

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. 05-20

CURTIS THOMAS,

Claimant – Petitioner

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY

Self-Insured Employer-Respondent.

Appeal from a Compensation Order of
Administrative Law Judge Linda F. Jory
OHA No. 03-517; OWC No. 584413

Steven Kaminski, Esquire, for the Petitioner

Detria J. Liles, Esquire, for the Respondent

Before: SHARMAN J. MONROE, JEFFREY P. RUSSELL, Administrative Appeals Judges and FLOYD LEWIS, Acting Administrative Appeals Judge.

FLOYD LEWIS, Acting Administrative Appeals Judge, on behalf of the 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

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 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

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 November 10, 2004, the Administrative Law Judge (ALJ) granted in part and denied in part the relief requested by Claimant-Petitioner (Petitioner), as Employer-Respondent (Employer) was ordered to pay Petitioner permanent partial disability benefits based on a 30% impairment rating to the left small toe and an additional \$2,500.00 for the residual scar on the left foot.² Petitioner now seeks review of that Compensation Order.

As grounds for this appeal, Petitioner alleges as error that the portion of the Compensation Order that denied any permanent impairment for Petitioner's foot is not supported by substantial evidence and is not in accordance with the law.

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. D.C. Official Code § 32-1522(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. Dist. of Columbia Dep't. of Employment Servs.*, 834 A.2d 882 (D.C. App. 2003). Consistent with this scope 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 specifically alleges that the ALJ's decision is erroneous because it did not comport with the law concerning the weight afforded treating physicians, as the ALJ disregarded the opinion of his treating physician, Dr. Ruth Robinson, and gave her opinion no weight. Respondent counters by arguing that Petitioner offered no credible evidence of an impairment to his foot and that the ALJ's denial of any award for Petitioner's foot was not even based on the evaluation of competing medical opinions. In addition, Respondent contends that Petitioner's own testimony refuted the existence of any impairment to his foot, beyond the presence of a scar, and that the manner in which Dr. Robinson

responsibility for administrative appeals filed prior to October 1, 2004, the effective date of the District of Columbia Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004.

² The ALJ who presided over the formal hearing resigned from OHA before a decision was issued and this matter was re-assigned to ALJ Jory. In response to a Show Cause Order in this regard, Petitioner indicated that he had no objection to the issuance of the Compensation Order by ALJ Jory. Respondent did not respond to the Show Cause Order.

agreed and joined with the opinion of Dr. Raymond Drapkin, Petitioner's independent medical examiner, does not convert Dr. Drapkin's report into an opinion from a treating physician.

The Act does not provide Petitioner with a presumption of compensability concerning the nature and extent of his disability. *Dunston v. Dist. of Columbia Dep't. of Employment Servs.* 599 A.2d 109, 111 (D.C. 1986). As such, Petitioner had the burden of proving by substantial credible evidence that he was entitled to the requested permanent partial disability benefits based upon a 25% rating to his left foot and 30% rating to his left toe, and Petitioner submitted a report from independent medical examiner, Dr. Drapkin, rating Petitioner's foot and toe at the level he sought. At the hearing, Petitioner contended that his treating physician, Dr. Robinson, agreed with Dr. Drapkin's ratings and submitted into evidence a form letter prepared by his counsel with Dr. Robinson's signature, indicating her concurrence with the ratings of Dr. Drapkin

The ALJ awarded a rating of 30% impairment to the toe, \$2,500.00 for scarring of the foot, but denied the request for a permanent rating to the foot. In justifying the award to the toe, the ALJ noted the pain in that area in Dr. Drapkin's report, which had some support in Petitioner's testimony and as for the disfigurement award, the ALJ referred to the visual evidence of a mark on Petitioner's foot and testimony concerning the skin sensitivity of the scar. In denying the rating to the foot, the ALJ emphasized that Dr. Drapkin's report of May 13, 2003 did not mention pain in the foot, only that there is "an obvious burn with change in the coloration of the skin involving the left foot." and that Claimant's own testimony did not justify a rating to the foot. Thus, the ALJ determined that the evidence offered by Petitioner as to the visual effects of the foot, was captured by the disfigurement award. Compensation Order at 4.

The ALJ rejected Dr. Drapkin's rating of 25% to the left foot, concluding that such a rating was not consistent with Petitioner's testimony that, "Sometimes because like if I wear a shoe or something, it feels kind of bad and I just don't feel right." Hearing transcript at 29. As a result, the ALJ found that it was unrealistic to justify a 25% permanent partial disability award to Petitioner's left foot on Petitioner's testimony that his left foot does not feel right. This Panel agrees with the ALJ's conclusion that Dr. Drapkin's rating of 25% is not supported by the evidence of record.

On the issue of a rating to the foot, Petitioner argues that the ALJ erred by disregarding Dr. Robinson and giving her opinion no weight, which violates the treating physician preference in worker's compensation cases. *Harris v. Dist. of Columbia Dep't. of Employment Servs.*, 746 A.2d 297, 302 (D.C. 2000); *Stewart v. Dist. of Columbia Dep't. of Employment Servs.*, 606 A.2d 1350, 1353 (D.C. 1992).

However, while Dr. Robinson was Petitioner's treating physician, on this issue, Dr. Robinson simply joined the opinion of Dr. Drapkin, an independent medical examiner, by checking a box on a letter, as requested by Petitioner's attorney. Moreover, Dr. Robinson last examined Petitioner on September 19, 2002. Thus, as emphasized by Respondent, when Dr. Robinson agreed with Dr. Drapkin by checking the box in the letter on September 23, 2003, it was almost impossible for Dr. Robinson to know what Petitioner's condition was on May 13, 2003, the date Petitioner was examined by Dr. Drapkin. As such, this Panel concludes that there was no error in the ALJ giving little or no weight to the opinion of Dr. Robinson because of the manner in

which Dr. Robinson joined Dr. Drapkin's opinion. Also, this Panel agrees with Respondent that the agreement by Dr. Robinson does not transform Dr. Drapkin's report into an opinion by a treating physician.

Finally, since Dr. Robinson joined Dr. Drapkin's opinion, the ALJ's rejection of Dr. Drapkin's 25% rating, in essence, equates to a rejection of the treating physician's opinion for the same reasons that Dr. Drapkin's opinion was rejected. The opinion of the treating physician can be rejected if the ALJ sets forth specific and legitimate reasons for doing so. *Canlas v. Dist. of Columbia Dep't. of Employment Servs.*, 723 A.2d 1210, 1211-12 (D.C. 1995).

After closely reviewing the evidence of record, we determine that the ALJ's conclusion to deny Petitioner's request for an impairment rating to his foot is supported by substantial evidence and is in accordance with the law.

CONCLUSION

The Compensation Order of November 10, 2004 is supported by substantial evidence in the record and is in accordance with the law.

ORDER

The Compensation Order of November 10, 2004 is hereby AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD

FLOYD LEWIS
Acting Administrative Appeals Judge

July 22, 2005
DATE