

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services
Labor Standards Bureau**

**Office of Hearings and Adjudication
Compensation Review Board**



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CRB No. 06-04

PATSY ABNEY,

Claimant - Petitioner

v.

CORRECTIONS CORP. OF AMERICA AND AIG CLAIMS SERVICE, INC.,

Employer/Carrier - Respondent

Appeal from a Compensation Order of
Administrative Law Judge Fred D. Carney, Jr.
OHA No. 04-182B, OWC No. 586376

Charles Krikawa, Esquire for the Petitioner

Lisa A. Zelenak, Esquire for the Respondent

Before LINDA F. JORY, FLOYD LEWIS, *Administrative Appeals Judges* and, E. Cooper Brown, *Chief Administrative Appeals Judge*.

LINDA F. JORY, *Administrative Appeals Judge*, on behalf of the Review Panel

DECISION AND ORDER

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board pursuant to D.C. Official Code §§ 32-1521.01 and 32-1522 (2004), 7 DCMR § 230, and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005)¹.

¹Pursuant to Administrative Policy Issuance No. 05-01, dated February 5, 2005, the Director of the Department of Employment Services realigned the Office of Hearings and Adjudication to include, *inter alia*, establishment of the Compensation Review Board (CRB) in implementation of the District of Columbia Fiscal Year 2005 Budget Support Act of 20024, Title J, the Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, sec. 1102 (Oct. 1, 1994) *codified at* D. C. Code Ann. §§ 32-1521.01, 32-1522 (2005). In accordance with the Director's Policy Issuance, the CRB

BACKGROUND

This appeal follows the issuance of a Compensation Order from the Administrative Hearings Division (AHD) of the Office of Hearings and Adjudication (OHA) in the District of Columbia Department of Employment Services (DOES). In that Compensation Order which was filed on September 30, 2005, the Administrative Law Judge (ALJ) concluded that Petitioner retained a 7% permanent partial disability to his left lower extremity and denied Petitioner's claim for additional permanent partial disability benefits.

Claimant-Petitioner's (Petitioner) Petition for Review alleges as grounds for its appeal that the ALJ's decision should be vacated to reflect a new disability rating obtained by Petitioner from her treating physician after the Compensation Order was issued. Employer-Respondent (Respondent) has filed a response asserting the CRB cannot review any evidence which was not before the ALJ on the date of the formal hearing and because the ALJ's denial of permanent partial disability benefits is in full accordance with the law therefore the Compensation Order must be affirmed.

ANALYSIS

As an initial matter, the scope of review by the Compensation Review Board (CRB) and this Review Panel (hereafter, the Panel) as established by 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. Official 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. District of Columbia Department of Employment Services* 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.

Turning to the case under review herein, Petitioner initially asserts that on October 25, 2005 her counsel received a hand written report from Dr. Manderson stating he normally would have expected [Petitioner] to have a permanent partial disability rating of 3% of the body as a whole, which he converted to 7% of the left lower extremity; and that Dr.

replaces the Office of the Director in providing administrative appellate review and disposition of workers' and disability compensation claims arising under the D.C. Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §§ 32-1501 to 32-1545 (2005) and the D.C. Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Official Code §§ 1-623.1 to 1.643.7 (2005), including responsibility for administrative appeals filed prior to October 1, 2004, the effective date of the D.C. Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004.

Manderson re-evaluated his position with respect to Petitioner's permanent partial disability to her left lower extremity. According to Petitioner, Dr. Manderson "concluded that upon reflection and re-evaluation, [petitioner's] knee problems entitle her to a 30% permanent disability rating to the body as a whole. Using Dr. Manderson's prior conversion factor of 2.33 this would equate to a left lower extremity rating of 69.9%, a rating higher than that of Dr. Jeffrey Phillips". Petitioner accordingly claims that the ALJ's decision should be vacated as to the degree of permanent disability to reflect the new disability rating by Dr. Manderson.

In its Memorandum of Points and Authorities in Response to Petitioner's Application for Review, Respondent asserts the October 22, 2005 and October 31, 2005 reports were not properly before Judge Carney and cannot be considered by the CRB. Specifically, Respondent asserts the CRB cannot find an error of law made by the ALJ based on evidence that was not before him at the formal hearing. Respondent further explains that if Petitioner felt Dr. Manderson's report was in error or inaccurate she had ample time to request that he re-evaluate his rating prior to the formal hearing. Instead, as Respondent asserts, "aggrieved by the ALJ's ruling he went back to Dr. Manderson and requested he re-evaluate his rating". Respondent further asserts that Petitioner's only remedy is a request for a modification based upon a change in the degree of disability that has occurred since the date of the compensation order pursuant to §32-1524 of the Act.

At the outset, the Panel must note that pursuant to the procedural rules adopted on December 8, 2005,² the Board is precluded from considering evidence that was not before the ALJ. 7 DCMR 266.1 specifically states:

The Board is not empowered to engage in a de novo proceeding or unrestricted review of a case brought before it, and is limited in its review to the record on appeal.

In *Bennett v. District of Columbia Department of Employment Services*, 629 A.2d 28, (D.C. 1993), the Court of Appeals held that once a request is made by the petitioner to introduce new evidence, the Director was required to determine whether "reasonable grounds existed for not introducing [the evidence] at the initial hearing" and whether the evidence is material i.e., whether it relates to the original claim for compensation.", citing *King v. District of Columbia Department of Employment Services*, 560 A.2d 1067 (D.C. 1989). Consistent with the Court of Appeals and the limited nature of the Board's jurisdiction, 7 D.C.M.R. §264.1 and 264.2 states: "Where a party requesting leave to adduce additional evidence must establish (a) that the additional evidence is material and (b) that there existed reasonable grounds for the failure to present evidence while the case was before the Administrative Hearings Division . . .".

In that the ALJ relied on the opinion rendered by Dr. Manderson that Petitioner retained a 7% permanent partial disability to the left lower extremity, Dr. Manderson's change of opinion in the panels' view would be considered material.

² These regulations were promulgated as emergency regulations on August 19, 2005.

However, the Panel cannot conclude that there exist reasonable grounds for Petitioner's failure to adduce said evidence at the initial hearing. Review of the Compensation Order reveals the permanent partial disability rating of Dr. Manderson relied upon by the ALJ was dated June 29, 2004. The Application for Formal Hearing filed by Respondent was filed on March 24, 2005 and the Formal Hearing held on July 6, 2005. In the event Petitioner disagreed with his own treating physician's rating or felt his condition had worsened he did have ample time, i.e., 13 months, in which to return to Dr. Manderson to "revisit" the permanency issue. Petitioner however did not return to Dr. Manderson until after he received the Compensation Order. After examining claimant on October 22, 2005, Dr. Manderson changed his rating from 7% of the left lower extremity to 30% to the whole body. Dr. Manderson's rating of 74% came after he was asked to convert the body as a whole rating which he did on October 31, 2005.

Thorough review of both Petitioner's Application for Review and the Supplemental Memorandum in support of the [Petitioner's] Application for Review reveals Petitioner did not proffer any explanation as to why he returned to Dr. Manderson after the Compensation Order issued or why he was unable to adduce the evidence prior to the Formal Hearing. Petitioner asserted only that he disagreed with the ALJ's finding and since Dr. Manderson changed his rating the ALJ's decision should be vacated.

The Panel accordingly concludes that Petitioner's newly obtained report does not qualify as newly discovered evidence³ and nor has Petitioner shown there were reasonable grounds for failure to adduce its evidence prior to the Formal Hearing. *Bennett, supra*,; *King, supra*. The Panel agrees that Petitioner's remedy under the Act would be to request a modification of the existing Compensation Order based upon a change in the degree of disability pursuant to §32-1524 of the Act.

CONCLUSION

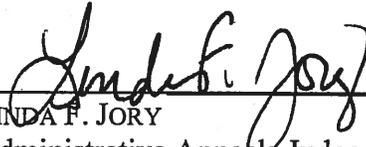
The ALJ's conclusion that Petitioner has sustained a 7% permanent partial impairment to the left lower extremity is supported by substantial evidence and the September 30, 2005 Compensation Order is in accordance with the law.

³ See *Woodall v. Children's Hospital*, Dir. Dkt. No. 86-25, OHA No. 865-226 (June 10, 1988).

ORDER

The Compensation Order of September 30, 2005 is hereby **AFFIRMED**.

FOR THE COMPENSATION REVIEW BOARD:



LINDA F. JORY
Administrative Appeals Judge

December 27, 2005
Date