GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR

LISA MARÍA MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 12-161

HARRIETT L. KENNEDY,
Claimant–Petitioner,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
Self-Insured Employer-- Respondent.

Appeal from a September 12, 2012 Compensation Order on Remand of
Administrative Law Judge Anand K. Verma
AHD No. 11-150, OWC No. 618906

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

Before JEFFREY P. RUSSELL, MELISSA LIN JONES, *Administrative Appeals Judges*, and LAWRENCE D. TARR, *Chief Administrative Appeals Judge*.

JEFFREY P. RUSSELL, *Administrative Appeals Judge,* for the Compensation Review Board.

DECISION AND REMAND ORDER

BACKGROUND

Harriett L. Kennedy was employed as a train operator for Washington Metropolitan Area Transit Authority (WMATA). She injured her right foot on September 11, 2005, when she fell exiting a train. Subsequent to the accident she underwent a course of medical care, and has returned to work for WMATA in a different capacity, that of a station manager.

She sought an award under the schedule for permanent partial disability to her right foot at an August 11, 2011 formal hearing before an Administrative Law Judge (ALJ) in the Department of Employment Services (DOES). She sought an award of 28% permanent partial disability to the foot, based upon an Independent Medical Evaluation (IME) performed by Dr. Michael Franchetti. WMATA opposed the claim, relying upon a medical impairment rating of 0% obtained in an IME from Dr. Clifford Hinkes.

On August 31, 2011, the ALJ issued a Compensation Order (CO 1) denying the claim, which was appealed by Ms. Kennedy to the Compensation Review Board (CRB).

On May 22, 2012, the CRB issued a Decision and Remand Order (DRO 1) in which the CRB determined that the Compensation Order cited an inappropriate provision of D.C. Code § 32-1501, *et seq.* (the Act), by referencing § 32-1508 (3)(V)(ii), as well as citing the proper section, § 32-1508 (3) A through U. Unable to discern which provision the ALJ meant to apply, the matter was remanded with instructions to apply the proper subsection.

On May 31, 2012, the ALJ issued a Compensation Order on Remand (CO 2), in which the claim was again denied. Ms. Kennedy appealed CO 2 to the CRB. On September 11, 2012, the CRB issued a Decision and Remand Order (DRO 2) in which it was determined that CO 2 again referenced both the correct and incorrect statutory provisions, mischaracterized an IME physician as a treating physician when evaluating competing medical opinions, and made a finding that Ms. Kennedy suffered no *sequalae* from the work injury which, assuming Ms. Kennedy was credible, was not supported by substantial evidence. The matter was remanded again, with instructions to further consider the claim.

On September 12, 2012, the ALJ issued a second Compensation Order on Remand (CO 3), in which the claim was again denied.

On October 4, 2012, Ms. Kennedy filed an Application for Review (AFR) with the CRB, appealing CO 3. The AFR was accompanied by "Claimant's Memorandum of Points and Authorities in Support of Application for Review" (Petitioner's Memorandum).

In that memorandum, Ms. Kennedy raises three arguments: (1) "when the record is taken as a whole [the ALJ's] conclusions are quite inconsistent with the findings of the treating physician" who "nearly five years after her original diagnosed stress fracture of the foot … noted the 'Chronic Nature of Pain associated with a foot injury' [and] released the Claimant from work for more than two weeks and mobilized her foot"; (2) "The CRB ordered [the ALJ] to evaluate this claim according to the proper statute. This was not done"; and (3) the ALJ's disregard of Dr. Franchetti's rating was improper because his "evaluation still showed swelling approximately five years after the original fracture, essentially confirming the treating physician's findings."

The relief requested in the Memorandum is that the CRB "reverse and/or modify the August 31, 2011, May 31, 2012 and September 12, 2012 Compensation Orders with instructions to all parties". What modifications or instructions are sought is not stated.

WMATA filed "Employer's Opposition to Claimant's Application for Review" (WMATA's Opposition). In the Opposition, WMATA argues that the ALJ followed the mandate of the CRB in DRO 2, by removing any references to any of the evaluations before the ALJ as being authored by a treating physician, and removed any reference to the incorrect statutory section. WMATA further argues that "The finding that claimant does not suffer from any permanent partial impairment is supported by the record" and "is supported by substantial evidence."

STANDARD OF REVIEW

The scope of review by the CRB is generally 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. Code § 32-1501, *et seq.*, (the Act) at § 32-1521.01 (d)(2)(A), and *Marriott International v. DOES*, 834 A.2d 882 (D.C. 2003). Consistent with this standard of review, the CRB and this review panel must affirm 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 this panel might have reached a contrary conclusion. *Id.*, at 885.

DISCUSSION AND ANALYSIS

We note that the ALJ has adequately addressed the improper citation to the wrong statutory provision, and has not improperly referred to any of the IME physicians as treating physicians in CO 3, and in those respects it conforms to the prior directive of the CRB as set forth on DRO 2. Thus, we reject Ms. Kennedy's second argument that "The CRB ordered [the ALJ] to evaluate this claim according to the proper statute. This was not done."

However, there is a significant problem with CO 3 that the ALJ must address: 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."

This is both legally and practically problematic.

Legally, a claimant is entitled to have an award less than that sought in the claim for relief, if the evidence demonstrates that entitlement. In other words, to find that a claimant has failed to prove a 28% permanent partial disability doesn't mean the claimant has sustained no (or zero) disability, and if the evidence supports a lesser amount than the specific amount claimed, the amount demonstrated should be awarded. Further, in order to conform to the District of Columbia Administrative Procedure Act and to withstand substantial evidence review, an Agency decision must state findings of fact and conclusions of law on *each contested material issue*, those findings must be supported by substantial evidence, and the conclusions must flow rationally from those findings. See, *Perkins v. DOES*, 482 A.2d 401 (D.C. 1984).

Practically speaking, merely denying the claim without a specific finding of a degree of disability makes it impossible for a claimant to seek a modification in the future, should the claimant allege that the condition has recurred or worsened; without a baseline, there is nothing to compare an allegedly worsened condition to.

Thus, on remand, the ALJ must 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.

CONCLUSION AND ORDER

The Compensation Order on Remand of September 12, 2012 is vacated. On remand a new Compensation Order based upon the record as a whole shall be issued, in a manner consistent with the aforegoing Decision and Remand Order.

FOR THE COMPENSATION REVIEW BOARD:

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JEFFREY P. RUSSELL
Administrative Appeals Judge

April 23, 2013
DATE