Claimant also argues the ALJ's determination regarding the cervical condition would be highly prejudicial to Claimant's ability to continue to receive necessary medical treatment because of her cervical radiculopathy.⁶ In so arguing, Claimant does not point to any evidence, or error of law when arguing the CO is wrong and we can discern none. The ALJ's conclusion that Claimant failed in presenting evidence to support her contention the cervical radiculopathy is affirmed.

⁴ Disability Compensation Program.

⁵ Even if Claimant had proven causation of the cervical radiculopathy, the record is unclear as to what impairment rating the AMA Guides would support, what work-related limitation is a result of the cervical radiculopathy, and how a separate award related to the five factors could result for the same arm.

⁶ Claimant concedes in argument any such error is harmless regarding the determination of Claimant's entitlement to PPD.

Finally, Claimant argues that the ALJ erred in not accepting Dr. Sabloff's rating over that of Dr. Rothschild.⁷ In so arguing, Claimant points this panel to selective portions of Dr. Sabloff's rating and Dr. Rothschild's ratings. In essence, Claimant is asking this panel to reweigh the evidence in his favor, a task we cannot do. As stated above, 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, supra*.

As we have addressed Claimant and Employer's arguments, Employer's Motion to Stay is rendered moot.

CONCLUSIONS AND ORDER

The determination by the ALJ in the Compensation Order that Claimant is entitled to 4% compound interest on accrued benefits is not in accordance with the law and is **REVERSED and REMANDED**, with directions to the ALJ to enter an award using simple interest.

The Compensation Order is **AFFIRMED** in all other respects.

So ordered.

⁷ We note the ALJ properly acknowledged that the treating physician preference is no longer applicable in public sector worker's compensation cases. *District of Columbia Public Schools v. DOES*, 95 A.3d 1284 (D.C. 2014).