

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA MARÍA MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 13-081

**HARRIETT L. KENNEDY,
Claimant-Petitioner,**

v.

**WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY and XCHANGING,
Employer/Insurer-Respondent.**

Appeal from a May 31, 2013 Compensation Order on Remand By
Administrative Law Judge Anand K. Verma
AHD No. 11-150, OWC No. 618906

Timothy J. Driscoll, Jr., Esquire for the Petitioner
Mark H. Dho, Esquire for the Respondent

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

MELISSA LIN JONES for the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

On September 11, 2005, Ms. Harriett L. Kennedy injured her right foot while working as a train operator for the Washington Metropolitan Area Transit Authority (WMATA). Ms. Kennedy treated conservatively for more than five years.

In November 2010, Ms. Kennedy obtained a permanency rating from an independent medical examination physician, Dr. Michael A. Franchetti. Dr. Franchetti asserted Ms. Kennedy had sustained a 28% impairment to her right foot as a result of her on-the-job accident.

In February 2011, Dr. Clifford Hinkes examined Ms. Kennedy on WMATA's behalf. Dr. Hinkes asserted Ms. Kennedy had sustained no permanent impairment to her right foot as a result of her on-the-job accident.

The parties proceeded to a formal hearing to determine Ms. Kennedy's entitlement to permanent partial disability to her right foot, a schedule member. On August 31, 2011, an administrative

law judge (ALJ) denied Ms. Kennedy's request for permanent partial disability benefits because she had "not met her burden of proving her entitlement to a 28% permanent impairment to her right foot by a preponderance of the evidence."¹

On May 22, 2012, the Compensation Review Board (CRB) vacated the Compensation Order.² In the Compensation Order, the ALJ had set forth the provisions of the District of Columbia Workers' Compensation Act, as amended, D.C. Code §32-1501 to 32-1545 ("Act") governing schedule member permanent partial disability as well as the provisions of the Act governing wage loss permanent partial disability; the matter was remanded for analysis under the correct section of the Act. In addition, the ALJ had applied the treating physician preference even though Ms. Kennedy's treating physician had not rendered an opinion on Ms. Kennedy's permanent impairment; the matter was remanded to omit reference to the treating physician preference. Finally, the ALJ had failed to explain any economic impact of Ms. Kennedy's injury; the matter was remanded for further analysis of this crucial element of permanent partial disability.

In a Compensation Order on Remand dated May 31, 2012, the ALJ again denied Ms. Kennedy's claim for relief.³ On September 11, 2012, the CRB again remanded the matter because although the ALJ had analyzed the claim pursuant to the schedule member provision of the Act, he had applied the treating physician preference and he had made contradictory findings regarding Ms. Kennedy's residual symptomatology.⁴

A second Compensation Order on Remand issued on September 12, 2012.⁵ A third Decision and Remand Order issued on April 23, 2013.⁶

In the April 23, 2013 Decision and Remand Order, the CRB determined the ALJ had adequately addressed the improper citation to the wrong statutory provision and had not referred to any independent medical examination physician as a treating physician. Nonetheless, a significant problem remained:

¹ *Kennedy v. Washington Metropolitan Area Transit Authority*, AHD No. 11-150, OWC No. 618906 (August 31, 2011).

² *Kennedy v. Washington Metropolitan Area Transit Authority*, CRB No. 11-108, AHD No. 11-150, OWC No. 618906 (May 22, 2012).

³ *Kennedy v. Washington Metropolitan Area Transit Authority*, AHD No. 11-150, OWC No. 618906 (May 31, 2012).

⁴ *Kennedy v. Washington Metropolitan Area Transit Authority*, CRB No. 12-099, AHD No. 11-150, OWC No. 618906 (September 11, 2012).

⁵ *Kennedy v. Washington Metropolitan Area Transit Authority*, AHD No. 11-150, OWC No. 618906 (September 12, 2012).

⁶ *Kennedy v. Washington Metropolitan Area Transit Authority*, CRB No. 12-161 AHD No. 11-150, OWC No. 618906 (April 23, 2013).

there has never been a specific finding or conclusion that Ms. Kennedy has sustained any specific numerical medical impairment, or any specific degree of disability. What the ALJ has concluded in each of the compensation orders is that the claim for a schedule award should be denied because Ms. Kennedy has “not met her burden of proving her entitlement to a 28% permanent impairment to her right foot by a preponderance of the evidence.”^[7]

The matter was remanded for the ALJ to

make a finding of fact as to the degree of disability, if any, the evidence demonstrates. If the ALJ concludes that Ms. Kennedy’s evidence fails to adequately demonstrate any disability at all, there must be a finding of zero disability; if the evidence demonstrates a disability in some amount other than that claimed, an award in the amount demonstrated is required.^[8]

In a Compensation Order on Remand dated May 31, 2013, the ALJ found Ms. Kennedy has 0% impairment of her right foot.⁹ Ms. Kennedy appeals this Compensation Order on Remand.

Ms. Kennedy accepts the facts as found by the ALJ but asserts the ALJ did not assign a percentage of disability. Ms. Kennedy also asserts that the ALJ failed to consider the treating physician opinions and that the ALJ’s ruling is inconsistent with the findings of the treating physician. Ms. Kennedy requests the CRB remand this matter to a different ALJ or “make a factual and legal finding.”

In opposition, WMATA argues that the ALJ addressed the errors contained in the prior Compensation Order on Remand and that the appealed Compensation Order on Remand is supported by substantial evidence and is in accordance with the law. WMATA requests the CRB affirm the May 31, 2013 Compensation Order on Remand.

ISSUES ON APPEAL

1. Did the ALJ assign a permanent partial disability?
2. Did the ALJ err by not applying a treating physician preference?
3. Is the May 31, 2013 Compensation Order on Remand supported by substantial evidence and in accordance with the law?

⁷ *Kennedy v. Washington Metropolitan Area Transit Authority*, CRB No. 12-161 AHD No. 11-150, OWC No. 618906 (April 23, 2013), p. 3.

⁸ *Id.*

⁹ *Kennedy v. Washington Metropolitan Area Transit Authority*, AHD No. 11-150, OWC No. 618906 (May 31, 2013), p. 4.

ANALYSIS¹⁰

Not only did the ALJ assign a permanent partial disability:

Predicated on the reliable IME of Dr. Hinkes, Claimant has zero percent impairment of her right foot.^[11]

the ALJ supported that ruling with a detailed review of the medical records as well as particular findings of fact including but not limited to

- Ms. Kennedy had a three year gap in conservative treatment;¹²
- Ms. Kennedy's current full duty employment as a station manager involves walking which she accomplishes without any assistive device and with only occasional over-the-counter medication;¹³
- Ms. Kennedy's subjective complaints are not supported by objective tests;¹⁴
- Ms. Kennedy remedies her occasional swelling by wearing a CAM walker boot, soaking her foot, and elevating her foot;¹⁵
- Ms. Kennedy's right foot pain was 98% mitigated in November 2005;¹⁶
- Ms. Kennedy stopped receiving palliative care in September 2009;¹⁷
- Ms. Kennedy was released to work in October 2009;¹⁸

¹⁰ 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. Section 32-1521.01(d)(2)(A) of the District of Columbia Workers' Compensation Act, as amended, D.C. Code §32-1501 to 32-1545.

¹¹ *Kennedy v. Washington Metropolitan Area Transit Authority*, AHD No. 11-150, OWC No. 618906 (May 31, 2013), p. 4. Although the ALJ wrote "impairment," based upon a review of the Compensation Order on Remand as a whole the ALJ certainly meant "disability."

¹² *Id.* at 3.

¹³ *Id.* at 4.

¹⁴ *Id.*

¹⁵ *Id.* at 5.

¹⁶ *Id.* at 6.

¹⁷ *Id.*

¹⁸ *Id.* at 7.

- Dr. Franchetti did not buttress Ms. Kennedy’s complaints with any diagnostic tests;¹⁹
- Ms. Kennedy has not suffered any economic impairment as a result of her injury;²⁰ and
- “[T]he work injury has not altered claimant’s capacity to meet her personal and occupational demands.”²¹

There is no appellate justification for the CRB to overturn the ALJ’s conclusion that Ms. Kennedy is not entitled to any award for permanent partial disability.

Finally, as stated in the CRB’s prior Decision and Remand Orders, Ms. Kennedy’s treating physician has not rendered an opinion on the issue of permanent partial impairment. Consequently, there is no treating physician opinion to which the ALJ could afford a preference, and the ALJ’s previous errors in doing so were rectified in the September 12, 2012 Compensation Order on Remand.

Ms. Kennedy’s true complaint is that the ALJ did not weigh the evidence so as to find that Ms. Kennedy proved her entitlement to an award for 28% permanent partial disability to her foot. The CRB, however, 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.²²

CONCLUSION AND ORDER

Consistent with substantial evidence in the record and without applying a treating physician preference, the ALJ assigned a 0% permanent partial disability to Ms. Kennedy’s right foot. The ALJ’s ruling is in accordance with the law, and the May 31, 2013 Compensation Order on Remand is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

 MELISSA LIN JONES
Administrative Appeals Judge

 September 12, 2013
 DATE

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 9.

²² *Marriott International v. DOES*, 834 A. D 882, 885 (D.C. 2003).