

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
ACTING DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 14-116

ALLEN LOVE,
Claimant-Petitioner,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY and
AS&G CLAIMS ADMINISTRATION,
Employer/Insurer-Respondent.

Appeal from a September 9, 2014 Compensation Order by
Administrative Law Judge Linda F. Jory
AHD No. 05-288A, OWC No. 550539

David M. Snyder for Claimant
Donna J. Henderson for Employer/Insurer

Before MELISSA LIN JONES and HEATHER C. LESLIE, *Administrative Appeals Judges* and
LAWRENCE D. TARR, *Chief Administrative Appeals Judge*.

MELISSA LIN JONES for the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

On October 2, 1999, Mr. Allen Love, an AA mechanic employed by the Washington Metropolitan Area Transit Authority ("WMATA"), injured his lower back while removing a windshield from a vehicle. In November 1999, he underwent back surgery, and in January 2000, he returned to his pre-injury employment without restrictions.

On February 13, 2001, Mr. Love appeared before administrative law judge ("ALJ") David L. Boddie for a formal hearing to resolve the issue of Mr. Love's entitlement to permanent partial disability benefits for his left leg. Although Mr. Love "continued to experience some residual symptoms in his left leg and back as a result of his work injury and subsequent surgery," *Love v. Washington Metropolitan Area Transit Authority*, OHA No. 01-078, OWC No. 550539 (April 29, 2002), ALJ Boddie determined Mr. Love's permanent partial disability from his work injury

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2015 FEB 23 AM 9 53

was attributable to his back or whole body, not his left leg; ALJ Boddie found “the evidence in the record is inconsistent with and does not support the claimant’s testimony that he has a permanent partial disability of his left leg which limits his ability to function, affects his endurance, and in turn his ability to perform the duties of his employment.” *Id.* ALJ Boddie denied Mr. Love’s claim for relief.

On October 21, 2011, Mr. Love filed another Application for Formal Hearing. A Scheduling Order issued on December 20, 2011, and WMATA filed a Motion to Dismiss or, In the Alternative, for Summary Judgment (“Motion”) raising a statute of limitations argument. On February 24, 2012, without giving Mr. Love any opportunity to respond, WMATA’s Motion was granted, and Mr. Love’s Application for Formal Hearing was dismissed. The CRB vacated the order granting the Motion and dismissing the Application for Formal Hearing; the CRB remanded the matter “to afford Mr. Love an opportunity to respond to the Motion, and in the Order ruling upon the Motion, the ALJ shall provide detailed factual statements and a thorough analysis of the issues and responses raised.” *Love v. Washington Metropolitan Area Transit Authority*, CRB No. 12-041, AHD No. 05-288A, OWC No. 550539 (May 15, 2012). On remand, the ALJ refused to comply with the May 15, 2012 Decision and Remand Order and issued an Order that constituted a legal nullity. *Love v. Washington Metropolitan Area Transit Authority*, CRB No. 12-093, AHD No. 05-288A, OWC No. 550539 (October 11, 2012).

On August 20, 2014, ALJ Linda F. Jory held a full evidentiary hearing to assess Mr. Love’s entitlement to “a scheduled loss award of permanent partial disability based upon a rating of 40% permanent partial impairment to the left leg.” *Love v. Washington Metropolitan Area Transit Authority*, AHD No. 05-288A, OWC No. 550539 (September 9, 2014), p. 2. ALJ Jory ruled Mr. Love’s claim is barred as an untimely request for modification.

On appeal, Mr. Love argues he presented to ALJ Jory a new claim for relief, not a request for modification of the April 29, 2002 Compensation Order because his claim for relief “is based upon the July 27, 2011 Independent Medical Evaluation of Dr. Michael Franchetti, who determined Mr. Love has a 40% permanent partial impairment of the left lower extremity” and because “subsequent payments of temporary total disability benefits in Mr. Love’s claim permit him to bring a new claim for relief” in accordance with *Cherrydale Heating & Air Conditioning v. DOES, infra*. Claimant’s Application for Review, p. 5. Mr. Love also argues that because WMATA made voluntary payments of temporary total disability benefits following the April 29, 2002 Compensation Order, § 32-1524 of the District of Columbia Workers’ Compensation Act, as amended, D.C. Code § 32-1501 to 32-1545 (“Act”) does not apply. For these reasons, Mr. Love requests the CRB reverse the September 9, 2014 Compensation Order.

In response, WMATA asserts the only difference between Mr. Love’s current claim for relief and the claim for relief resolved by way of the April 29, 2002 Compensation Order is an increase in his permanent partial impairment rating. WMATA also asserts its voluntary payment of temporary total disability benefits to compensate for Mr. Love’s back disability is irrelevant to his current request for permanent partial disability to his left leg. WMATA requests the CRB affirm the September 9, 2014 Compensation Order.

ISSUE ON APPEAL

Does Mr. Love's claim for relief at the August 20, 2014 formal hearing constitute a request for modification of the April 29, 2002 Compensation Order?

ANALYSIS¹

On February 13, 2001, Mr. Love presented his claim for permanent partial disability of his left leg as a result of his October 2, 1999 work-related back injury. In a Compensation Order dated April 29, 2002, an ALJ denied Mr. Love's claim for relief; in other words, the ALJ granted Mr. Love 0% permanent partial disability to his left leg. *Love v. Washington Metropolitan Area Transit Authority*, OHA No. 01-078, OWC No. 550539 (April 29, 2002).

Modification pursuant to § 32-1524 of the Act is required when a prior Compensation Order makes it clear the issue to be decided in the current proceeding was decided in a prior Compensation Order. On August 20, 2014, Mr. Love again presented his claim for permanent partial disability of his left leg as a result of his October 2, 1999 work-related back injury. Mr. Love attempts to fashion his claim for relief as a new claim because the one-year statute of limitations on requests for modification of an existing Compensation Order does not apply to timely filed new claims, even if benefits previously have been awarded for a different injury arising out of the same work-related accident, *Washington Metropolitan Area Transit Authority v. DOES*, 981 A.2d 1216 (D.C. 2009); however, Mr. Love's claim is a classic case of worsening of condition purportedly supported by more recent testimony and a more recent medical opinion. Nonetheless, calling the claim a new claim does not make it so, particularly when it is identical in all respects to the original claim (albeit supported by new evidence). Thus, the ALJ correctly stated:

The question in the instant matter accordingly is how claimant's claim for 40% permanent partial impair[ment] to the left leg could be construed as a new claim which was not the subject of the existing Compensation Order.

As found in the findings of fact herein, a formal hearing was conducted on February 13, 2001 by David L. Boddie, Administrative Law Judge and the sole claim for relief sought by claimant at the time of that formal hearing was 20 [percent] permanent partial impairment of the left leg pursuant to D.C.[.] Code §[3]2-1508(3)(B). In a nine page Compensation Order issued by ALJ Boddie, claimant's claim for a 20 [percent] permanent partial disability award was rejected as the opinion of employer's Independent Medical Examination [IME]

¹ The scope of review by the CRB is limited to making a determination as to whether the factual findings of the appealed 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. Section 32-1521.01(d)(2)(A) of the Act. Consistent with this standard of review, the CRB is constrained to uphold a Compensation Order 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).

was found by the ALJ to be consistent with the medical evidence than [sic] claimant's IME opinion.

Having reviewed the Compensation Order in its entirety, the undersigned finds there is no question that the nature and extent of claimant[']s permanent partial disability was the issue addressed at the prior formal hearing and the Compensation Order addressed entirely whether claimant's back injury resulted in a permanent partial impairment to claimant's left leg. Thus the undersigned must agree with employer that the instant claim is not a new claim but the same claim and the only thing that is increased is Dr. Franchetti's rating. HT at 49.

Accordingly, as reiterated by the CRB in *Fletcher [v. Safeway, Inc.]*, CRB No. 11-090, AHD No. 04-217C (January 31, 2013)], and pursuant to §32-1524, in order for AHD to retain jurisdiction over the instant claimant's current claim, his request for modification must have been filed[] at any time prior to 1 year after the date of the rejection of his claim which both parties agree, claimant did not do.

Love v. Washington Metropolitan Area Transit Authority, AHD No. 05-288A, OWC No. 550539 (September 9, 2014), p. 4.

Contrary to Mr. Love's argument, *Cherrydale* is not applicable to this case. In *Cherrydale*, the Director carved out a narrow exception to *Smith v. DOES*, 548 A.2d 95 (D.C. 1988) for a resumption of temporary total disability benefits following an award of permanent partial disability benefits in the event of "an extreme change of condition resulting in amputation or its functional equivalent." *Cherrydale Heating & Air Conditioning v. DOES*, 722 A.2d 31, 34 (D.C. 1998). Here, Mr. Love requests permanent partial disability benefits for his left leg following a denial of an award of permanent partial disability benefits to his left leg, and his reliance on *Cherrydale* is misplaced.

Similarly, Mr. Love's argument that WMATA's voluntary payment of temporary total disability benefits for his back injury abrogates the requirement to comply with § 32-1524 of the Act is without merit. WMATA's voluntary payment of benefits does not change that Mr. Love's current claim for left leg permanent partial disability was fully presented to an ALJ in 2001 and was ruled upon in a Compensation Order in 2002. WMATA was under no adjudicated obligation to pay temporary total disability benefits, and its doing so is irrelevant to the impact of the previously issued Compensation Order adjudicating Mr. Love's entitlement to permanent partial disability to his left leg.

CONCLUSION AND ORDER

Mr. Love's claim for relief at the August 20, 2014 formal hearing constituted a request for modification of the April 29, 2002 Compensation Order subject to the limitations period in § 32-1524 of the Act. The September 9, 2014 Compensation Order is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:



MELISSA LIN JONES
Administrative Appeals Judge

February 23, 2015
DATE