

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services
Labor Standards Bureau**

**Office of Hearings and Adjudication
Compensation Review Board**

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CRB No. 07-156

QUENTIN BRISCOE,

Claimant – Respondent

v.

PEPCO,

Self-Insured Employer – Respondent.

Appeal from a Compensation Order of
Administrative Law Anand K. Verma
AHD No. 06-313, OWC No. 614189

Kevin J. O’Connell, Esq., for the Petitioner

W. Scott Fungler, Esq., for the Respondent

Before LINDA F. JORY, SHARMAN J. MONROE and JEFFREY P. RUSSELL, *Administrative Appeals Judges.*

SHARMAN J. MONROE, *Administrative Appeals Judge*, on behalf of the Review Panel:

DECISION AND REMAND 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

¹ Pursuant 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 D.C. Workers’ Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, sec. 1102 (Oct. 1, 1994), *codified at* D.C. Code Ann. § 32-1521.01 (2005). In accordance with the

BACKGROUND

This appeal follows the issuance of a Compensation Order on Remand 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 July 31, 2007, the Administrative Law Judge (ALJ) granted the Claimant-Respondent's (Respondent) requested relief for temporary total disability benefits and permanent partial disability benefits under the schedule found at D.C. Official Code § 32-1508(3) for a fifteen percent (15%) impairment to the left lower extremity. On August 31, 2007, the Self-Insured Employer-Petitioner (Petitioner) filed an Application for Review seeking a review of that Compensation Order on Remand.

As grounds for this appeal, the Petitioner alleges as error that the decision below is not supported by substantial evidence and is not in accord with the law and the instructions given in the Decision and Remand Order issued by the CRB. The Respondent filed an Opposition.

ANALYSIS

As an initial matter, the standard 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. D.C. Official Code § 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 Int'l. v. District of Columbia Department of Employment Services*, 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.

This is the second time that this matter is before the Board. Previously, in a Compensation Order dated April 12, 2007, the ALJ awarded, *inter alia*, schedule permanent partial disability benefits based upon a fifteen percent (15%) impairment to the left lower extremity. The Petitioner appealed. In a Decision and Remand Order dated June 19, 2007, the Board remanded this matter as the Compensation Order was ambiguous with respect to the legal analysis and standard applied in reaching the schedule award made. The ALJ was directed to identify the

Director's Policy Issuance, the CRB replaces the Office of the Director in providing administrative appellate review and disposition of workers' and disability compensation claims arising under the D.C. Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §§ 32-1501 to 32-1545 (2005) and the D.C. 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 D.C. Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004.

legal standard used in awarding schedule award, if any, and to identify the record evidence supporting that award under the applicable standard.

Turning to the case under review herein, the Petitioner alleges that the ALJ did not follow the directions given in the CRB's Decision and Remand dated June 19, 2007. The Petitioner maintains that contrary to the directions given, the ALJ did not "assess implicitly or explicitly the vocational impact of the medical impairment on the knee nor did he identify or discuss which record evidence was considered (much less what other pertinent evidence was rejected) in making an award under the applicable standard." Memorandum of Points and Authorities in Support of Application for Review at p. 7. Rather, the Petitioner asserts, the ALJ merely adopted the same Conclusion of Law made in the earlier Compensation Order, as well as the medical opinion of the treating physician on impairment. The Petitioner also requests that the Board revisit its earlier rulings that the ALJ actions in denying its Motion to Re-Open the Record to receive post-hearing medical reports and in precluding the testimony of its witness were in accord with the law and harmless, not requiring a reversal.

Before addressing the merits of the Petitioner's appeal, the Panel will address the Petitioner's request to revisit the evidentiary rulings made in the Decision and Remand Order. The merits of the Petitioner's arguments with respect to the rulings were examined and rejected in the prior decision. At this time, the Petitioner does not present any persuasive reason or reasons, nor does this Panel discern any persuasive reason or reasons, to revisit the rulings. Accordingly, the Petitioner's request is denied.

In the decision now on appeal, the ALJ set forth the legal standard as enunciated in *Wormack v. Fishbach and Moore*, CRB (Dir. Dkt.) No. 03-159, OWC No. 564205 (July 2, 2005) and in *Neguisse v. D.C. Department of Employment Services*, 915 A.2d 391 (D.C. 2007) for making schedule awards in this jurisdiction. The ALJ recognized that standard does not compel an adjudicator "to find an amount of disability that is no greater than the highest medical evaluation and no less than the lowest medical evaluation". Compensation Order on Remand at p. 3. The ALJ also indicated the evidence upon which he relied in making the schedule award. After stating that he was not bound to elect the rating of the treating or the IME, the ALJ found the opinion of the treating physician persuasive "in light of the quality of her care spanning a period of over one year." Compensation Order at p. 4. On review, the Panel finds that the ALJ's award is supported by substantial evidence and is accord with the law. Neither *Wormack* nor *Neguisse* preclude an adjudicator from utilizing a rating put forth by a treating or IME physician.

However, the ALJ, in making the schedule award, cited the American Medical Association (AMA) Guides as his basis. This was an error as a matter of law. As *Wormack* and *Neguisse* indicate, the AMA Guides reflect a medical concept or impairment only; it is the province of the ALJ to determine the rate of *disability* awardable pursuant to D.C. Official Code § 32-1508(3) in light of the evidence presented in this case. Therefore, a remand is necessary to correct the Conclusions of Law in the Compensation Order on Remand so that it conforms to the law in this jurisdiction.

CONCLUSION

The Compensation Order on Remand of July 31, 2007 is supported by substantial evidence in the record, but not in accordance with the law.

ORDER

The Compensation Order on Remand of July 31, 2007 is hereby AFFIRMED IN PART AND REMANDED IN PART

The Compensation Order on Remand is affirmed with respect to the award made and the evidentiary basis thereof.

The Compensation Order is remanded for the sole and limited purpose of correcting the Conclusions of Law to reflect that the schedule award was made, not pursuant to the AMA Guides, but pursuant to D.C. Official Code § 32-1508(3).

FOR THE COMPENSATION REVIEW BOARD:

SHARMAN J. MONROE
Administrative Appeals Judge

November 8, 2007
DATE