

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

Labor Standards Bureau

**Office of Hearings and Adjudication
COMPENSATION REVIEW BOARD**



(202) 671-1394-Voice

(202) 673-6402-Fax

CRB No. 07-066

MILAGRO MAJANO,

Claimant–Petitioner,

v.

LINENS OF THE WEEK D/B/A PALACE LAUNDRY AND LIBERTY MUTUAL INSURANCE COMPANY,

Employer/Respondent.

Appeal from a Compensation Order of
Administrative Law Judge Leslie A. Meek
AHD No. 06-285, OWC No. 578369

Carlos Espinosa, Esquire, for the Petitioner

Thomas Dempsey, Esquire, for the Respondent

Before JEFFREY P. RUSSELL, LINDA F. JORY, and FLOYD LEWIS, *Administrative Appeals Judges*.

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

DECISION AND ORDER

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board pursuant to D.C. Official Code §§ 32-1521.01 and 32-1522 (2004), 7 DCMR § 230, and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005).¹

¹Pursuant to Administrative Policy Issuance No. 05-01, dated February 5, 2005, the Director of the Department of Employment Services realigned the Office of Hearings and Adjudication to include, *inter alia*, establishment of the Compensation Review Board (CRB) in implementation of the District of Columbia Fiscal Year 2005 Budget Support Act of 2004, Title J, the District of Columbia Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, *codified at* D.C. Official Code § 32-1521.01. In accordance with the Director's Directive, the CRB replaces the Office of the Director in providing administrative appellate review and disposition of workers' and disability compensation claims arising under the District of Columbia Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §§ 32-1501 to 32-1545 (2005), and the District of Columbia Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Code Ann. §§ 1-623.1 to 1-643.7 (2005), including responsibility for administrative appeals filed prior to October 1, 2004, the effective date of the District of Columbia Workers'

BACKGROUND

This appeal follows the issuance of a Compensation Order from the Administrative Hearings Division (AHD) of the Office of Hearings and Adjudication (OHA) in the District of Columbia Department of Employment Services (DOES). In that Compensation Order, which was filed on February 23, 2007, the Administrative Law Judge (ALJ) awarded Petitioner a permanent partial disability award under the schedule in the amount of 65% for loss of use of the left arm, and 3% for loss of use of the left leg. Petitioner now seeks review of that order.

As grounds for this appeal, Petitioner alleges as error that the ALJ's failure to award 90% for loss of use of the left arm and 12% for loss of use of the left leg was erroneous, because the awards were less than the medical impairments that Petitioner's treating physician had concluded that Petitioner had sustained, and that the reason for "reducing" the award amount from the impairment figures, being that Petitioner remains employed in a modified position with Respondent, was inadequate to justify such a "reduction", because, in Petitioner's view on appeal, the modifications to Petitioner's job are subject to change by Respondent at any time, which would result in a greater vocational impact than is presently apparent. Petitioner also raises an issue concerning Petitioner's compensation rate, which issue does not appear to have been raised or addressed below, and which issue is not sufficiently articulated in the filings of Petitioner for us to recognize or consider.

Respondent filed no response to this appeal.

ANALYSIS

As an initial matter, the scope of review by the Compensation Review Board (CRB) and this Review Panel, as established by the Act and as contained in the governing regulations, is 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 Ann. §32-1501 to 32-1545 (2005), at §32-1521.01(d)(2)(A). "Substantial evidence," as defined by the District of Columbia Court of Appeals, is such evidence as a reasonable person might accept to support a particular conclusion. *Marriott International v. District of Columbia Dep't. of Employment Serv's.*, 834 A.2d 882 (D.C. 2003). Consistent with this standard of review, the CRB and this Review Panel are constrained to uphold 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 the reviewing authority might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

Turning to the case under review herein, Petitioner alleges that the ALJ's decision is unsupported by substantial evidence and is not in accordance with the law, because despite accepting the opinion of Petitioner's treating physician that Petitioner had sustained medical impairments of 90% and 12% to her left arm and left leg, respectively, the ALJ only made a 65% disability award for the arm and a 3% disability award for the leg. In Petitioner's view, the ALJ "reduced" the medical

Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004.

impairments based upon an erroneous interpretation of the evidence relating to Petitioner's current employment conditions. Petitioner reads the Compensation Order as suggesting that the ALJ started from some "baseline", and then reduced it based upon these vocational factors.

First, we detect no error in the ALJ's evaluation of the effect of the work injury upon Petitioner's vocational capacity. She notes correctly that "neither party adduced any expert opinion regarding Claimant's vocational capacity" (Compensation Order, page 3), and thus she was limited only to Petitioner's testimony about the subject in considering the vocational component of the disability issue, and those facts were considered at page 6 and 7 of the Compensation Order. The ALJ summarized the effects as follows: "Claimant can perform the requisite duties of her employment. However, it is reasonable to conclude that claimant's future wage earning capacity may be affected, by her inability to work near heat or cold; by her sensitivity to chemicals; her inability to make a fist, her inability to lift items heavier than five pound; and the pain she experiences in her left leg and hip."

Petitioner raise no challenge to the substance of these findings, specifically, Petitioner has not alleged that they are not supported by substantial evidence in the record.

It is not error for the ALJ not to have specifically addressed whether the specific modifications to her current job are or may be temporary, since such is mere speculation, and Petitioner points us to no record evidence which addresses the points raised in this regard. Further, should conditions change in the future, the Act has provisions governing when and how a modification of an award based upon such a change of conditions is to be considered. See, D.C. Code § 32-1524.

Second, Petitioner misapprehends the role of the ALJ in the process of arriving at a disability award under the schedule. Petitioner's argument assumes that the ALJ must, and in this case did, arrive at some baseline figure of disability which is determined by medical impairment before arriving at a disability award figure. However, that is not what the Act requires, is not what the ALJ did, and is not what the medical textbook referred to in the Act² as a potential source of guidance in this area contemplates. In that text, the *American Medical Association Guides to the Evaluation of Permanent Impairment* (the *Guides*), after discussing some of the technical methodologies employed in arriving at percentage impairment ratings, the authors cautioned as follows:

The medical judgment used to determine the original impairment percentages could not account for the diversity or complexity of work but could account for daily activities of most people. Work is not included in the clinical judgment for impairment percentages for several reasons: (1) work involves many simple and complex activities; (2) work is highly individualized, making generalizations inaccurate; (3) impairment percentages are unchanged for stable conditions, but work and occupations change; and (4) impairments interact with such other factors as the worker's age, education, and prior work experience to determine the extent of worker disability. For example, an individual who receives a 30% whole person impairment due to pericardial heart disease is considered to have a 30% reduction in

² See, D.C. Code § 32-1508 (U-I), authorizing the consideration of "the most recent edition" of the *American Medical Association Guides to the Evaluation of Permanent Impairment*, as well as additional factors such as pain, weakness, atrophy, loss of endurance and loss of function.

general functioning as represented by a decrease in the ability to perform activities of daily living. For individuals who work in sedentary jobs, there may be no decline in their work ability although their overall functioning is decreased. Thus, a 30% impairment rating does not correspond to a 30% reduction in work capability. Similarly, a manual laborer with this 30% impairment rating due to pericardial disease may be completely unable to do his or her regular job and, thus, may have a 100% work disability.

As a result impairment ratings are not intended for use as direct determinants of work disability. When a physician is asked to evaluate work-related disability, it is appropriate for a physician knowledgeable about the work activities of the patient to discuss the specific activities the worker can and cannot do, given the permanent impairment.

The AMA Guides, Linda Cocchiarella, and Gunnar B.J. Anderson, Editors, American Medical Association 2000, Chapter 1, “Philosophy, Purpose and Appropriate Use of the *Guides*”, Section 1.2, “Impairment, Disability and Handicap”, page 5 – 6.

Further, unlike other questions that ALJs are called upon to decide in connection with contested compensation claims, there is no dichotomous answer in schedule award cases. That is, there is no “a” or “b” choice in schedule disability awards, as there is in cases where the ALJ must make a choice between compensable or non-compensable, causally related or not causally related, employment relationship or no employment relationship, timely notice or untimely notice, etc. Those questions present scenarios in which there is presumably a right answer and a wrong answer. However, schedule loss cases present the problem of prediction: the goal is to make the best approximation of the effect of a scheduled injury on future wage loss, and then to express that approximation in percentage terms of the member in question, which in the words of the Court of Appeals result in an award based upon an “arbitrary” number of weeks of benefits. See, *Smith v. District of Columbia Department of Employment Services*, 548 A.2d 95 (1988), at 101. Only time will determine whether, in any given case, the approximation arrived at through the hearing process is close to “the right answer”, or is wildly under reality, or wildly over it. That may be unfortunate, for either the employer or the worker, but as the Court of Appeals has recognized, that is the nature of the system.

The ALJ took proper notice of the controlling case law in this area, citing *Wormack v. Fischbach & Moore, Inc.*, CRB No. 03-159, OHA No. 03-151 (July 22, 2005), as well as *Negussie v. District of Columbia Department of Employment Services*, 915 A.2d 391 (2007), a case in which the Court of Appeals ruled on this issue, which followed *Wormack* in time, and referenced it in a footnote. The ALJ exercised her appropriate discretion in making the award, which is in accordance with the law and supported by substantial evidence.

CONCLUSION

The Compensation Order of February 23, 2007 is supported by substantial evidence in the record and is in accordance with the law.

ORDER

The Compensation Order of February 23, 2007 is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

JEFFREY P. RUSSELL
Administrative Appeals Judge

April 24, 2007
DATE