

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services**

**VINCENT C. GRAY
MAYOR**



**LISA M. MALLORY
DIRECTOR**

COMPENSATION REVIEW BOARD

CRB No. 12-053

GWENDETTA STOCKS,

Claimant–Petitioner,

v.

WASHINGTON HOSPITAL CENTER,

Self-Insured Employer–Respondent.

Appeal from a Compensation Order on Remand of
Administrative Law Judge Linda F. Jory
AHD No. 09-394A, OWC No. 639622

Michael J. Kitzman, Esquire, for the Petitioner

William S. Sands, Jr., Esquire, for the Respondent

Before JEFFREY P. RUSSELL,¹ LAWRENCE D. TARR, AND HENRY W. MCCOY, *Administrative Appeals Judges.*

JEFFREY P. RUSSELL, for the Compensation Review Board.

DECISION AND ORDER

OVERVIEW

Gwendetta Stocks injured her low back on April 23, 2007 while lifting a patient. She treated for low back pain which radiated into her legs, ultimately undergoing two spinal surgeries performed by Dr. Joseph O’Brien, from whom she also obtained follow-up care.

Ms. Stocks presented her claim for an award of 32% permanent partial disability under the schedule to each leg to an Administrative Law Judge (ALJ) in the Department of Employment Services (DOES) on February 16, 2012. The ALJ issued a Compensation Order on March 7, 2012, in which the ALJ denied the claim. Ms. Stocks filed a timely appeal and Memorandum of Points and

¹ Judge Russell is appointed by the Director of the Department of Employment Services (DOES) as a member of the Compensation Review Board CRB pursuant to (DOES) Administrative Policy Issuance No. 12-01 (June 20, 2012).

Authorities in Support of Application for Review (Petitioner’s Memorandum), to which Washington Hospital Center (WHC) filed a timely opposition.

STANDARD OF REVIEW

The scope of review by the CRB, as established by the Act and as contained in the governing regulations, 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

In this appeal, Ms. Stocks argues that it was error for the ALJ to fail to specifically address what she refers to as “Wormack” factors. In her Memorandum she writes:

The Compensation Review Board’s decision in *Wormack v. Fishback & Moore Electric, Inc.*, CRB Number 03-159, AHD No. 03-151, OWC No. 456201 (7/22/05) requires a Compensation Order disposing of the issue of the extent of the permanent disability to a scheduled member to “consider the medical impairment, the Maryland Factors **and** the effect of the work injury on Petitioner’s industrial capacity in arriving at a percentage of disability under the Act. In so doing, the Compensation Order shall identify the record evidence upon which it relied in exercising said discretion to arrive at the percentage of disability to award.” (Emphasis added). The use of the conjunctive and [sic] in this decision clearly requires Compensation Order fact finder [sic] is required [sic] to consider and address **three** distinct factors: (a) the nature of the physical injury; (b) pain, weakness, atrophy, loss of function and endurance. The Court of Appeals has addressed the manner in which an Administrative Law Judge is to analyze permanent partial impairment evaluations in *Muhammad v. District of Columbia Department of Employment Services*, 774 A.2d 1107 (DC 2001) (Compensation Order shall consider what disability, if any results from complaints of pain, weakness, atrophy, loss of function and loss of endurance); and c) industrial loss.

The Compensation Review Board further articulated this standard in *Corrigan v. Georgetown University*, CRB No.: 06-094, AHD No.: 06-256, OWC No.: 604612 (September 14, 2007). There, the CRB noted that the above factors should be applied with the proper standard, which is “that specific loss is to be determined **without reference to the claimant’s earning capacity or ability to return to work.**” (Emphasis Added). Here, the Compensation Order failed to address these factors.

Petitioner's Memorandum, unnumbered pages 3 – 4 (emphasis, bolding, and italics in original). We do note, however, that the editing of the quote from *Wormack* omitted the words "broad discretion to" which immediately precede "consider medical opinion...", and instead prefaced the quote with the phrase beginning "requires a Compensation Order...", fundamentally changing its meaning from a description of empowerment and discretion to one of mandatory obligation, which it is not.

From this disquisition it is somewhat difficult to decipher what errors Ms. Stocks is asserting. However, she follows this with two numbered sub-arguments, being "1. The Compensation Order failed to address any of the 5 Factors" and "2. The Compensation Order fails to address Industrial Loss".

What the Memorandum appears to concede, therefore, is that the ALJ did address what Ms. Stocks characterizes as "(a) the nature of the physical injury", which we take to mean "medical impairment". And, review of the Compensation Order confirms that the ALJ did, in fact, address medical impairment, and found that Ms. Stocks had failed to prove that she has sustained any such impairment to her legs. And, in the absence of there being any physical impairment, there can be no disability. That is, some degree of physical impairment is a *sine qua non* for a disability award under the schedule.

Thus, the question becomes whether the ALJ's determination that Ms. Stocks has failed to adduce a preponderance of the evidence establishing that she has sustained a physical impairment to her legs is supported by substantial evidence.

In assessing the issue, the ALJ reviewed the medical evidence from Ms. Stocks' treating physician Dr. Joseph O'Brien, her independent medical evaluator (IME) Dr. Joel Fechter, and WHC's IME physician Dr. James Gardiner.

With respect to the treating physician, the ALJ noted that the record contained no opinion concerning the existence of or the degree of any impairment to Ms. Stocks' legs, but that on April 24, 2009, she had reported to the doctor that she had 0 out of 10 pain, and that on May 25, 2010 although she was experiencing back pain, her radiating leg pain had disappeared following surgery. CO, page 5.

The ALJ found that these reported findings were inconsistent with Ms. Stocks' testimony that she suffered radiating leg pain and with Dr. Fechter's November 17, 2010 IME report's reference to such radiating leg pain. The ALJ reasoned that the lack of any treatment for such conditions between May and November 2010 weighed heavily against a finding that Ms. Stocks' testimony and the report of such pain in Dr. Fechter's report were accurate. She also noted that Dr. Fechter's conclusions were based completely upon subjective complaints by Ms. Stock, and were unsupported by any objective testing.

She therefore determined that Dr. Gardiner's IME opinion that there was no permanent leg impairment was more consistent with the treating physician's assessment and with the lack of treatment, and accepted it. CO, page 6. Dr. Gardiner's opinion couldn't be more unequivocal:

Based on my review of the medical records, examination of Ms. Stocks and history I can state within a reasonable degree of medical probability that Ms. Stocks has no permanent impairment in either of her lower extremities from the 2007 low back injury.

I have had the opportunity to review Dr. Joel Fechter's assessment of Ms. Stocks. I can find no medical correlation or basis for his findings of 32% impairment of her right and left lower extremities. Her range of motion is normal. Her muscle strength is 5/5. There is no muscle atrophy or wasting. She has no sensory abnormalities. She certainly does not meet any of the criteria for permanent impairment as per the AMA guides 5th Edition. It is my opinion that Ms. Stocks has suffered no permanent impairment in one or both extremities as a result of the 2007 injury. She had a full and complete recovery of her function in both extremities and other than some occasional low back pain and stiffness, of which she does have some prior injuries to her back, there is no impairment or disability.

EE 1, page 2. This report and the opinions therein are certainly such evidence as a reasonable mind might accept to support the proposition that Ms. Stocks has no medical impairment in either leg. As such, the ALJ's determination to that effect is supported by substantial evidence, thereby rendering her conclusion that Ms. Stocks has failed to demonstrate the existence of a disability under the Act in accordance with the law.

CONCLUSION

The CO is supported by substantial evidence and is in accordance with the law.

ORDER

The Compensation Order of March 7, 2012 is affirmed.

FOR THE COMPENSATION REVIEW BOARD:

JEFFREY P. RUSSELL
Administrative Appeals Judge

August 15, 2012
DATE