

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. 07-102

QUINTON BRISCOE,

Claimant–Respondent,

v.

PEPCO,

Self-Insured Employer–Petitioner.

Appeal from a Compensation Order of
Administrative Law Judge Anand K. Verma
AHD No. 06-313, OWC No. 615289

Kevin J. O’Connell, Esquire, for the Petitioner

W. Scott Fungler, Esquire, for the Respondent

Before E. COOPER BROWN, *Chief Administrative Appeals Judge*, JEFFREY P. RUSSELL and FLOYD LEWIS, *Administrative Appeals Judges*.

JEFFREY P. RUSSELL, *Administrative Appeals Judge*, for the Compensation Review Panel:

DECISION AND REMAND 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 2004, Title J, the District of Columbia Workers’ Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, *codified at* D.C. Official Code § 32-1521.01. In accordance with the Director’s Directive, the CRB replaces the Office of the Director in providing administrative appellate review and disposition of workers’ and disability compensation claims arising under the District of Columbia Workers’ Compensation Act of 1979, as amended, D.C. Code Ann. §§ 32-1501 to 32-1545 (2005), and the District of Columbia Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Code Ann. §§ 1-623.1 to 1-643.7 (2005), including responsibility for

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 April 13, 2007, the Administrative Law Judge (ALJ) granted Claimant-Respondent's (Respondent's) claim for a 15% award for permanent partial disability to his left leg. Employer-Petitioner (Petitioner) now seeks review of that Compensation Order.²

As grounds for this appeal, Petitioner alleges as error that the ALJ failed to adequately consider its defense to this claim, by not considering the lack of any negative effect of the injury upon Respondent's earnings, and that the ALJ impermissibly refused to permit Petitioner to adduce additional evidence in the form of testimony from Carl Anglin concerning Mr. Anglin's observations of Respondent and the physical requirements of the return to work position that Respondent now holds, and two post-hearing medical reports from a physician who treated Respondent's injuries which reports address Respondent's capacity to perform that job.

Because the ALJ's erroneous decision precluding the testimony of Mr. Anglin was harmless, and because there has been no showing of unusual circumstances which prevented the presentation of the opinions contained in the proffered post-hearing medical reports, the record of the formal hearing below is adequate and complete. However, because the Compensation Order is ambiguous as it relates to what legal analysis and standards the ALJ applied in reaching his decision regarding the degree of disability to be awarded, we remand the matter for further consideration.

ANALYSIS

As an initial matter, the scope of review by the Compensation Review Board (CRB) and this Review 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. *See* D.C. Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §32-1501 to 32-1545 (2005), at §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 International v. District of Columbia Dep't. of Employment Serv's.*, 834 A.2d 882 (D.C. 2003). Consistent with this standard of review, the CRB and this Review Panel are constrained 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.

administrative appeals filed prior to October 1, 2004, the effective date of the District of Columbia Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004.

² The claim for relief also included a claim for a period of temporary total disability, which was also granted. Petitioner has not appealed that aspect of the award. Further, Respondent argued at the formal hearing that he was entitled to an award greater than 15%. However, Respondent has not appealed the award that was made, and seeks an affirmance of that award in this appeal.

The first issues that we address concern Petitioner's claim in this appeal concerning what it frames as a violation of Petitioner's "due process" rights. Petitioner's complaints in this regard concern two separate evidentiary matters: first, two post-hearing medical reports or notes from Dr. Christina Cervieri, and second, the testimony of Mr. Anglin. Petitioner's request for admission of the testimony was made and denied at the formal hearing and renewed in a post hearing Motion to Re-open the Record; the request to admit the medical reports was made only in the post hearing motion. The ALJ failed to rule upon the motion, which failure we deem to be a denial thereof.

Regarding the medical records or reports, Petitioner asserted in the motion but a single reason why the reports were not admitted or offered at the formal hearing: the unusual circumstance was that "the reports of Dr. Cervieri were not available at the time of the Formal Hearing". As far as we can detect, the Memorandum of Points and Authorities in Support of Application for Review is utterly silent on the question of why the reports (or more to the point, the opinions alleged to be contained therein) were not available to be presented to the ALJ at the time of the formal hearing.

The mere fact that a document was not produced until after a formal hearing has been concluded is not an adequate reason to re-open the record for its receipt. The core question in that regard is whether there exists some reason why the substance of the evidence could not have been produced at that time. Petitioner has given no such reason, and therefore denial of the request was proper.

Regarding the testimony of Mr. Anglin, we have reviewed the affidavit, as well as the reasons the Petitioner asserts the failure to re-open the record for receipt of his testimony was erroneous.

We have also reviewed the transcript of the discussion between Petitioner's counsel at the formal hearing and the ALJ, and agree that the ALJ erroneously ruled that because the time for the hearing had expired, and because Petitioner had not sought an extension of time for the hearing prior to its commencing, that Petitioner would not be permitted to offer a witness. The ALJ was, to say the least, inconsistent when he stated that, on the one hand, because the Scheduling Order and pretrial statement stated that the matter would consume no more than 2 hours unless more time was sought prior to the hearing, the hearing in this matter was terminated because no such additional time was sought, while on the other hand indicating to the attorney that neither the ALJ nor the other ALJs in AHD follow the scheduling order or pretrial statement in the conduct of the formal hearings. Precisely which parts of the pretrial orders are to be adhered to, and which are to be ignored, is something that no one could be expected to predict, and it would be fundamentally unfair to countenance a denial of a party's right to present probative, relevant and non-cumulative evidence merely because the ALJ permitted one side to consume the entire time allotted for the hearing, where the ALJ has been apprised that the other side has identified witnesses in accordance with the established prehearing procedures, and those witnesses are present at the hearing and available to testify.

In this case, however, we discern no harm in the error, because we see nothing of substantial relevance or significance in the proffer of Mr. Anglin's testimony, as contained in the affidavit. That document discusses two subjects generally, being the comparative requirements of Petitioner's pre-injury job with his post injury job to which he was promoted, and the affiant's observations of Respondent since returning to work, including the fact that Respondent does not appear to the

affiant to have a limp or other observable difficulty in performing his job, and has never complained to the affiant about having any such difficulties.

Review of Respondent's testimony includes Respondent's admission that he never mentioned having any restrictions on his ability to perform the job to which he has been promoted to Mr. Anglin, or reported to Mr. Anglin that he had experienced any difficulties in performing it. HT 84; 75 - 76. Thus, Mr. Anglin's testimony on that score is irrelevant, cumulative, and in fact corroborative of Respondent's testimony. Regarding the lack of observing any discernable limp or other indicia of ongoing incapacity, although Respondent offered testimony from a co-worker/subcontractor to the effect that the co-worker had observed such a limp and some other indicia of ongoing knee impairment, the ALJ did not rely upon or even refer to that testimony in the Compensation Order, did not make a finding one way or the other concerning any such ongoing discernable (discernable, that is, by a lay person observing Respondent's behavior) anomalies in gait, and based his assessment of Respondent's knee condition solely upon the medical evidence in the reports and Respondent's testimony.

In regard to the comparative requirements of physicality between the pre-injury job and the job to which Respondent was promoted shortly after returning to work, although there may be some variance between Respondent's opinion of the requirements of the two jobs and the opinion of Mr. Anglin, any such variance is fundamentally irrelevant to this case. This is because, regardless of what either of them think the job ought to entail, Respondent testified that he is doing the job and is capable of doing the job. See, for example, HT 92.

Further, the record contains Petitioner's own in-house documents which describe the requirements of the two jobs (see, EE 6). If the ALJ had thought that the differences, if any, were relevant to the outcome of this case, he already had evidence, in the form of Respondent's own job descriptions, of Respondent's view of the two positions. As such, Mr. Anglin's testimony would either have been cumulative, or even worse, contradictory of Respondent's own internal version of the requirements of the two positions. In any event, there is nothing in the Compensation Order which discusses the question of whether one job is or ought to be considered more or less physically demanding than the other, and no such determination is required in order to assess the degree of disability experienced or suffered by Respondent. In this case, given the absence of any finding that the subsequent position is less physically demanding than the pre-injury job, it is safe to assume that the ALJ did not believe that it is sufficiently less physically demanding as to have had an impact on the degree of disability awarded. We will therefore not disturb the ALJ's explicit denial of the offer of proof regarding Mr. Anglin, and the implicit denial of the offer of proof relating to the post hearing reports of Dr. Cervieri.

Regarding the second aspect of this appeal, Respondent argues that, in failing to cite either *Wormack v. Fischbach and Moore*, CRB (Dir. Dkt.) No. 03-159, OWC No. 564205 (July 22, 2005), to which Respondent referred numerous times in the formal hearing, or *Negussie v. District of Columbia Dep't of Employment Serv's.*, 915 A.2d 391 (D.C. 2007), a case decided by the District of Columbia Court of Appeals subsequent to the formal hearing but prior to the issuance of the Compensation Order, and in failing to explicitly discuss the "vocational" impact of the medical impairment to the knee, the ALJ's Compensation Order is legally deficient.

We note first that, although the ALJ did appear to briefly misstate the law when he stated that the issue presented is “a medical issue”, it also appears that he may have amended that statement, indicating that he “understood” Petitioner’s position, which position had been explicitly and impliedly made numerous times, by reference to *Wormack*, in Petitioner’s opening statement as well as throughout the hearing. See, for example, HT 7; 16; 17; and 21. Indeed, the ALJ at one point referred to *Wormack* directly, at HT 116. However, he almost immediately then made the statement that “But this case is basically a medical question”, calling into question the degree to which the reference to *Wormack* signaled a proper analytic posture.

And, compounding the problem is the fact that, despite identifying the issue as “Nature and extent of claimant’s *disability*, if any”, (emphasis added) and the claim for relief as including a claim for “15% permanent partial *disability* to [claimant’s] left lower extremity” (Compensation Order, page 2, emphasis added), the ALJ concluded his “Findings of Fact” with this somewhat difficult to decipher sentence fragment:

Insofar as the degree of claimant’s medical impairments, 15% *impairment*, as apportioned by both the treating physician and IME, when measured against the physical limitations that continually subject claimant, seems appropriate” (Compensation Order, page 6, emphasis added). The ALJ then proceeded to write, in the “Conclusion of Law”, that “Based upon a review of the record evidence as a whole, I find and conclude claimant has proffered substantial evidence to support his entitlement to a 15% *permanent partial impairment* to his left lower extremity to Table 17.6 of the *American Medical Associations’ Guides to the Evaluation of Permanent Impairment, Fifth Edition*.

(Compensation Order, page 6, emphasis added).

The threefold problem presented by the ALJ’s failure to address the legal issue of *disability* as discussed in *Wormack* and, more to the point, in *Negussie*, along with a possible but not conclusively shown misunderstanding of the law as revealed by the ALJ’s description of the matter as being “basically a medical issue”, added to the two references to *impairment* under the AMA Guides, which is a medical concept only, without any discussion of *disability*, creates an ambiguity in the Compensation Order such that we are unable to discern what standard the ALJ was in fact applying, that is, we cannot determine whether the ALJ applied the old standard of assessing disability (as being synonymous with or the same concept as medical impairment³) which was rejected in *Wormack* and *Negussie*, or the new, proper standard as described in those cases.

³ We note that in the *American Medical Association Guides to the Evaluation of Permanent Impairment* (the *Guides*), after discussing some of the technical methodologies employed in arriving at percentage impairment ratings, the authors cautioned as follows:

The medical judgment used to determine the original impairment percentages could not account for the diversity or complexity of work but could account for daily activities of most people. Work is not included in the clinical judgment for impairment percentages for several reasons: (1) work involves many simple and complex activities; (2) work is highly individualized, making generalizations inaccurate; (3) impairment percentages are unchanged for stable conditions, but work and occupations change; and (4) impairments interact with such other factors as the worker’s age, education, and prior work experience to determine the extent of worker disability. For example, an individual who receives

We hasten to note that there is no impediment to an ALJ in finding that, on a given set of facts, whether it is the ones before us or some other, the degree of medical impairment established fairly states the degree of disability. However, given the ambiguities in the Compensation Order we are unable to determine what standard the ALJ employed in arriving at the decision, and thus we must remand the matter for further consideration.

CONCLUSION

The ALJ's implied denial of the Motion to Re-open the Record to receive the post hearing reports of Dr. Cervieri is in accordance with the law and is affirmed. The ALJ's erroneous decision to preclude the testimony of Mr. Anglin was harmless, and therefore does not warrant reversal of the Compensation Order. The Compensation Order's granting of the claim for relief is insufficiently explained and is fraught with ambiguity, rendering it not in accordance with the law.

a 30% whole person impairment due to pericardial heart disease is considered to have a 30% reduction in general functioning as represented by a decrease in the ability to perform activities of daily living. For individuals who work in sedentary jobs, there may be no decline in their work ability although their overall functioning is decreased. Thus, a 30% impairment rating does not correspond to a 30% reduction in work capability. Similarly, a manual laborer with this 30% impairment rating due to pericardial disease may be completely unable to do his or her regular job and, thus, may have a 100% work disability.

As a result impairment ratings are not intended for use as direct determinants of work disability. When a physician is asked to evaluate work-related disability, it is appropriate for a physician knowledgeable about the work activities of the patient to discuss the specific activities the worker can and cannot do, given the permanent impairment.

The AMA Guides, Linda Cocchiarella, and Gunnar B.J. Anderson, Editors, American Medical Association 2000, Chapter 1, "Philosophy, Purpose and Appropriate Use of the *Guides*", Section 1.2, "Impairment, Disability and Handicap", page 5 – 6. See also, *Majano v. Linens of the week*, CRB No. 07-066, AHD No. 06-285 (Decision and Order April 24, 2007).

ORDER

The Compensation Order of April 12, 2007 is affirmed in part and reversed in part and remanded. The explicit and implied denials of the Motion to Re-open the Record are affirmed. Upon remand, the ALJ shall issue a new Compensation Order in which he identifies the legal standard for disability, makes an award in conformance with that standard, and identifies the record evidence before him that supports an award under the applicable standard.

FOR THE COMPENSATION REVIEW BOARD:

JEFFREY P. RUSSELL
Administrative Appeals Judge

June 19, 2007
DATE