COMPENSATION REVIEW BOARD

CRB No. 13-038

HOSEA LANTION,
Claimant–Petitioner,
v.

EAGLE MAINTENANCE SERVICES, INC. and THE HARTFORD INSURANCE COMPANIES,
Employer/Insurer-- Respondent.

Appeal from a February 28, 2013 Compensation Order of
Administrative Law Judge Leslie A. Meek
AHD No. 11-029A, OWC No. 655847

Raymond M. Hertz, Esquire, for the Petitioner
Chad A. Michael, Esquire, for the Respondent

Before JEFFREY P. RUSSELL, MELISSA LIN JONES, and HENRY W. MCCOY, *Administrative Appeals Judges*.

JEFFREY P. RUSSELL, for the Compensation Review Board.

DECISION AND REMAND ORDER

BACKGROUND

Hosea Lantion injured himself on his first day of employment with Eagle Maintenance Services (EMS), a company that provides cleaning, maintenance and janitorial services. Mr. Lantion's injury occurred at the Verizon Center, which was to be his work site.

EMS accepted the claim and provided causally related medical care. Mr. Lantion ultimately returned to work for EMS, where he continued to be employed until he was terminated for reasons not relevant to this appeal at this time.

However, the parties were unable to reach agreement concerning several issues related to the claim, including Mr. Lantion's average weekly wage (AWW) for compensation purposes, the nature and extent of Mr. Lantion's disability, whether EMS controverted the claim in a timely fashion, and whether EMS delayed payment of benefits due in bad faith.

These issues were presented for resolution at a formal hearing before a Department of Employment Services (DOES) Administrative Law Judge (ALJ) on July 19, 2012, following which the ALJ issued a Compensation Order (CO) on February 28, 2013.

In the CO, the ALJ concluded her Discussion with the following paragraph:

> Claimant has failed to meet his burden of proof to establish his average weekly wage, as such the issue of nature and extent and schedule loss are moot. Claimant has also failed to meet his burden of proof regarding the issues of timely controversion and unreasonable delay as he has failed to present evidence to support theses [sic] assertions.

CO, page 4.

Immediately following this paragraph, the ALJ wrote:

> **CONCLUSION OF LAW**
>
> Based upon a review of the record evidence as a whole, I hereby dismiss Claimant's claim without prejudice.

CO, page 4.

Finally, immediately following the "Conclusion of Law", the ALJ wrote:

> **ORDER**
>
> It is **ORDERED** Claimant's claim for relief be, and hereby is **Dismissed** without prejudice.

CO, page 5.[1]

Mr. Lantion appealed the CO to the Compensation Review Board (CRB) on March 28, 2013, to which appeal EMS filed an Opposition on April 11, 2013.

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

[1] Ordering that a "claim for relief be dismissed without prejudice" is a somewhat novel terminology. We take it to mean that the claims are denied.

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 begin our analysis by pointing out that a "Dismissal without prejudice" is not the proper result where the evidence of record fails to support a claim for relief. The proper outcome in such a case is either a denial of the claim if the facts support a denial, or reopening the record as is discussed later in this Decision and Remand Order. Further we also note that a failure of the record to contain adequate evidence to establish an AWW does not render a claim for disability benefits moot. The claims remain viable, merely requiring a finding as to the AWW in order to compute the amount due in connection with any disability that is found to result from the work injury.

On these bases alone we are compelled to vacate the CO and remand the matter for further consideration.

And we must also correct apparent internal contradictions in the CO.

In footnote 2, the ALJ wrote:

> While each of the parties' exhibits is not specifically referenced in this discussion, each was reviewed, considered and weighed during the course of this deliberation.

CO, page 2, footnote 2.

Then, the ALJ later wrote:

> In determining whether Claimant has met his burden to prove his average weekly wage, this Tribunal is not required to consider the Evidence presented by Employer as the D.C. Court of Appeals has determined "… a decision against the party having the burden of proof does not rest upon the quantum of evidence." *Golding-Alleyne v. Dist. Of Columbia Dept. of Employment Services, 980 A.2d 1209 (DCCA 2009)* at 1216.
>
> As the burden of proof rests with Claimant, and Dr. Gordon's IME report is evidence submitted by Employer, this Tribunal accords it no weight in determining whether Claimant has met his burden.
>
> Employer's evidence includes a document titled "Transactions by Payroll Item" for an employee named Ricky Hall. (EE 5). Also included in Employer's evidence are documents entitled "Employee Attendance Records." (EE 6). Employer asserts these are the payroll records of employees who are in the same class and work in the same or similar employment as Claimant.
>
> *Employee's* evidence is void of any documentary evidence that shows the title or job functions of any of the employees mentioned in EE's [sic] 5 or 6. Further,

> Employer's evidence fails to indicate the rate of pay for any of the employee's mentioned in EE's [sic] 5 and 6. EE 5 and 6 are given no weight in the determination of average weekly wage pursuant to the Act.

CO, page 4 (italicized "*Employee's*" added.)

We assume that the italicized "*Employee's*" was meant to be "Employer's".

Least significantly but confounding nonetheless, we are at a loss to understand why the reference to Dr. Gordon's IME was inserted into the middle of what was otherwise a discussion of AWW.

More to the point, though, despite asserting in footnote 2 that *all* the evidence was considered, the ALJ goes to significant length in discussing that she was under no obligation to consider evidence submitted by EMS when determining whether Mr. Lantion has, on this record, met his burden of proof as it relates to AWW. Then the ALJ discusses and rejects EMS's EE 5 and EE 6 for various substantitive reasons. We are perplexed by this serve-and-volley approach to the analysis.

We note that the language the ALJ attributes to the District of Columbia Court of Appeals (DCCA) in *Golding-Alleyne*, while found in that decision, is a quotation that the DCCA took from an Indiana case, *Scott v. Steene School Township of Knox County*, 121 Ind. App. 206, 95 N.E.2d 308, 309 (Ind. App. 1950), and is contained in a string of citations and short quotes from courts around the country that deal with nuances of the phraseology "substantial evidence". Although the ALJ appears to be interpreting *Golding-Alleyne* to be addressing "burden of production", it is not. It is addressing "burden of proof". As several other cases in the DCCA string of citations make clear, the point is that whether a party has met a burden of proof is a matter of considering *the record as a whole.* Here is the whole relevant portion from *Golding-Alleyne:*

> Petitioner misapprehends the issue before us when she argues that "[i]t was simply not reasonable for the ALJ to conclude that Petitioner failed to present substantial evidence regarding her left leg disability." The claimant had the burden of proof when presenting her case to the ALJ, and she must prove her case by a *preponderance* of the evidence. *See Washington Metropolitan Area Transit Auth.*, 926 A.2d at 149 (holding that plaintiff has the burden to prove the nature and extent of his disability by a preponderance of the evidence); *Director, Office of Workers' Compensation Programs, Dep't of Labor v. Greenwich Collieries*, 512 U.S. 267, 281, 114 S. Ct. 2251, 129 L. Ed. 2d 221 (1994) (interpreting § 7 (c) of the federal APA to mean that "when the evidence is evenly balanced, the benefits claimant must lose."). Merely presenting "substantial evidence" to support her claim is not necessarily enough to carry the burden of persuading the finder of fact. *See Shaw Project Area Comm., Inc. v. District of Columbia Comm'n on Human Rights*, 500 A.2d 251, 255 (D.C. 1985) ("'The substantiality of evidence must take into account whatever in the record fairly detracts from its weight.'" (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488, 71 S. Ct. 456, 95 L. Ed. 456 (1951)).
>
> Petitioner also protests that the ALJ's ruling was not supported by "substantial evidence" because there was no competing medical evidence on the employer's side

of the case. We agree that this is not a typical case where there are medical experts on both sides. However, the ALJ's ruling that petitioner failed to carry her burden of proof was not a finding of fact. Rather, it was a conclusion reached by applying the law to the record presented. It thus is not clear that the "substantial evidence" test governs or, if it does, that it applies in the traditional fashion.

Although this court apparently has not had occasion to address this issue, many others have. *See, e.g., Hickman v. Kellogg, Brown & Root*, 372 Ark. 501, 277 S.W.3d 591, 596 (Ark. 2008) ("Where the [Workers' Compensation] Commission denies a claim because of the claimant's failure to meet his burden of proof, the substantial-evidence standard of review requires that we affirm the Commission's decision if its opinion displays a substantial basis for the denial of relief."); *Scott v. Steene School Township of Knox County*, 121 Ind. App. 206, 95 N.E.2d 308, 309 (Ind. App. 1950) (worker's compensation case; "The finding [that claimant did not sustain his burden of proof] cannot therefore be attacked upon the ground that there was a lack of evidence to support it, as a decision against the party having the burden of proof does not rest upon the quantum of evidence."); *Finance & Administration Cabinet, Dep't of Revenue v. Slagel*, 253 S.W.3d 74, 76 (Ky. Ct. App. 2008) ("Where an administrative agency's decision is to deny relief to the party with the burden of proof or persuasion, as was the case here, the issue on appeal is whether the evidence in that party's favor is *so compelling that no reasonable person could have failed to be persuaded by it*.") (emphasis in original); *Douglas v. Board of Trustees of the Maine State Retirement System*, 669 A.2d 177, 179 (Me. 1996) ("When an agency concludes that the party with the burden of proof failed to meet that burden, we will reverse that determination only if the record compels a contrary conclusion to the exclusion of any other inference, . . . and hence, in the language of the Maine Administrative Procedures Act, the Board's failure to be persuaded was 'arbitrary or capricious.'"); *Dale v. S & S Builders, LLC*, 2008 WY 84, 188 P.3d 554, 561 (Wyo. 2008) (workers' compensation claim; "If the hearing examiner determines that the burdened party failed to meet his burden of proof, we will decide whether there is substantial evidence to support the agency's decision to reject the evidence offered by the burdened party by considering whether that conclusion was contrary to the overwhelming weight of the evidence in the record as a whole.").

In this context, as these cases teach, it is neither mandatory nor helpful to search for "substantial evidence," as that concept is normally understood -- "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Georgetown University Hospital v. District of Columbia Dep't of Employment Servs*., 916 A.2d 149, 151 (D.C. 2007) (quoting *Children's Defense Fund v. District of Columbia Dep't of Employment Servs*., 726 A.2d 1242, 1247 (D.C. 1999)). In some cases, rather, the weakness of the proponent's proof -- the lack of evidence -- may be enough to defeat her claim. Thus, our duty is to determine whether the ALJ's decision that petitioner failed to carry her burden of proof was "[a]rbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." D.C. Code § 2-510 (a)(3)(A) (2001).

> There was no such infirmity here. Presented with a claim that petitioner suffered from a permanent disability of the left leg, the ALJ obviously found the dearth of evidence of medical analysis and treatment significant, as do we. Petitioner's evidence certainly did not compel the ALJ to conclude that she had carried her burden of proof "to the exclusion of any other inference." *Douglas*, 669 A.2d at 179. Dr. Ammerman's opinion letter was cryptic and conclusory, and the record provided a substantial basis for questioning its reliability. *See Hickman*, 277 S.W.3d at 596 (the "opinion displays a substantial basis for the denial of relief"). Looking at the record as a whole, the ALJ's conclusion that Ms. Golding-Alleyne had failed to prove the existence of a permanent 20% left leg disability was not arbitrary, capricious, or contrary to law. *See Gage v. District of Columbia Bd. of Zoning Adjustment*, 738 A.2d 1219, 1222 (D.C. 1999) (finding "no error in the Board's determination that petitioners failed to satisfy their burden of proof").

Golding-Alleyne, 1215 – 1217.

We take the trouble to cite this portion at such length because the 18 words extracted from the *Steene* case, taken out of context from the discussion in which the DCCA placed them, gives the misapprehension that the DCCA was suggesting that only evidence *offered by a party* can be considered in determining whether that party's burden of persuasion has been met, and that is most emphatically not the meaning of that case. Such a rule would be unduly formulaic in an administrative setting wherein the humanitarian nature of the statute colors its application. And, it would be inconsistent with the obvious purposes of D.C. Code § 32-1525 (a), which provides:

> In … conducting a hearing the Mayor shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter, but may make such investigation or inquiry or conduct such hearing in such manner as to best ascertain the rights of the parties.

It is clear from the context of the discussion in *Golding-Alleyene* that the DCCA was referring to consideration of the contents of the record as a whole.

The ALJ quoted D.C. Code § 32-1511 in full, in which various alternative methods of arriving at AWW are outlined, two of which cover situations in which a claimant has not worked the entire 26 weeks which is the preferred statutory baseline for workers who are paid by the day, the hour or the employee's output. She also referenced Mr. Lantion's post-hearing submission, in which he provided a calculation which he submits comports with one of those subsections, (6), in which the wages earned by what is known as a "like employee" earned during the 26 weeks preceding the date of injury. The ALJ rejected that submission as being unpersuasive, stating:

> Claimant's computations are based upon Claimant's hourly rate at the time of his employment. Claimant's computations fail to consider the average daily wage of an employee of the same class, working in the same or similar employment as Claimant. No weight was accorded Claimant's wage computations.

> Claimant has failed to meet its [sic] burden to show the amount of his average weekly wage.

CO, page 4.

And, as previously quoted, the ALJ went on to write:

> Employer's evidence includes a document titled "Transactions by Payroll Item" for an employee named Ricky Hall. (EE 5). Also included in Employer's evidence are documents entitled "Employee Attendance Records." (EE 6). Employer asserts these are the payroll records of employees who are in the same class and work in the same or similar employment as Claimant.
>
> Employee's [which, as we have said, we take to mean "Employer's"] evidence is void of any documentary evidence that shows the title or job functions of any of the employees mentioned in EE's [sic] 5 or 6. Further, Employer's evidence fails to indicate the rate of pay for any of the employee's mentioned in EE's [sic] 5 and 6. EE 5 and 6 are given no weight in the determination of average weekly wage pursuant to the Act.

CO, page 4.

The ALJ's "dismissal" of the claim for relief is by all appearances based upon one or perhaps two premises: (1) that her consideration of whether Mr. Lantion has met his burden of proof is limited to consideration of the evidence that he submitted, and; (2) that there is insufficient evidence in this record to establish an AWW under any of the statutory schemes.

7 DCMR §223 governs the manner in which formal hearings are to be conducted.

7 DCMR §223.3 mandates that the ALJ "*shall* inquire *fully* into matters at issue and *shall* receive in evidence the testimony of witnesses and any documents which are relevant and material to such matters" (emphasis added).

7 DCMR §223.4 provides that "If [the ALJ] believes that there is relevant and material evidence available which has not been presented at the formal hearing, the [ALJ] may order the parties to acquire and submit the evidence. The [ALJ] may also continue the hearing to allow the parties to develop the evidence or, at any time prior to the issuance of a compensation order, reopen for receipt of the evidence."

In the case before us, it is undisputed that Mr. Lantion sustained a work-related injury while working for EMS, and that he lost wages as a result of that injury. The Act provides for how an AWW is to be determined in cases such as that which was before the ALJ, and the regulations mandates that an ALJ who finds that the parties have not supplied sufficient evidence for a proper rendition of a decision "inquire fully" into the circumstances of the case, by permitting the ALJ to direct the parties to obtain such additional evidence as is missing.

Merely denying the claim under the circumstances of this case is an arbitrary and capricious abuse of discretion. The Act and the regulations require that the ALJ inquire fully and obtain the information needed to render a record based decision; they do not contemplate just throwing in the towel.

We vacate the Compensation Order and remand the matter for further consideration. If on remand and further review of the record as a whole, the ALJ determines that there is sufficient evidence in the record as a whole to determine the AWW under D.C. Code § 32-1511, she is to do so. If after that further review of the record she determines that the record contains insufficient information or evidence upon which an AWW can be determined, prior to issuing a Compensation Order on Remand the ALJ is to advise the parties concerning what additional evidence is necessary in order for an AWW determination to be made and direct that they obtain and submit such evidence so that the record can be reopened and an AWW be established.

Thereafter, the ALJ is to further consider the nature and extent of the disability, if any, that Mr. Lantion has sustained as a result of the injury.

CONCLUSION AND ORDER

The denial of the claims for temporary total and permanent partial disability is unsupported by substantial evidence and is not in accordance with the Act.

The denial of the temporary total and permanent partial disability claims are vacated. The matter is remanded for further consideration 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

May 15, 2013
DATE