GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR

DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 15-020

SHURON TURNER,
Claimant–Respondent,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY
Self-Insured Employer-Petitioner.

DEPT. OF EMPLOYMENT SERVICES
COMPENSATION REVIEW BOARD
2015 MAY 19 PM 12 15

Appeal from a January 16, 2015 Compensation Order on Remand by
Administrative Law Judge Nata K. Brown
AHD No. 11-124, OWC No. 667761

David J. Kapson for Claimant
Mark H. Dho for Employer

Before, LINDA F. JORY, HEATHER C. LESLIE, and JEFFREY P. RUSSELL, *Administrative Appeals Judges.*

LINDA F. JORY for the Compensation Review Board:

DECISION AND REMAND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

On February 15, 2010, Claimant injured her right knee, right ankle and right leg after slipping and falling on ice in Employer's parking lot. Claimant came under the care and treatment of Dr. Richard Meyers and Dr. Frederic Salter of the medical practice Phillips and Green, Limited Partnership. After conservative treatment, Claimant was ultimately released back to full duty. Dr. Jeffrey Phillips, of the same practice, examined Claimant on November 23, 2010, for a final evaluation and opined Claimant suffered from a 16% permanent partial disability to her right lower extremity as a result of the work injury.

Employer sent Claimant for an Independent Medical Evaluation (IME) with Dr. Louis Levitt on two occasions, April 20, 2010 and February 1, 2011. Dr. Levitt opined that Claimant did not suffer from any permanent impairment attributable to her work injury.

A full evidentiary hearing was held on July 13, 2011 with the sole issue presented being the nature and extent of the Claimant's right lower extremity. A Compensation Order (CO) was

issued on September 20, 2011, denying Claimant's claim for relief. In that CO, the ALJ found that Dr. Phillips was not a treating physician and not entitled to the treating physician preference. The ALJ found the opinion of Dr. Levitt more persuasive that Claimant did not sustain a permanent partial impairment to the right lower extremity as claimed.

The Claimant appealed on October 27, 2011. In a Decision and Remand Order (DRO) dated January 26, 2012, the CRB remanded the case to the ALJ to apply the proper legal burden when determining permanent partial disability, being the preponderance of the evidence. The ALJ also was directed to reconcile internally inconsistent statements. Finally, the ALJ was tasked to clarify, in light of the ALJ's discussion regarding the Claimant's physical complaints, whether or not the Claimant's work capacity had been impacted.

A Compensation Order on Remand (COR 1) was issued on February 10, 2012. In that COR, the ALJ utilized the preponderance of the evidence standard when analyzing the nature and extent of the disability and reconciled the two internally inconsistent statements as instructed by the CRB. The ALJ again denied the Claimant's request for an award of permanent partial disability benefits. The Claimant timely appealed. In a Decision and Remand Order (DRO 2) dated September 10, 2012, the CRB remanded the case to the ALJ to clarify whether or not Claimant was entitled to a permanent partial disability award based upon the impact of the injury on Claimant's work capacity.

As the ALJ who originally decided the matter had retired, the remand was re-assigned to another ALJ. A second COR (COR 2) was issued on January 16, 2015 which granted Claimant's claim for relief of 16% permanent partial impairment to the right lower extremity. Employer timely appealed.

Employer asserts that the COR 2 fails to address the specific legal issue identified by the CRB in the second Decision and Remand Order (DRO 2). Claimant responds asserting the COR 2 is supported by substantial evidence and should be affirmed.

ISSUE ON APPEAL

Is the January 16, 2015 COR 2 supported by substantial evidence and in accordance with the law?

ANALYSIS

Employer asserts that the September 10, 2012 DRO 2 provided a specific scope of review on remand and in fact, the language of the DRO 2 is clear that the remand was for a limited purpose.

Employer quoted the specific language of the CRB's DRO 2:

> We are unfortunately forced to remand again for the ALJ to clarify whether or not the Claimant was entitled to a permanent partial disability award based upon the impact on the Claimant's work capacity.

. . .

> We are quick to note that we make no decision on whether or not [the] record supports such an award of permanent partial disability based on any impact to the Claimant's work capacity, but simply the ALJ must explain whether or not in light of the discussion of Claimant's current complaints some award is warranted. Upon remand, the ALJ is to clarify the above discussion.

Employer asserts:

> The underlying COR 2 is completely devoid of the legal analysis directed by the CRB. Even though there [is] testimony that claimant's job duties required her to walk around the bus before driving it, possible squatting to lift the driver's seat, and assist passengers using a wheelchair lift, there is no analysis or finding of fact directly related to claimant's actual work capacity. The ALJ instead made conclusory finding that these three duties 'more likely than not, would exacerbate her ongoing radiating [pain] in her right knee.' COR 2 at 5. Claimant never testified that in her return to work capacity, working full duty, that she suffered any ongoing problems performing the three specific functions.
>
> Following the work injury, the claimant returned to full duty work as a bus operator in August of 2010. HT at 26. There is no evidence that claimant's injuries caused any permanent impairment in her work duties. The three examples of physical requirements identified by the ALJ were elicited testimony (sic) regarding claimant's basic job duties. HT at 17. At no time the (sic) the hearing testimony did claimant state she could not perform the duties as described. The finding of fact made by ALJ is based on speculation and not evidence in the record.

Employer's Brief at 7.

Employer further correctly asserts:

> The Law of the Case Doctrine recognizes that 'once the court has decided a point in a case, that point becomes and remains settled unless it is reversed or modified by a higher court' *Kritsidimas v. Sheskin*, 411 A.2d 370, 371 (D.C. 1980). The ALJ's findings of fact in the initial CO and even the subsequent COR, both held that the medical opinion of Dr. Louis Levitt was more comprehensive and recent compared to the opinion of Dr. Phillips. COR at 5. The ALJ Newsome rejected the medical opinion of Dr. Phillips and specifically relied on the opinion of Dr. Levitt as to the finding of medical impairment. The CRB remand (DRO-2) was limited in in its scope to address the potential economic impact of any physical impairment on claimant's job functions. The ALJ in the subsequent compensation order on remand (COR 2) made an impermissible finding rejecting Dr. Levitt's opinion in favor of Dr. Phillips. COR 2 at 6. This finding of fact is

> clearly outside the scope of the CRB's remand and is contrary to the established law of the case. The prior decision and remand orders of the CRB did not reverse the findings of ALJ Newsome regarding the weight given to Dr. Levitt's medical opinion. The last decision and remand order did not wholly vacate the COR, but rather continued to uphold key elements of the CO and COR which was supported by substantial evidence. The finding of fact by ALJ Newsome to give more weight to the medical opinion of Dr. Levitt, on the issue of medical impairment, is supported by substantial evidence. It was error for the ALJ Brown to readdress this specific issue.

Employer's Brief at 8.

We agree with Employer on all points. The DRO 2 did not address the prior ALJ's analysis with regard to the PPD opinions of Dr. Levitt vs. Dr. Phillips with the exception of the following paragraph:

> The Claimant first argues that the ALJ was incorrect in finding Dr. Phillips was not a treating physician. The Employer responds by stating that the prior DRO has already affirmed the ALJ's finding that Dr. Phillips is not a treating physician entitled to a preference. We agree with the Employer. This issue has already been discussed at length and we direct the parties to our prior DRO for our analysis and conclusion that the ALJ was correct in not extending the treating physician preference to Dr. Phillips.

DRO 2 at 3. We agree with Employer's "law of the case" argument with regard to the weight the prior ALJ provided to IME physician Louis Levitt's opinion and that the current ALJ made an impermissible finding rejecting Dr. Levitt's opinion in favor of Dr. Phillips.

Citing *Jones v. DOES*, 41 A.3d 1219 (D.C. 2012), the CRB limited its remand to the following:

> We again must remand the case back to the ALJ to discuss whether or not the Claimant has proved entitlement to some permanent partial disability benefits based upon the effect the injury may or may not have on her ability to work, in keeping with the law of this jurisdiction.

DRO 2 at 4.

With regard to Claimant's ability to fulfill her work duties post injury, the ALJ wrote:

> Claimant testified that she experiences ongoing radiating pain through her right knee, an inability to walk long periods of time, and having to ice and elevate her right knee for pain. In light of her job duties, which require her to walk around the bus before driving it, the possibility for squatting to lift the driver's seat, and assisting disabled passengers using the wheelchair lift while getting on an off the bus, these duties, more likely than not, would exacerbate her ongoing radiating pain in her right knee.

COR 2 at 5.

Review of COR 2 and the lack of specific evidence upon which to base a prediction that her presently unimpaired leg is likely to deteriorate in the future due to her work injuries leads us to conclude that an award at this time is unsupported by substantial evidence. If at some point in the future these activities lead to an injury that results in a permanent medical impairment, a new claim for a new injury is not foreclosed, and would be the proper manner in which to address the issue.

CONCLUSION AND ORDER

The ALJ's conclusion that Claimant is entitled to an award of 16% permanent partial disability to the lower extremity is not supported by substantial evidence, is not in accordance with the law and accordingly is VACATED.

FOR THE COMPENSATON REVIEW BOARD:

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LINDA F. JORY
Administrative Appeals Judge

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CONCLUSION AND ORDER

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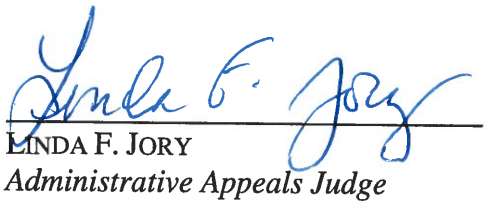

LINDA F. JORY
Administrative Appeals Judge

May 19, 2015
DATE