CRB No. 12-122

GLADYS K. PUPLAMPU,

Claimant–Petitioner,

v.

CONTRACT CLEANING SERVICES,

Self-Insured Employer-Respondent.

Appeal from a Compensation Order of
Administrative Law Judge Anand K, Verma
AHD No. 10-255A, OWC No. 659012

Krista N. DeSmyter, Esquire, for the Petitioner

Mary G. Weidner, Esquire, for the Respondent

Before JEFFREY P. RUSSELL,[1] LAWRENCE D. TARR, and HENRY W. MCCOY, *Administrative Appeals Judges*.

JEFFREY P. RUSSELL, for the Compensation Review Board, HENRY W. MCCOY, *concurring without opinion.*

DECISION AND ORDER

BACKGROUND

On February 27, 2012, an Administrative Law Judge (ALJ) in the hearings section of the Department of Employment Services (DOES) issued a Compensation Order (CO) in which Petitioner Gladys Puplampu's claims for schedule awards to her left arm and left leg were denied. Ms. Puplampu appealed that denial to the Compensation Review Board (CRB), which issued a Decision and Remand Order (DRO) on June 8, 2012.

[1] Judge Russell was appointed by the Director of DOES as a Board member pursuant to DOES Administrative Policy Issuance No. 12-01 (June 20, 2012).

In the DRO, the CRB reversed the denial on two bases: first, that the ALJ had erroneously applied a treating physician preference in assessing the competing medical opinions concerning the degree of impairment, when the only such evidence was in the nature of independent medical evaluation (IME) reports, and second that the ALJ made a number of errors all involving consideration of the lack of an effect upon Ms. Puplampu's ability to perform her pre-injury job and earn wages, which the CRB determined ran afoul of the CRB's decision in *Corrigan v. Georgetown University*, CRB No. 06-094, AHD No. 06-256, OWC No. 604612 (September 14, 2007). The CRB directed that the ALJ consider the matter further in a manner that does not involve according a treating physician preference to IME opinion, and in a manner consistent with *Corrigan*.

On June 29, 2012, the ALJ issued a Compensation Order on Remand (COR), again denying the claims. Ms. Puplampu appealed that COR to the CRB, to which appeal Respondent Contract Cleaning Services (CCS) filed a response in opposition. We affirm.

STANDARD OF REVIEW

The scope of review by the CRB is generally 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. *See*, D.C. Workers' Compensation Act of 1979, as amended, D.C. Code § 32-1501, *et seq.*, (the Act) at § 32-1521.01 (d)(2)(A), and *Marriott International v. DOES*, 834 A.2d 882 (D.C. 2003). Consistent with this standard of review, the CRB and this review panel must affirm 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 this panel might have reached a contrary conclusion. *Id.*, at 885.

DISCUSSION AND ANALYSIS

The COR followed a remand from the CRB, in which the following matters were identified as errors in the original CO: (1) the ALJ erroneously applied the treating physician preference when assessing the competing medical opinions, despite the fact that all the competing opinions came from independent medical evaluators (IMEs); and (2) the ALJ considered Ms. Puplampu's return to work activities and earnings in a manner deemed inconsistent with the case of *Corrigan v. Georgetown University*, CRB No. 06-094, AHD No. 06-256, OWC No. 604612 (September 14, 2007). The matter was remanded with instructions to further consider the claim without reference to the treating physician preference, and in a manner consistent with *Corrigan*, keeping in mind that a schedule award may be appropriate even where a claimant has returned to work full time without any ongoing wage loss.

In the COR, the ALJ acknowledged the error with respect to the treating physician preference, and properly avoided its application in his analysis. And, although the COR again contained discussion of and reference to Ms. Puplampu's having returned to work without any diminution in work hours and without any impact upon her functioning at work (see, Analysis, page 4), in his concluding paragraphs the ALJ explicitly declaimed any reliance upon that discussion, and stated that:

> Premised on the two conflicting IME opinions, the undersigned is not persuaded by the opinion of Dr. Mininberg and rather finds the opinion of Dr. Gordon more cogent and deserving of significant weight. Accordingly, it is not Claimant's full recovery nor her resumption of her full duty, pre-injury employment that became the predicate for the denial of the claim for relief; rather it was her discredited IME opinion which did not buttress her permanent partial disability on account of her knee infirmity. It must be noted that the adduced evidence does not support Dr. Mininberg's rated impairments.

COR, Analysis, page 6. Putting aside the somewhat confusing shift in tense, it is evident that the ALJ sought to make clear that he followed the CRB's admonition that "It was the two IME impairment rating opinions that the ALJ should have weighed against each other to determine the nature and extent of Claimant's disability". .

While the existence of discussion concerning the lack of functional impact upon her ability to perform her pre-injury job might reasonably cause one to doubt the accuracy of this declamation, such concerns are now fundamentally irrelevant. Since the time of the original remand in this case, the CRB has considered the effect of the case of *Jones v. DOES*, 41 A.3rd 1219 (D.C. 2012) upon the status of the doctrines in *Corrigan*, and concluded that that case's highly restrictive constraints upon consideration of the effect of the injury upon a workers' capacity to perform the pre-injury and earn wages in that job are inconsistent with the court's decision in *Jones.* See, *Al Robaie v. Fort Myer Constr. Co.,* CRB No. 10-014, AHD No. 09-383, OWC No. 642015 (June 6, 2012) and *Hill v. Howard University*, CRB No. 12-016, AHD No. 10-117A, OWC No. 657973 (September 5, 2012), (AAJ Jones concurring in part and dissenting in part). It is no longer error for an ALJ to take such matters into consideration.

In any event, the ALJ was faced with competing IME ratings, and chose Dr. Gordon's while rejecting Dr. Mininberg's. Regarding the left leg, Ms. Puplampu complains in this appeal that the ALJ impermissibly focused on Dr. Mininberg's lack of objective findings in her knee, while her theory of the case is that her left leg impairment stems from low back radiating pain.

We decline to hold that the ALJ was compelled to accept Ms. Puplampu's implication that the lack of knee pathology is irrelevant to whether she has sustained impairment to her leg. The ALJ accurately described her deposition testimony as suggesting that the most significant leg problems involved her knee. See, EE 3, pages 15 – 17. Ms. Puplampu's deposition testimony to the effect that her left leg problems stem largely from the knee render appropriate the ALJ's consideration of the lack of objective knee pathology and Dr. Mininberg's near total exclusion of any reference to any knee complaints in his IME report render reasonable the ALJ's discounting the value of his opinion.

Further, our reading of the analysis of Dr. Mininberg's opinion is that the ALJ felt that Ms. Puplampu's examinations yielded little or no objective signs of impairment to her leg (or, for that matter, her shoulder). The ALJ found:

> Claimant's ongoing complaints of left shoulder, lumbar and left leg pains are purely subjective in nature, not corroborated by any objective diagnostic evidence. Claimant, who presently works 40 hours per week in her pre-injury employment,

takes no prescribed medications and regularly undergoes no physical therapy to ameliorate the alleged discomforts.

COR, Findings of Fact, page 4. These findings are clearly indicative of the ALJ's concerns centering upon a lack of objective corroboration of the existence of any pathology, and those concerns are not limited to the left knee, referencing specifically the low back. Again, the lack of reference to any objective abnormality in an IME report assigning two significant impairment ratings (25% to the left leg and 25% to the left arm) is a rational reason to discredit the IME report.

Regarding the left shoulder, Ms. Puplampu argues that the ALJ's reference to a lack of objective findings is itself erroneous, and she points to CE 4, a report concerning a shoulder x-ray taken April 17, 2009. The report interprets the x-ray as revealing "No acute fracture or dislocation", indicating that "There are degenerative changes of the acromioclavicular joint", that "The humeral head hangs low", a condition which "could relate to a rotator cuff laxity" and "could relate to a rotator cuff injury". CE 4. She also argues that her treating physician noted a 25% decrease in range of motion of the shoulder, and that Dr. Mininberg noted similar motion limitations on his exam. CE 1. She contends that both the x-ray report from 2009 and the range of motion findings reported in Dr. Mininberg's 2011 IME report are "objective" findings.

Regarding range of motion, we recognize that some physicians and some ALJ's view limited ranges of motion as being "objective" findings, while others do not. We do not agree that, as a matter of law, an ALJ must accept range of motion limitation findings as "objective".

We agree that there is some discrepancy between the ALJ's blanket assertion of there being no "objective diagnostic evidence" of any pathology to the shoulder, and the contents of CE 4. However, we also note that nowhere in the record does an evaluating physician (either a treating or IME physician) comment upon the significance of these findings.

The subject x-ray pre-dates Dr. Mininberg's IME by more than two years, and his own x-rays taken at the time of the IME are described by him in his report as merely showing "No evidence of fracture or dislocation", without further comment. Thus, the ALJ's statement is accurate inasmuch as, by the time of the subject IME, the condition of Ms. Puplampu's left shoulder as revealed by x-ray was unremarkable.

Whether the two year old x-ray should have been considered, explained or commented upon by Dr. Mininberg instead of or in addition to his own x-rays, and, if they had been, whether the ALJ may have viewed the evidence differently, are matters of speculation. If the contents of CE 4 were of critical significance, it was incumbent upon Ms. Puplampu, as the claimant bearing the burden of proof, to adduce evidence explicating that significance. *Washington Metropolitan Area Transit Authority v. DOES and Juni Browne, Intervenor*, 926 A.2d 149 (D.C. 2007); *Dunston v. DOES.,* 509 A.2d 109 (D.C. 1986). As it is, the absence in the record of any medical opinion concerning the relevance of the two year old x-ray renders Ms. Puplampu's concerns is speculative at best.

The operative mandate of the CRB in its remand to the ALJ was to weigh the IME evidence and reach a conclusion without either being accorded treating physician status. This the ALJ did. It is undeniably the role of the ALJ to assess and weigh the competing evidence, and that is a role with

which we are loathe to interfere. We discern no reversible error in the manner that the ALJ undertook to carry out the CRB's mandate.

Ms. Puplampu argues in this appeal that the ALJ's finding that she sustained no medical impairment as a result of the work injury is really a causal relationship determination and hence erroneous because she was not given the benefit of the presumption of compensability, and because causal relationship had been stipulated.[2] Her argument is premised upon the fact that that Dr. Gordon's reports state that she sustained 0% impairment "as related to any soft tissue injuries that may have occurred on 04/03/09".

We disagree that this renders his opinion one based upon causal relationship. Reading his report in context and as a whole, it is abundantly clear that Dr. Gordon is of the view that Ms. Puplampu has no disability. Dr. Gordon acknowledges the presence on x-ray of degenerative arthritis, but assigns it no significance in his IME assessment of her disability. There is no suggestion in Dr. Mininberg's reports that these changes were the result of the work injury, and Dr. Gordon and the ALJ base their conclusions on the lack of any objective medical evidence of pathology from the work injury. Those findings are supported by the evidence and the ALJ's conclusion flows rationally from them.

CONCLUSION

The finding that Ms. Puplampu sustained no permanent physical impairment from the work injury is supported by substantial evidence, and the conclusion that she sustained no disability under the schedule is in accordance with the law.

ORDER

The Compensation Order on remand of June 29, 2012 is affirmed.

FOR THE COMPENSATION REVIEW BOARD:

_____
JEFFREY P. RUSSELL
Administrative Appeals Judge

November 14, 2012
DATE

[2] Why Ms. Puplampu raises this objection now yet failed to raise it in the first appeal we do not know.