

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

Labor Standards Bureau

**Office of Hearings and Adjudication
COMPENSATION REVIEW BOARD**



(202) 671-1394-Voice

(202) 673-6402 - Fax

CRB (Dir.Dkt) No. 05-261

MARY LYNN RAY,

Claimant - Petitioner

v.

INTERNATIONAL LAW INSTITUTE AND UTICA NATIONAL INSURANCE GROUP,

Employer/Carrier – Respondent.

Appeal from a Compensation Order of
Administrative Law Judge Henry W. McCoy
OHA No. 05-184, OWC No. 590296

Heather C. Leslie, Esquire for the Petitioner

Michael T. O'Bryant, Esquire for the Respondent

Before LINDA F. JORY, SHARMAN J. MONROE, and FLOYD LEWIS, *Administrative Appeals Judges*.

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 2004, 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 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.

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 Order which was filed on July 25, 2005, the Administrative Law Judge (ALJ) concluded Petitioner's work related injury of May 20, 2003 resulted in a 1% permanent partial disability to the upper right extremity and a 1% permanent partial disability to her lower right extremity and that claimant was entitled to reimbursement for causally related medical expenses.

As grounds for this appeal, Petitioner alleges the ALJ erred by failing to exercise his authority to arrive at his own percentage of disability considering the medical impairment, the Maryland factors and the effect of the work injury on Petitioner's industrial capacity.

Respondent has not filed a response.

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 asserts that given the reversal of the precedent which was felt to preclude a splitting of the ratings or consideration of the industrial loss that these injuries have unarguably caused for [Petitioner], the Compensation Order is clearly erroneous and must be vacated and remanded. Petitioner explained that the ALJ was not bound to pick one medical opinion (PPD rating) or the other and cites the recent decision issued by the CRB in *Wormack v. Fischbach & Moore Electric, Inc.* CRB No. 03-159, OHA No. 03-11, OWC No. 564205 (July 22, 2005) which was issued a mere three days before the ALJ's decision.

The Panel agrees that pursuant to the *Wormack* decision, the ALJ is no longer bound to pick one permanent partial impairment rating over another other especially in situations where the ALJ finds both ratings are contrary to the ALJ's interpretation of the evidence of record. However, the Panel cautions that the *Wormack* decision alone does not mandate the ALJ to pick another rating if the facts of the case do not warrant the same.

However in the instant matter, the ALJ made clear that he was precluded from arriving at a permanent impairment figure contrary to that of the physicians and that his only permissible option available is to make a choice between or among conflicting medical opinions, *citing Julio Alberto Amaya v. Fort Meyer Construction Co.*, Dir Dkt. No. 03-15, OHA No. 01-080B (April 19, 2003); *Carmen Deguzman v. Bell Atlantic Washington*, Dir. Dkt., No. 99-73, OHA No. 99-231 (May 31, 2002). The ALJ sated:

Given Claimant's lingering complaints of pain in her right upper extremity and the persistent pain in her lower right extremity, I would be inclined to make a modest upwardly adjustment to the impairment ratings by Employer's IME. However, there is a line of decisions by the Director of the Department of Employment Services (the Director) in which he has held that the Office of Hearings and Adjudication, now Administrative Hearings Division, does not have the authority to do anything more than to accept one or the other of the medical impairment ratings entered into evidence that prevents me from doing so.

CO at 6, 7.

Inasmuch, as the ALJ stated in his Compensation Order that he was prevented from making a modest upwardly adjustment to the impairment rating provided by Employer's IME physician, it is clear the ALJ had yet to receive the *Wormack* decision issued 3 days prior. Accordingly, the Panel agrees the Compensation Order is not in accordance with the current law and the matter should be remanded to the ALJ.

CONCLUSION

The ALJ's Conclusion that Petitioner has suffered a 1% permanent partial impairment to his upper right extremity and 1% permanent impairment to the lower right extremity is not in accordance with the law.

ORDER

The Compensation Order of July 25, 2003 is hereby VACATED AND REMANDED to AHD for further proceedings, if warranted, so the ALJ may arrive at his own percentage of disability considering the medical impairment, the Maryland factors and the effect of the work injury on Petitioner's industrial capacity if he deems appropriate.

FOR THE COMPENSATION REVIEW BOARD:

LINDA F. JORY
Administrative Appeals Judge

October 21, 2005
Date