

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA M. MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 11-059

MICHELLE HART,
Claimant-Petitioner,

v.

GEORGE WASHINGTON UNIVERSITY and AVIZENT RISK,
Self-Insured Employer and Third Party Administrator.

Appeal of a Compensation Order Issued by
The Honorable Anand K. Verma
AHD No. 10-596, OWC No. 657712

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2011 SEP 26 PM 12 17

Michelle Y. Hart, *pro se*¹
David M. Schoenfeld, Esquire, for the Self-Insured Employer and Third Party Administrator

Before LAWRENCE D. TARR, Heather C. Leslie², and HENRY W. MCCOY, *Administrative Appeals Judges*.

LAWRENCE D. TARR, *Administrative Appeals Judge*, for the Compensation Review Board.

DECISION AND ORDER

OVERVIEW

This case is before the Compensation Review Board (CRB) on the request of Michelle Y. Hart (claimant) for review of the May 27, 2011, Compensation Order (CO) issued by an Administrative Law Judge (ALJ) in the Hearings and Adjudication section of the District of Columbia Department of Employment Services (DOES).

In that CO, the ALJ held the claimant had not proven entitlement to temporary total disability benefits from February 17, 2009, through November 24, 2010, and that she had voluntarily limited her income. We affirm.

BACKGROUND FACTS OF RECORD AND PROCEDURAL HISTORY

¹ Peter N. Njang, Esquire, represented the claimant at the formal hearing.

² Judge Heather C. Leslie is appointed by the Director of DOES as an Interim Board Member pursuant to DOES Administrative Policy Issuance No. 11-02 (June 13, 2011).

On February 17, 2009, the claimant, Michelle Y. Hart was working for The George Washington University as an "asset management assistant" having been so employed for about two years. It is not contested that on that day the claimant was injured while at work after pulling heavy equipment. The claimant completed her work shift, returned home, self-medicated, by using Epsom salts and soaking in the bathtub.

The claimant first received professional medical care from Dr. Eduardo Flores on March 11, 2009. Dr. Flores diagnosed a lumbosacral strain and found the claimant disabled from March 11 to March 17, 2009. At the next examination on April 1, 2009, Dr. Flores amended his diagnosis to lumbosacral strain and sciatic radiculopathy. Dr. Flores opined the claimant should "continue regular work" and referred the claimant for an orthopedic consultation.

Pursuant to this referral, the claimant came under the care of orthopedic surgeon Dr. Leonid Selya on April 15, 2009. Dr. Selya suspected a disc problem and recommended an MRI. Dr. Selya also advised the claimant to do light duty work, a recommendation that Dr. Flores agreed with at his April 22, 2009, examination. After a May 5, 2009, MRI showed some disc protrusion and degenerative changes, Dr. Selya stated on May 27, 2009, his belief that the claimant had a herniated nucleus pulposus at L4-5 and L5-S1. He continued to recommend light duty work for the claimant.

The claimant treated with Dr. Selya on August 12, September 9, September 16, and November 18, 2009. After the November 18, 2009, Dr. Selya reported the claimant "should be allowed to exercise the option of calling a [sic] sick due to her back condition."

The claimant did not treat with Dr. Selya again until April 14, 2010, and after that, apparently for the last time, on October 13, 2010. The note from the October 2010 examination, released the claimant to be seen "as needed" and stated the claimant "barely can" tolerate commuting to work or prolonged sitting.

The employer had the claimant examined by Dr. Louis K. Levitt for an IME on July 20, 2010. In his December 14, 2010, addendum report to his IME examination, Dr. Levitt wrote that he had reviewed the claimant's MRI and that "it is conceivable" the accident at work aggravated the claimant's pre-existing disc disease. Dr. Levitt suggested the claimant could return to work after she had a course of epidural injections and a three-week course of structured physical therapy.

Pursuant to a referral from Dr. Selya, the claimant was treated by pain management specialist, Dr. Haddis Hagos, five times between November 1, 2010, and February 3, 2011. Dr. Hagos administered a series of lumbar epidural injections.

Dr. Hagos completed a DCWC Form 12 on February 12, 2011, on which he checked the claimant will never be able to resume her regular employment and wrote "unknown" as to when the claimant could return to light duty work.

The ALJ denied the claim for temporary total benefits. Although the claimant did not seek benefits after November 24, 2010, the ALJ also held the claimant voluntarily limited her income after that date.

The claimant timely appealed.

THE STANDARD OF REVIEW

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. Substantial evidence” is relevant evidence a reasonable person might accept to support a conclusion. *Marriott International v. DOES*, 834 A.2d 882, 885 (D.C. 2003) and §32-1521.01(d) (2) (A) of Act.

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 contrary conclusion. *Marriott, supra*.

ANALYSIS

In the present claim, the claimant sought temporary total disability benefits from February 17, 2009, through November 24, 2010. The hearing transcript shows the claim was composed of two parts—a claim for disability benefits for unspecified days from February 17, 2009, through November 24, 2010, on which she called in sick and a claim for benefits for the other days.

The ALJ denied the claim because the claimant failed to prove she sustained any wage loss:

In the case, *sub judice*, the requested claim for relief is for an award of temporary total disability benefits from February 17, 2009 through November 24, 2010. Review of the adduced evidence, including claimant's testimony at the hearing, however, fails to disclose the specific dates claimant did not report to work or lost wages because of her symptomatic low back, as well as the dates when she actually worked without any loss of wages. Thus, absent clear proof of claimant's lost wages during the claimed period of her disability, a determination of total disability cannot be made.

CO at 6.

We affirm the ALJ's decision.

In our jurisdiction, an injured worker must prove she sustained a wage loss to be entitled to benefits. As the Court of Appeals stated in *Robinson v. DOES*:

Disability is an economic and not a medical concept, and any injury that does not result in loss of wage-earning capacity cannot be the foundation for a finding of disability.

824 A.2d 962, 963-964 (D.C. App. 2003) (Citation omitted).

Here, the claimant did not establish entitlement to any disability benefits because she did not establish she had a wage loss on any of the days for which benefits are sought.

Although Dr. Selya reported on November 18, 2009, the claimant “should be allowed to exercise the option of calling a [sic] sick due to her back condition,” neither the claimant’s testimony nor her documentary evidence specified the days on which she did not work because she felt she was in too much pain.³

The claimant also did not establish she sustained a wage loss on the other days for which disability benefits are sought. On these days, the claimant only was released to light duty, the employer provided appropriate light duty work at the claimant’s pre-injury wage, and the claimant worked during the entire time for which she sought benefits at her pre-injury wage.

On Review, the now *pro se* claimant identified fourteen findings of fact in the CO that she believes were incorrect or need further clarification.

We first note that the CRB must review a CO based only on the record that was produced at the formal hearing. While either party may proffer arguments to the CRB based on the evidence contained in the formal hearing record, at the review level the parties may not present new testimony or evidence to clarify previously admitted evidence.

Applying this rule to the claimant’s argument, we find all but the first, second, ninth and eleventh alleged errors seek to present additional evidence. Therefore they will not be discussed.

The claimant’s first alleged error argues that the ALJ incorrectly found at page two, paragraph two, that the claimant “continued her regular work on April 1, 2009.” The claimant asserts, “This statement is incorrect because I was in pain and had taken the whole day off, during this day I went to the doctor. This is one of the days I am seeking compensation for.”

The passage in the CO to which the claimant refers states:

In a follow up on April 1, 2009, Dr. Flores diagnosed her with lumbosacral strain with sciatic radiculopathy, substituted Tylenol for Ibuprofen for pain, continued her regular work and referred her for an orthopaedic evaluation.

The ALJ did not find, as argued by the claimant, that she did not work on April 1, 2009. Rather the ALJ found that Dr. Flores did not impose light duty restrictions or otherwise restrict the claimant from working on April 1, 2009. Indeed, the report in question stated “Continue regular work”.

The claimant’s second alleged erroneous finding of fact relates to this finding found at page 3 of the CO:

³ The ALJ also rejected the defense that the claimant must have a medical disability slip for each day. The employer has not appealed that decision.

Considering the length and severity of symptoms as well as failure of the symptomatic modalities, including epidural injections and physical therapy, Dr. Selya recommended an MRI scan of the lumbar spine and released her to return to light duty work.

The claimant argues, "This is incorrect because the first physical therapy session started in March/April 2009 (please see exhibit 1), my MRI was taken on April, 2009, and I did not start my epidural injections until November 2010."

We disagree. The ALJ's finding is consistent with the sequence of treatment stated in Dr. Selya's April 15, 2009, report in which he wrote:

Considering the duration of symptoms of more than two months, severity of pain, and failure of symptomatic modalities including injections and physical therapy, an MRI of the lumbar spine is recommended to rule out herniations.

The claimant's ninth alleged error asserts that the ALJ's statement on page 4 of the CO that Dr. Selya "did not recommend that she discontinue her regular employment."

The claimant erroneously reads the ALJ's statement as referring to Dr. Selya's December 20, 2010, report in which he wrote that the claimant "is disabled and cannot work" whenever she experiences flare-ups of back pain. As the paragraph in which the challenged statement clearly shows, the ALJ's statement on page 4 of the CO relates to Dr. Selya's October 13, 2010, office note. In that note Dr. Selya did not, as the ALJ found, remove the claimant from working.

The eleventh alleged error refers to the ALJ's statement on page 5 that "Dr. Hagos did not opine claimant was incapacitated to return to her regular employment."

The claimant correctly points out that on February 21, 2011, Dr. Hagos completed DCWC Form 12 ("Medical Report") on which he marked "No" in response to Question 26 "Will patient ever be able resume regular employment?"

Dr. Hagos also wrote "unknown" in response to Question 28 that asked when she was able to resume regular work and wrote "unknown" in response to Question 29 that asked when she was able to resume light work.

Therefore, we agree with the claimant that the ALJ misread Dr. Hagos' report and the ALJ erred in finding that Dr. Hagos did not opine that the claimant was incapacitated from doing her regular work.

This error does not require reversing his decision.

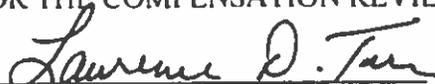
The ALJ denied the claim because the claimant did not establish she sustained a wage loss during any of the days for which she sought benefits. Dr. Hagos' opinion regarding the

claimant's disability, without proof of wage loss, is not sufficient to support an award of benefits.⁴

CONCLUSION AND ORDER

The May 27, 2011, Compensation Order is supported by substantial evidence and is in accordance with the law. It is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:



LAWRENCE D. TARR

Administrative Appeals Judge

SEPTEMBER 26, 2011

DATE

⁴ Moreover, Dr. Hagos did not start treating the claimant until November 1, 2010. His opinion as to disability beginning nine months before he first examined the claimant is of little probative value when the doctors who treated her during that time did not find her totally disabled. Despite his belief the claimant could not work, the claimant testified she did work during the only month for which she sought benefits and treated with Dr. Hagos.