GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR

LISA M. MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 12-008

CLAIRE GANTHIER,
Claimant–Petitioner,

v.

FAIRMONT HOTEL and ZURICH AMERICAN INSURANCE CO.,
Employer-Respondent.

Appeal from a Compensation Order on Remand by
The Honorable Linda F. Jory
AHD No. 10-231A, OWC No. 647568

Eric M. May, Esquire for the Petitioner
Mark W. Bertram, Esquire for the Respondent

Before, JEFFREY P. RUSSELL,[1] HEATHER C. LESLIE,[2] and MELISSA LIN JONES *Administrative Appeals Judges*.

MELISSA LIN JONES, *Administrative Appeals Judge*, *dissenting*.

JEFFREY P. RUSSELL, *for the Compensation Review Board.*

DECISION AND ORDER

BACKGROUND

Ms. Claire Ganthier worked for Fairmont Hotel as a steward. On October 18, 2007, Ms. Ganthier slipped at work. In order to break the fall, she put out her right arm and injured her shoulder.

Ms. Ganthier sought treatment that day and came under the care of Drs. Mininberg and Fechter, P.A. Ms. Ganthier, after objective testing confirmed a tear, underwent surgery on January 8, 2008.

[1] Judge Russell has been appointed by the Director of the DOES as a Compensation Review Board ("CRB") member pursuant to DOES Administrative Policy Issuance No. 11-01 (June 23, 2011).

[2] Judge Leslie has been appointed by the Director of the DOES as a Compensation Review Board member pursuant to DOES Administrative Policy Issuance No. 11-02 (June 13, 2011).

Ms. Ganthier continued to experience symptoms and was referred to a shoulder specialist, Dr. Edward G. McFarland. Ms. Ganthier had a significant rotator cuff tear and required additional surgery. On June 2, 2009, she underwent a right, reverse, total shoulder arthroplasty.

Ms. Ganthier has not returned to work since the October 18, 2007 accident. Fairmont Hotel voluntarily paid temporary total disability benefits from October 19, 2007 through July 8, 2011.

Initially, Ms. Ganthier applied for a formal hearing seeking permanent total disability benefits. She later amended her claim for relief to 100% permanent partial disability to the right arm. Fairmont Hotel opposed Ms. Ganthier's claim for permanent partial disability and argued Ms. Ganthier was permanently and totally disabled as claimed in the Application for Formal Hearing. In response, Ms. Ganthier argued she could not be "forced to claim permanent total disability." The formal hearing proceeded solely on the issue of the nature and extent of Ms. Ganthier's right arm permanency, and in an August 5, 2011 Compensation Order, Ms. Ganthier was granted 40% permanent partial disability to her right arm plus temporary total disability benefits.

Both parties appealed that Compensation Order, and in a Decision and Remand Order dated November 29, 2011, the CRB remanded the case for a determination as to whether or not Fairmont Hotel had been prejudiced by Ms. Ganthier's change to her claim for relief. In the event that Fairmont Hotel was not prejudiced by the change, the administrative law judge ("ALJ") was directed to issue a Compensation Order on Remand considering only Ms. Ganthier's claim for permanent partial disability benefits to her right arm.

In a Compensation Order on Remand issued on January 31, 2012, an ALJ denied Ms. Ganthier's claim for relief, and in this appeal, Ms. Ganthier asserts the ALJ exceeded the scope of the CRB's directives by ruling that Ms. Ganthier is not entitled to permanent partial disability benefits because she is permanently, totally disabled. Fairmont Hotel asserts the ALJ was within the scope of her authority when she denied Ms. Ganthier's request for permanent partial disability benefits.

ANALYSIS

The scope of review by the CRB is limited to making a determination as to whether the factual findings of the appealed Compensation Order on Remand are based upon substantial evidence in the record and whether the legal conclusions drawn from those facts are in accordance with applicable law. S*ee* District of Columbia Workers' Compensation Act of 1979, D.C. Code, as amended, §32-1501 *et seq*. (the "Act") at §32-1521.01(d)(2)(A). Consistent with this standard of review, the CRB is constrained to uphold a Compensation Order on Remand that is supported by substantial evidence, even if there also is contained within the record under review substantial evidence to support a contrary conclusion and even if the CRB might have reached a contrary conclusion. *Marriott International v. DOES*, 834 A.2d 882, 885 (D.C. 2003).

Prior to the formal hearing, Ms. Ganthier had requested permanent total disability benefits; thereafter, she changed her claim for relief to 100% permanent partial disability to her right arm. Consequently, the first issue for the ALJ to address on remand was whether or not the Fairmont Hotel had been prejudiced by the change.

In response to this issue, the ALJ ruled:

> [U]pon receipt of the Decision and Remand Order, the undersigned issued an Order which provided employer the opportunity to submit written argument as to how it was prejudiced by claimant's change in her claim for relief from permanent total disability benefits to permanent partial disability benefits based upon the §32-1508(3) schedule.
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> Employer filed a timely response conceding "it cannot be stated that the employer/carrier was prejudiced regarding the change, since the change was reflected in the pre-trial statement". Similarly, claimant responded that she formally made her change in her claim for relief in a letter dated May 11, 2011, nearly two months before the formal hearing. Nevertheless the undersigned cannot make a determination that employer was prejudiced by claimant's claim when employer concedes no prejudice.

Ganthier v. Fairmont Hotel, AHD No. 10-231A, OWC No. 647568 (January 3, 2012), p.4.

Based upon Fairmont Hotel's concession, we can find no error in the ALJ's ruling.

Turning to the issue of Ms. Ganthier's entitlement to benefits, Ms. Ganthier's claim for relief was for "an award under the Act of 100% permanent partial disability to the right upper extremity." *Id*. at p.2. In order to prove entitlement to permanent partial disability to a schedule member, the only claim before the ALJ, it was Ms. Ganthier's burden to prove by a preponderance of the evidence she had reached maximum medical improvement and had sustained a "disability partial in character but permanent in quality." See, D.C. Code §32-1508(3). Although the ALJ stated, "It is clear that the instant claimant has not asked for a determination that she is permanently and totally disabled," (*Ganthier v. Fairmont Hotel*, AHD No. 10-231A, OWC No. 647568 (January 3, 2012), p.4.), the ALJ went on to find:

> Claimant's own treating physician Dr. McFarland has certified claimant to be permanently and totally disabled, and while this issue is not before the undersigned as claimant withdrew her claim for PTD benefits, this is the evidence that has been presented for this record and the undersigned cannot ignore it. Due process considerations require the undersigned to award only the benefit level that was requested. *See Acevedo v. Brother's Concrete Construction*, CRB No. 10-164, AHD No. 293B (March 7, 2011) citing *Teklu v. Jury's Doyle Hotel*, CRB No. 08-016, AHD No. 05-241 (January 23, 2008). However, in light of the Court of Appeals' language in *Ambrose* that "a person can be no more than totally disabled at a given point" the undersigned is precluded from awarding claimant any additional benefits. 952 A. 2d at 175. In so concluding, the undersigned finds persuasive employer's argument that:
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> > Allowing a claimant to clearly exploit the compromise and the humanitarian purpose of the Workers' Compensation system by foregoing the most medically appropriate result in favor of the one that is most financially enriching is not supported by the law.

In other words, the ALJ ruled that because Ms. Ganthier is permanently, totally disabled, she is no longer entitled to permanent partial disability benefits for a schedule member loss.

That is a correct statement of the law. The case cited by the ALJ stands for the proposition that a person can not be more than 100% disabled. See, *Howard University Hospital v. DOES and Tommie Ambrose, Intervenor*, 952 A.2d 168 (2008). Here, the ALJ accepts the evidence before her that Ms. Ganthier is permanently and totally disabled—and there clearly is such evidence on this record, coming from Ms. Ganthier's treating physician, and being conceded at the formal hearing by Fairmont Hotel (see, HT page 8), the finding that Ms. Ganthier is permanently and totally disabled is supported by substantial evidence. She offered no evidence to counter that status.

A claimant's entitlement to a benefit or class of benefits is a function of that claimant's status at the time for which the benefit is sought. In seeking a schedule award for a time period in which she is as a matter of fact permanently totally disabled, Ms. Ganthier seeks an award to a class of benefits to which she is not entitled. The fact that for some reason, a reason which may be obvious or may only be known to her, she chose to seek first an award under the schedule is irrelevant to the fact that she is entitled only to the class and level of benefits that the evidence establishes, and in this case the ALJ's determination that the evidence establishes that her status is one of permanent total disability is supported by substantial evidence. Accordingly the denial of a schedule award is in accordance with the law.

CONCLUSION AND ORDER

The January 3, 2012 Compensation Order on Remand is supported by substantial evidence and is in accordance with the law, and is affirmed.

FOR THE COMPENSATION REVIEW BOARD:

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JEFFREY P. RUSSELL
Administrative Appeals Judge

May 22, 2012
DATE

MELISSA LIN JONES, *Administrative Appeals Judge*, dissenting:

The claim for relief at the formal hearing was "an award under the Act of 100% permanent partial disability to the right upper extremity."[3] The administrative law judge ("ALJ") did not rule on a request for permanent partial disability; she ruled on a request for permanent total disability. Thus, the issue on appeal is not whether or not the evidence supports the ALJ's finding that Ms. Ganthier

[3] *Ganthier v. Fairmont Hotel*, AHD No. 10-231A, OWC No. 647568 (January 3, 2012).

is permanently totally disabled; the issue on appeal is whether or not the ALJ properly assessed Ms. Ganthier's entitlement to permanent partial disability benefits.

When assessing a claim for permanent partial disability, the ALJ must determine if the claimant has reached maximum medical improvement; then, the *Negussie* process begins.[4] The test for entitlement to permanent partial disability benefits is different from the test for entitlement to permanent total disability benefits where an ALJ must determine if the claimant has reached maximum medical improvement; then, the ALJ must determine if the disability has continued for a lengthy period as distinguished from one in which recovery is a function of the healing process and if the injuries prevent the claimant from engaging in the only type of gainful employment for which she is qualified.[5] These entitlements are two different claims with two different analyses.

Here, the ALJ found Ms. Ganthier is permanently totally disabled but did not award permanent total disability benefits because she couldn't-- Ms. Ganthier had not asked for permanent total disability benefits; neither party had presented a case for permanent total disability benefits; and neither party had prepared a case for permanent total disability benefits. Thus, confounding the claim (or finding a lack of entitlement to permanent partial disability benefits because the entitlement to permanent total disability benefits purportedly has been proven) is a violation of due process. The ALJ ruled on an issue the parties had no notice was being litigated.[6]

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MELISSA LIN JONES
Administrative Appeals Judge

[4] *Negussie v. DOES*, 915 A.2d 391 (D.C. 2007).

[5] *Logan v. DOES*, 805 A.2d 237 (D.C. 2002).

[6] *Transportation Leasing v. DOES*, 690 A.2d 487 (D.C. 1997).