GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR

LISA MARÍA MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 13-012

RONALD LEIDELMEYER,
Claimant-Petitioner,

v.

NBC NEWS and ELECTRIC INSURANCE COMPANY,
Employer and Insurer-Petitioners.

Appeal from a January 16, 2012 Compensation Order issued by
Administrative Law Judge Karen R. Calmeise
AHD No. 10-279B, OWC No. 654170

Robert G. Blackford, Esquire, for the Claimant
W. John Vernon, for the Employer and Insurer

Before: LAWRENCE D. TARR, *Chief Administrative Appeals Judge*, HENRY W. MCCOY, and JEFFREY P. RUSSELL, *Administrative Appeals Judges*.

LAWRENCE D. TARR, *Chief Administrative Appeals Judge*, for the Compensation Review Board.

DECISION AND REMAND ORDER

This case is before the Compensation Review Board (CRB) on the claimant's request for review of the January 16, 2013 Compensation Order (CO) issued by Administrative Law Judge (ALJ) Karen R. Calmeise of the Administrative Hearings Division (AHD) of the District of Columbia's Department of Employment Services (DOES). Also before the CRB is the claimant's request to introduce additional evidence and the employer's March 1, 2013 Motion To Dismiss Application For Review.

For the reasons stated, we deny the employer's motion to dismiss the application, deny the claimant's request to introduce additional evidence and REMAND this matter to the ALJ.

BACKGROUND FACTS OF RECORD AND PROCEDURAL HISTORY

The claimant, Ronald Leidelmeyer, worked for this employer, NBC News, as a camera operator. On July 27, 1996, the claimant was working at the Atlanta Summer Olympics when a bomb exploded near him and the claimant was knocked down when shrapnel struck him in the back of the head.

The current dispute concerns the claimant's request for permanent partial disability benefits for injuries to both his ears pursuant to the schedule in D.C. Code §32-1508 (3) (M)[1], for disfigurement to his head under D.C. Code §32-1508 (3) (T)[2], and for determination of his average weekly wage.

In the January 16, 2013 CO under review, the ALJ determined that the claimant's average weekly wage was $1,376.78, and that he proved entitlement to an award of $250 for disfigurement caused by the accident to his head. The ALJ denied the claim for hearing loss.

On February 14, 2013, the claimant filed an Application for Review (AFR) together with a Memorandum of Points and Authorities challenging the ALJ's failure to award him permanent partial disability benefits. Within his memorandum, the claimant requested leave to introduce additional evidence.

On March 1, 2013, the employer filed a Motion to Dismiss Application For Review and also filed an Opposition to the AFR. The claimant also has filed an opposition to the employer's motion to dismiss his AFR.

We shall discuss the two procedural motions first.

EMPLOYER'S MOTION TO DISMISS

The employer's Motion to Dismiss Application For Review requests the CRB dismiss with prejudice the claimant's AFR because it does not show that a copy of the AFR was served on the Administrative Hearings Division (AHD), as required by 7 DCMR §§ 258.6 (b) and (c).

The claimant concedes that he did not send a copy of the AFR to AHD when the AFR was filed and further asserts that he now has done so:

> The undersigned counsel inadvertently failed to send the Office of Administrative Hearings a copy of the Application for Review. That this matter has now been brought to undersigned counsel's attention by counsel for Employer/Insurer, and on March 5, 2013, undersigned counsel sent the attached letter with a copy of the filed Application For Review to the Office of Administrative Hearings and Adjudications in order to facilitate transmission of the record and to comply with the rules.

Opposition To Motion To Dismiss Application For Review at 1.

7 DCMR §258.2 states:

> An Application for Review must be filed within thirty (30) calendar days from the date shown on the certificate of service of the compensation order or final decision from which appeal is taken.

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[1] D.C. Code §32-1508 (3) (M) provides:

> Compensation for loss of hearing of 1 ear, 52 weeks. Compensation for loss of hearing of both ears, 200 weeks

[2] D.C. Code §32-1508 (3) (T) states:

> The Mayor shall award proper and equitable compensation for serious disfigurement of the face, head, neck or other normally exposed bodily areas not to exceed $ 7,500

7 DCMR §258.6 provides:

> At the same time that the petitioner files the Application for Review and supporting memorandum with the Board, the petitioner shall:
>
> (a) serve a copy, by mail or personal delivery, copies of same upon the opposing party(ies), who shall be designated the "respondent(s)" for purposes of proceedings before the Board on appeal;
>
> (b) serve a copy on either the Administrative Hearings Division or the Office of Workers' Compensation, depending upon which office issued the compensation order or final decision from which the appeal is taken; and,
>
> (c) file with the Board certification that such service required by this section was effected.

The 30-day deadline for filing an Application for Review in 7 DCMR §258.2 is strictly enforced. However, the requirement in 7 DCMR §258.6 that an appealing party serve AHD with a copy of the AFR is not strictly enforced and may be extended. See, *Hartgrove v. Aramark Corp.*, CRB No. 09-133, AHD No. 04-476A, OWC No. 590360 (August 16, 2011), *Onofre v. George and Irene Lorinczi,* Dir. Dkt. No. 95-48, H&AS No. 92-302A, OWC No. 209231 (June 30, 1997).

Therefore, consistent with our precedent and in light of the fact that the claimant now has served a copy of his AFR on AHD, the employer's Motion is DENIED.

CLAIMANT'S REQUEST TO INTRODUCE ADDITIONAL EVIDENCE

In his memorandum, the claimant stated that he requests:

> leave to introduce additional evidence since [he] had no opportunity to do so at the time of the hearing before the Office of Administrative Law Judges pursuant to 7 DCMR Section 264 et seq.

The claimant argues that he should be permitted to introduce additional evidence now because prior to the formal hearing he believed "there was no dispute in the record that there was a permanent hearing loss to both ears."

However, because the ALJ found that his evidence did not meet the requirements of the Act, the claimant asserts:

> It is submitted that Claimant's counsel was/is not clairvoyant, and until the ALJ expressed her skepticism about evidence in the Order, there was no reason in this case to think this claim would be dismissed. Therefore, reasonable grounds for the introduction of additional evidence exists.

Section 32-1520(c) of the D.C. Code states:

> [n]o additional information shall be submitted by the claimant or other interested parties after the date of hearing, except under unusual circumstances as determined by the Mayor.

The purpose underlying the requirement of "unusual circumstances" is "to prevent a hearing from being reopened simply for the purpose of introducing new or additional evidence when that evidence could have reasonably been presented at the hearing." *Young v. DOES,* 681 A.2d 451, 454 (D.C. 1996). In other words, reasonable grounds must exist for not having introduced the evidence at the hearing. *Bennett v. DOES,* 629 A.2d 28, 30 (D.C. 1993), citing *King v. DOES,* 560 A.2d 1067, 1073 (D.C. 1989).

Applying § 32-1520 **(**c) of the Act and the applicable test as articulated in *Young* and *Bennett* to the instant case, the CRB finds that the claimant has not identified any legally sufficient reason to permit post-hearing evidence. The fact that a party did not anticipate how the ALJ would rule is not a legitimate reason for reopening the record.

CLAIMANT'S APPLICATION FOR REVIEW

The claimant only challenges that portion of the CO that denied his claim for binaural hearing loss. On review, the claimant asserts that the ALJ's CO is "replete with errors, legal and factual, and ought to be reversed and/or remanded for further hearing."

The claimant asserts the ALJ erred by failing to discuss the August 20, 1012, medical report of Dr. Dettelbach.

At the formal hearing, the claimant introduced into evidence two reports from Dr. Mark A. Soltany, an otolaryngologist who examined the claimant for an IME at the claimant's request. The employer introduced into evidence an August 20, 2012, report from Dr. Mark A. Dettelbach, an otolaryngologist who examined the claimant for the employer.

On review, the claimant's primary argument is that the ALJ failed to consider "Dr. Deedleback's" [sic] August 20, 2012 IME report, in which the claimant asserts Dr. Dettelbach wrote he had a hearing impairment of 4%.[3]

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[3] In his August 20, 2012 IME report for the employer, Dr. Dettelbach's wrote the following:

> It appears that Mr. Leidelmeyer in fact does have noise trauma that relates to the accident he reported. There is no evidence of prior noise trauma or additional trauma that could cause hearing loss. His hearing loss is [sic] not progressed much since the 1996 test and if there is another cause for the hearing loss, we would have expected worsening to continue. Therefore, it appears that it is a causal relationship between the accident and the hearing loss…
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> Using our test from today, [the claimant has] a 0% hearing impairment in the right ear and a 4% hearing impairment in the left ear. This is using the AMA fourth edition guidelines. Using the tests from 1996 that 4% hearing loss would disappear because of the additional slight loss of hearing that has occurred over the past 16 years. His tinnitus has approximately a 3% additional impairment to both ears. This would make his overall hearing impairment approximately 4%.

We agree with the claimant's argument because it does not appear that the ALJ considered Dr. Dettelbach's opinion in reaching her decision.

Other than indirectly referring to the report, in the Statement of the Case, section of the CO as "Employer Exhibit (EE) Nos. 1-4, described in the Hearing Transcript (HT)" as being admitted into evidence, there is no specific mention of Dr. Dettelbach or his IME in the CO. The ALJ identified several doctors' reports in the Findings of Fact and the Discussion section of the CO, but did not refer to the report of Dr. Dettelbach. Moreover, the ALJ did not say anything about the claimant's employer-requested IME in either of these sections or anywhere in the CO.

The ALJ decided the claim for a schedule award in the Nature and Extent subsection of the CO's Discussion section. The ALJ wrote:

> It is undisputed that Claimant suffers from a hearing problem in both ears and the medical records submitted by both parties indicate this is so. Claimant reached maximum medical improvement on February 27, 2012, the date of the earlier medical evaluation report pertaining to his hearing evaluation.

The ALJ then referred to the legal standard of proof and stated the relevant part of D.C. Code §32-1508 that pertained to this claim. The ALJ concluded her discussion by stating

> To support the claim for a schedule award for 200 weeks of compensation for 55% right ear hearing loss and 60% left ear hearing loss, Claimant submits the Claimant IME rating report as part of his evidence at the formal hearing. While reviewing Claimant's past and current hearing tests, Claimant's IME opined;
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> > **In the years that followed, (*the 1996 blast*) Mr. Leidelmeyer became aware of a hearing loss that has also been associated with the sound blast. The hearing loss pattern was initially found to be an upper and high-frequency loss of approximately forty percent and equal in both ears. Since that time, the hearing loss has progressed further and now is approximately sixty percent loss of hearing *in the upper, mid, and high frequencies*. (*Emphasis added*)** (CE 1)
>
> In addition to the loss of hearing at the upper mid and high frequency, the physician also notes that the Claimant continues with complaints of tinnitus in both ears, the right ear more significant that the left. (CE 1)
>
> I find the medical opinion expressed in the report fails to substantiate the Claimant's claim for a schedule award for a binaural hearing loss. (HT 85) Claimant's March 2012 and August 2012 IME reports cite to a loss of hearing in each ear for only part of the hearing frequency. The physician opines that the bomb blast affected the Claimant's the upper, mid, and high frequencies. (CE 1) The Claimant's IME does not explain how the mid, upper and high frequency hearing loss relates to Claimant's total hearing ability. Furthermore, Claimant's

> March 2012 IME report only states that that Claimant has a 60% hearing loss however, the report makes no reference to a 55% loss for either ear. Despite Claimant's credible testimony, I find that Claimant's evidence is deficient in that the medical opinion fails to offer a rating that meets the requirements under the Act. The evidence fails to present a rating for impairment of full hearing spectrum.
>
> The undersigned is constrained from awarding benefits which are not proven by the evidence presented. Therefore it is determined that, in this proceeding, Claimant has not shown by a preponderance of the evidence support for a schedule award for hearing loss under the Act. With Claimant's evidence having been deemed not sufficient, Employer's evidence need not be considered in rebuttal.

Leidelmeyer v. NBC News, AHD No. 10-279B, OWC No. 654170 (January 16, 2013) at 5-6. (Footnote omitted. Italics and bold font in original. Underlined added).

As the underlined sentence shows, the ALJ specifically stated that she did not consider the employer's evidence in deciding this case.[4]

The ALJ correctly stated that the clamant had the burden to prove his claim by a preponderance of the evidence, and even stated this burden applies "in the absence of the presumption" but by only looking at the claimant's exhibits and characterizing the employer's exhibits as rebuttal evidence, the ALJ appears to have used a presumption-type analysis in a non- presumption case. Certainly the claimant has the burden, but this burden may be proven by any exhibit in the record, without regard to which party introduced the evidence.

While it is well settled that there is no requirement for an ALJ to inventory the evidence in a case, there is a requirement to acknowledge and address evidence that is presented in direct support of, or in opposition to, a claim. See, *Kyle v. Safeway Stores, Inc.,* CRB No. 12-117, AHD No. 12-116, OWC No. 685101(October 9. 2012), *Green v. Palomar Hotel,* CRB No. 11-065, AHD No. 10-582, OWC Nos. 673571 and 673273 (November 10, 2011).

The claimant also argues that the ALJ erred by failing to enter an award because there "was no dispute in this record that there was a permanent hearing loss to both ears". The employer disputes this assertion and points out that it consistently contested the nature and extent of the work-related injury.

In her CO, the ALJ acknowledged that the evidence established the bomb blast has caused damage to Petitioner's ears, and that damage has caused Claimant to suffer a loss of hearing in certain wavelengths on the higher end. Thus, the ALJ has acknowledged that Claimant has suffered a compensable hearing loss.

[4] We have not overlooked that the ALJ referred to an "August 2012" report and that Dr. Dettelbach's IME report is the only exhibit in evidence that was written in August 2012. However, when this reference is viewed in context it is clear the ALJ is not referring to Dr.Dettelbach's report. Dr. Dettlebach's report is not a Claimant's IME, and his IME was part of the employer's evidence which the ALJ specifically said she did not consider.

However, in the CO, the ALJ held

> Despite Claimant's credible testimony, I find that Claimant's evidence is deficient in that the medical opinion fails to offer a rating that meets the requirements under the Act. The evidence fails to present a rating for impairment of full hearing spectrum. (Footnote omitted).

CO at 6.

In his memorandum, the claimant correctly states that the ALJ "did not give us the benefit of her reasoning as to why the medical opinion 'fails to meet the requirements of the Act."

However, by employing the term "full hearing spectrum" (a term not found in the Act and not used by any of the medical experts in any of their reports in this case) and premising the denial of the claim upon the lack of evidence proving a full hearing spectrum loss, the ALJ appeared to acknowledge that the claimant proved some degree of permanent hearing loss but determined the claim must be denied because the claimant failed to adduce enough evidence to ascertain what the overall degree of hearing loss is. The ALJ seems to be saying that the claimant merely adduced evidence of a hearing loss percentage in only a part of the audible spectrum, and therefore failed to meet his burden of proof.

We do not agree and find the claimant can meet his burden of proof by establishing some degree of permanent hearing loss in part of the audible spectrum.

We find that the present case is analogous to a claim for a schedule award to the leg based upon impairment to the knee wherein the claimant presented an IME report in which the physician provided an impairment rating of 30% to the knee, and the employer presented an IME that assigned 10% impairment to the leg as a result of the impairment to the knee.

It would be error to deny such claim because the claimant had not adduced a rating to the leg if the record was uncontradicted that the claimant had a leg impairment and the record contained evidence that the leg impairment was 10%. In this example, it would be an abuse of discretion for the ALJ to deny a disability claim because under these circumstances there was insufficient evidence to establish the extent of the leg impairment.

Similarly, in the present case, the record is uncontradicted that claimant has suffered some degree of impairment to his hearing. Employer's IME includes an undifferentiated 4% hearing impairment rating to one ear, and 0% to the other, while claimant's IME includes significantly higher ratings for a limited portion of the audible spectrum, to both ears.

Having proven some degree of hearing loss, the ALJ should consider the evidence that is before her and evaluate which of the medical opinions is superior, i.e., which preponderates. If the ALJ deems a rating submitted by the Claimant to lack detail to the degree that she finds persuasive, the record contains counter evidence against which the evidence can be weighed.

Because the ALJ did not analyze the record evidence in accordance with the applicable law, we must remand this case. The CRB cannot affirm a CO that "'reflects a misconception of the

relevant law or a faulty application of the law.' *WMATA v. DOES, 992* A.2d 1276, 1280 (D.C. 2010) (quoting *Georgetown University v. DOES and Ford, Intervenor*, 971 A. 2d 909, 915 (D.C. 2009).

CONCLUSION AND ORDER

That part of the January 16, 2013 Compensation Order relating to the claim for binaural hearing loss is not in accordance with the law. Accordingly, it is REVERSED and this case remanded to the ALJ for such further action as is consistent with this decision.

FOR THE COMPENSATION REVIEW BOARD:

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LAWRENCE D. TARR
Chief Administrative Appeals Judge

April 18, 2013
Date