

CRB (Dir.Dkt.) No. 06-04

ROBERT GOBBETT,

Claimant–Petitioner

v.

DISTRICT OF COLUMBIA DEPARTMENT OF MENTAL HEALTH,

Employer/Carrier–Respondent.

Appeal from a Compensation Order of
Administrative Law Judge Robert R. Middleton
AHD No. PBL 04-005, DCP No. LT4-HEALTH 000554

Robert Gobbett, *pro se*,¹

Ross Buchholz, Esq., for the Respondent

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

JEFFREY P. RUSSELL, *Acting Administrative Appeals Judge*, on behalf of the Compensation Review Panel:

DECISION AND ORDER

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board pursuant to Jurisdiction is conferred upon the Compensation Review Board pursuant to D.C. Official Code §1-623.28, §32-1521.01, 7 DCMR §118, and DOES Director’s Directive Administrative Policy Issuance No. 05-01 (Feb. 5, 2005), 7 DCMR § 230, and the Department of Employment Services Director’s Directive, Administrative Policy Issuance 05-01 (February 5, 2005).²

¹ Although represented by counsel at the formal hearing, Claimant-Petitioner filed the Application for Review *pro se*, and no attorney has entered an appearance on his behalf in connection with this appeal.

² Pursuant 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*,

BACKGROUND

This appeal follows the issuance of a Final Compensation Order by the Assistant Director for Labor Standards of the District of Columbia Department of Employment Services, approving and adopting a Recommended Compensation Order from the former Office of Hearings and Adjudication, currently the Administrative Hearings Division (AHD) of the Office of Hearings and Adjudication (OHA). In that Compensation Order, which was filed on July 16, 2004, the Administrative Law Judge (ALJ) denied Claimant-Petitioner's claims for (1) continuing disability benefits for wage loss, (2) cost of living increases since the date of the work injury (3) an increase of 7% to a total of 17% permanent partial disability to the right leg, and (4) an award of 18% permanent partial disability to the skin as an organ.

Claimant-Petitioner's Petition for Review requests the following action be taken in connection with his appeal: that he be awarded (1) 18% of 312 weeks at his compensation rate for permanent partial disability of the skin as an organ, and (2) 10% of 205 weeks of compensation for permanent partial disability to his right foot. Petition for Review, paragraph 6.

Review of the Recommended Compensation Order reveals that Claimant-Petitioner was indeed awarded the requested permanent partial disability to the right foot. *See*, Recommended Compensation Order, page 7: "In said instance, claimant is entitled to payment of the greater of two awards to the right lower extremity, but not two. Accordingly, claimant is entitled to either 20.16 weeks of compensation for loss of use of the right leg or 20.5 weeks for the loss of use of the right foot." While it may not have been stated as clearly as it could have been, it appears that Claimant-Petitioner was awarded the benefits sought in his Petition for Review in connection with that impairment, and the appeal is therefore moot in that regard. Thus, the sole remaining issue articulated for resolution is the denial of an award for 18% permanent partial disability of the skin as an organ.

In his Petition for Review, Claimant-Petitioner identifies the grounds for this appeal as follows: "[(1)] Judge R. Middleton did not know the requirement [sic] to get a schedule award. He misread Doctor's reports [and] put a lot of false information on his final decision, [(2)] and most important he is not a member of the Wash. D.C. Bar." Petition for Review, paragraph 9 (bracketed references supplied).

establishment of the Compensation Review Board (CRB) in implementation of the D.C. Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, 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 D.C. Workers' Compensation Act of 1979, as amended, D.C. Official Code §32-1501 *et seq.*, and the D.C. Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Official Code §1-623.1 *et seq.*, 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.

ANALYSIS

As an initial matter, the scope of review by the Compensation Review Board (CRB) and this Compensation 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. Official Code §32-1501 *et seq.*, at §32-1522(d)(2)(A), *and* D.C. Comprehensive Merit Personnel Act of 1978, as amended, D.C. Official Code § 1-623.01, *et seq.*, at § 1-623.28 (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 standard of review, the CRB and this Compensation 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.

Turning to the case under review herein, Claimant-Petitioner alleges first that "Judge R. Middleton did not know the requirement [sic] to get a schedule award. He misread Doctor's reports [and] put a lot of false information on his final decision." This is expounded upon in the memorandum filed therewith, wherein Claimant-Petitioner asserts that:

The skin is a recognized organ of the body and Judge Middleton indicated in his decision that, while plausible, he is not convinced of this argument. I believe he is incorrect in his assessment. D.C. Code [§] 1-623.03 specifically states which organs are not covered—back, brain and heart. Under statutory construction, the exclusion of named items means the inclusion of all others. Because the skin was not specifically excluded as an organ it should be included. Also, Dr. Marion Jordan, an expert on skin burns at the Washington Hospital Center, along with the American Medical Association recognize the skin as an organ.

Memorandum Attachment to Petition for Review, page 1. In support of this argument, the record contains Claimant-Petitioner's exhibit G, a report from Dr. Marion Jordan, prepared January 18, 2004, in which Dr. Jordan opines that the skin is "the largest organ system of the body", and that Claimant-Petitioner has sustained scarring and fibrosis due to the work injury on areas totaling 18% of the surface area of the body. In further support, Claimant-Petitioner submitted another report by Dr. Jordan, exhibit E, in which Dr. Jordan, citing the American Medical Association Guides to the Evaluation of Permanent Impairment, opines that Claimant-Petitioner has sustained a 13% whole person impairment due to the permanent sequela of the burns that he sustained.

Review of the Recommended Compensation Order reveals that the ALJ did not expound to any appreciable degree on the merits of Claimant-Petitioner's request that he be granted a schedule award for permanent partial disability to the skin as an organ, or upon the legal or factual basis of his decision thereon. In fact, the total substance of the discussion of the argument is found on page 5, where the ALJ wrote "[a]fter carefully assessing the arguments of the parties and weighing the evidence and testimony provided herein, I am persuaded employer has properly corrected its initial error in calculating claimant's permanency award [to the right leg or foot]. I am not persuaded, however, claimant is entitled to a permanency award based upon damage to his skin as an organ". Recommended Compensation Order, page 5. The ALJ then proceeded to describe accurately the burden that is placed upon Employer to adduce "persuasive medical evidence" to support a modification or termination of benefits,³ a procedural matter the propriety of which has not been challenged in this appeal.

From this scant treatment of the matter, it is not possible to discern whether the ALJ's reticence in awarding Claimant-Petitioner's claim for a schedule award for permanent partial disability to the skin as an organ is based upon (1) the assumption that the Act, and particularly D.C. Code § 1-624.07 (c) (22) (2005 as amended) does not permit such an award, regardless of whether such an "organic" disability, to a specific degree, has been proved, (2) whether, despite that provision's permitting such an award under some circumstances, such an award is not appropriate in this case for certain specific reasons contained in the record, or (3) regardless of whether the Act permits such an "organic" award, Claimant-Petitioner's evidence has not demonstrated the existence of a ratable skin impairment of which the schedule takes cognizance.

For these reasons, we conclude that the matter must be remanded for clarification and additional fact-finding, if necessary, by the ALJ as to the substance and basis for his decision, consistent with this discussion. On remand the ALJ shall address the question of whether Claimant-Petitioner has sustained any permanent partial disability to an external organ as defined by the Act; if so, what the degree of said impairment is; and whether that impairment, if any, should result in a schedule award under the Act.

Regarding the other assignment of alleged error, that "[the ALJ] is not a member of the Wash. D.C. Bar", regardless of the factual merit or lack thereof to Claimant-Petitioner's complaint concerning the alleged status of the ALJ vis a vis the District of Columbia Bar, it is noted that (1) there is no evidence in the record concerning that status,⁴ and (2)

³ This was a procedural discussion connected with Employer-Respondent having initially awarded Claimant-Petitioner a 17% permanent partial disability award to the right "leg/foot", due to an erroneous initial reading of a disability evaluation in which the evaluator assessed a 10% impairment equating to a 7% impairment of the leg, and combining the figures, when in fact, they represent two different alternative approaches to assessing the single impairment.

⁴ It is noted that Claimant-Petitioner submitted a packet of materials at or following the time of the filing of the Petition for Review, consisting of a handwritten, two page document with the heading "Exhibits", with 13 numbered sub-headings and with corresponding attachments. To the extent that the attachments already are part of the record as it was developed at the formal hearing, they have been considered herein. To the extent that they are not, they have not been. Claimant-Petitioner has made no motion to re-open the record for the

nowhere in the Act is there a provision governing the bar-status of ALJs conducting hearings under it, rendering the issue irrelevant, or at least beyond the jurisdiction of this office. Accordingly, Claimant-Petitioner's appeal on that ground is denied.

CONCLUSION

The Compensation Order of July 16, 2004 requires additional clarification and possible additional fact finding on the issue of Claimant-Petitioner's entitlement to a schedule award for permanent partial disability to his skin as an organ pursuant to D.C. Code §1-624.07 (c) (22) (2005 as amended).

ORDER

The Compensation Order of July 16, 2004 is hereby affirmed in part and remanded in part. The award of a schedule award as contained therein to the foot, and the denial of wage loss benefits and cost of living adjustments, are affirmed. The matter is remanded to the Administrative Hearings Division of the Office of Hearings and Adjudication with instructions that on remand, the ALJ make additional findings of fact and conclusions of law addressing the factual issue of whether Claimant-Petitioner has sustained a permanent partial disability to his skin as an organ, whether Claimant-Petitioner has presented sufficient evidence to establish the extent of said disability if established, and, if so, whether Claimant-Petitioner is entitled to an award for a schedule loss under the Act for said disability.

FOR THE COMPENSATION REVIEW BOARD:

JEFFREY P. RUSSELL
Acting Administrative Appeals Judge

DATE

receipt of additional evidence, and has made no showing as to the reasons for the failure to adduce any such evidence at the formal hearing.