

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA M. MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 12-039

SHURON TURNER,

Claimant- Petitioner,

v.

WASHINGTON METROPOLITAN TRANSIT AUTHORITY,

Self Insured Employer - Respondent.

Appeal from a Compensation Order on Remand of
Administrative Law Belva D. Newsome
OHA No. 11-124, OWC No. 667761

David Kapson, Esquire, for the Claimant
Mark H. Dho, Esquire, for the Employer

Before HEATHER C. LESLIE,¹ MELISSA L. JONES, and HENRY MCCOY, *Administrative Appeals Judges.*

HEATHER C. LESLIE, *Administrative Appeals Judge*, for the Review Panel:

DECISION AND REMAND ORDER

OVERVIEW

This case is before the Compensation Review Board (CRB) on the request for review filed by the Claimant - Petitioner (Claimant) of the February 10, 2012, Compensation Order on Remand (COR) issued by an Administrative Law Judge (ALJ) in the Office of Hearings and Adjudication of the District of Columbia Department of Employment Services (DOES). In that COR, the ALJ denied the Claimant's request for permanent partial disability to her right lower extremity, causally related medicals and interest. We REVERSE and REMAND.

BACKGROUND AND FACTS OF RECORD

On February 15, 2010, the Claimant injured her right knee, right ankle and right leg after slipping and falling on ice in the Employer's parking lot. The Claimant came under the care and treatment of Dr. Richard Meyers and Dr. Frederic Salter of the medical practice, Phillips and Green, Limited Partnership. After conservative treatment, the Claimant was ultimately released

¹Judge Heather C. Leslie is appointed by the Director of DOES as an interim Board member pursuant to DOES Administrative Policy Issuance No. 12-02 (June 20, 2012).

back to full duty. The Claimant saw Dr. Jeffrey Phillips of the same practice on November 23, 2010, for a final evaluation where Dr. Phillips opined the Claimant suffered from a 16% permanent partial disability to her right lower extremity as a result of the work injury.

The Employer sent the Claimant to be examined for an Independent Medical Evaluation (IME) with Dr. Louis Levitt on two occasions, April 20, 2010 and February 1, 2011. Dr. Levitt opined that the Claimant did not suffer from any permanent impairment attributable to her work injury.

A full evidentiary hearing was held on July 13, 2011 with the sole issue presented being the nature and extent of the Claimant's right lower extremity. A CO was issued on September 20, 2011 denying the Claimant's claim for relief. In that CO, the ALJ found that Dr. Phillips was not a treating physician and not entitled to the treating physician preference. The ALJ found the opinion of Dr. Levitt more persuasive.

The Claimant appealed on October 27, 2011. In a Decision and Remand Order (DRO) dated January 26, 2012, the CRB remanded the case back to the ALJ, first to apply the proper legal burden when determining permanent partial disability that of a preponderance of the evidence, Secondly, the ALJ was ordered to reconcile internally inconsistent statements. Finally, the ALJ was tasked to clarify, in light of the ALJ's discussion regarding the Claimant's physical complaints whether or not the Claimant's work capacity had been impacted.

A COR was issued on February 10, 2012. In that COR, the ALJ utilized the preponderance of the evidence standard when analyzing the nature and extent of the disability and reconciled the two internally inconsistent statements pointed out by the CRB. The ALJ again denied the Claimant's request for an award of permanent partial disability benefits. The Claimant timely appealed. The Claimant argues that the ALJ was in error in not affording the treating physician preference to Dr. Phillips and that the COR was not supported by the substantial evidence in the record in that the Claimant had demonstrated that she suffers from a permanent partial disability as a result of her work injury. The Employer counters that the ALJ was correct in not extending the treating physician preference to Dr. Phillips and that the COR is supported by the substantial evidence in the record and should be affirmed.

THE STANDARD OF REVIEW

The scope of review by the CRB 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 District of Columbia Workers' Compensation Act of 1979, D.C. Code, as amended, §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 must uphold a Compensation Order that is supported by substantial evidence, even if there is substantial evidence in the record to support a contrary conclusion, and even where the CRB might have reached a contrary conclusion. *Id.* at 885.

DISCUSSION AND ANALYSIS

The Claimant first argues that the ALJ was incorrect in finding Dr. Phillips was not a treating physician. The Employer responds by stating that the prior DRO has already affirmed the ALJ's finding that Dr. Phillips is not a treating physician entitled to a preference. We agree with the Employer. This issue has already been discussed at length and we direct the parties to our prior DRO for our analysis and conclusion that the ALJ was correct in not extending the treating physician preference to Dr. Phillips.

We are unfortunately forced to remand again for the ALJ to clarify whether or not the Claimant was entitled to a permanent partial disability award based upon the impact on the Claimant's work capacity. The ALJ, in the COR, states,

In support of her claim for 16% permanent partial disability to her right lower extremity, Claimant relies upon testimony and medical records. Claimant testified that her job duties required her to walk around the bus before driving it; the possibility for squatting to lift the driver's seat; use the different devices on the dashboard to help disabled passengers get on and off the bus using the wheelchair lift. Claimant testified that she had never injured her right knee prior to the incident on February 15, 2010. Claimant described her continuing symptoms as radiating pain through her right knee; inability to walk long periods of time; and, the requirement of icing and elevating her right knee for pain.

COR at 4.

We will note this is the same paragraph that the CRB discussed in the prior DRO. Specifically, as we stated in the prior DRO²:

[A]s the ALJ correctly noted, the ALJ is free to consider more than [sic] the medical opinions when assessing the extent of disability to a scheduled member. It is well settled that "disability is an economic and not a medical concept." *The Washington Post v. DOES*, 675 A.2d 37, 40 (D.C. 1996). The ALJ is not bound to accept the treating physician's medical opinion of whether petitioner has a "disability" as that concept is defined in the Workers' Compensation Act. *See Negussie v. DOES*, 915 A.2d 391, 392 (D.C. 2007) ("[A]s used in the Act, 'disability' is an economic and legal concept which should not be confounded with a medical condition . . ."). The ALJ is required by statute to consider all the evidence and to exercise independent judgment in determining whether the claimant has a permanent disability and, if so, the extent of that disability. *Id.* at 398.

The ALJ did discuss the Claimant's testimony regarding her job duties, the physical demands of the Claimant's job, and her current complaints, including her "continuing symptoms as radiating pain through her right knee; inability to walk long periods of time; and, the requirement of icing

² *Turner v Washington Metropolitan Transit Authority*, CRB No. 11-115, AHD No. 11-124, OWC No. 667761, (January 26, 2011) at 5-6 (footnote omitted).

and elevating her right knee for pain.” CO at 4. However, no other discussion regarding any effect on the Claimant’s ability to work ensues making it unclear in what context the above paragraph should be taken. We are quick to note that we make no decision on whether or not the record supports such an award of permanent partial disability based on any impact to the Claimant’s work capacity, but simply the ALJ must explain whether or not, in light of the discussion of the Claimant’s current complaints, some award is warranted. Upon remand, the ALJ is to clarify the above discussion.

A review of the COR shows no such clarification or discussion ensued, pursuant to the DRO as quoted above. We again must remand the case back to the ALJ to discuss whether or not the Claimant has proved entitlement to some permanent partial disability benefit based upon the effect the injury may or may not have on her ability to work, in keeping with the law of this jurisdiction.³

CONCLUSION AND ORDER

The COR of February 10, 2012 is not in accordance with the law. The Compensation Order is **REVERSED** and **REMANDED** for further findings and analysis consistent with the above discussion.

FOR THE COMPENSATION REVIEW BOARD:

Heather C. Leslie
Administrative Appeals Judge

September 10, 2012

DATE

³ See *Jones v. D.C. Department of Employment Services*, 41 A.3d 1219 (D.C. 2012).