COMPENSATION REVIEW BOARD

CRB No. 13-002

VIVIANA SANDOVAL,
Claimant–Petitioner,

v.

HOTEL & RESTAURANT EMPLOYEE INTERNATIONAL UNION and
COMPANION PROPERTY & CASUALTY,
Employer/Insurer - Respondents

An Appeal from a December 7, 2012 Compensation Order by
Administrative Law Judge Anand K. Verma
AHD No. 11-277A, OWC No. 679754

Matthew Peffer, Esquire, for the Claimant
James C. Willette, Esquire, for the Employer

Before: HEATHER C. LESLIE, JEFFREY P. RUSSELL, and MELISSA LIN JONES, *Administrative Appeals Judges.*

HEATHER C. LESLIE, *Administrative Appeals Judge*, for the Compensation Review Board.

DECISION AND ORDER

OVERVIEW

This case is before the Compensation Review Board (CRB) on the request for review filed by the Claimant - Petitioner (Claimant) of the December 7, 2012, Compensation Order (CO) 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 CO, Claimant's request an award of 27% permanent partial disability to her right upper extremity and 8% permanent partial disability to her left upper extremity was denied in part. We AFFIRM.

FACTS OF RECORD AND PROCEDURAL HISTORY

On March 22, 2011, the Claimant was involved in a motor vehicle accident which arose out of and in the course of her employment. The Claimant sought medical treatment and was diagnosed with a left fifth metacarpal fracture and a right ulnar shaft fracture. The Claimant subsequently underwent surgery to address her injuries.

The Claimant followed up with her treating physician, Dr. Dan E. Weingold. The Claimant experienced gradual progress in subsequent visits. The Claimant last sought treatment from Dr. Weingold on July 8, 2011.

The Claimant underwent an independent medical evaluation (IME) with Dr. Jeffrey Phillips on March 30, 2012. Dr. Phillips took a history of the Claimant's injury, performed a physical examination, and took x-rays. Dr. Phillips opined that the Claimant suffered from a 27% permanent partial impairment to the right upper extremity and an 8% permanent partial impairment to the left upper extremity.

The Employer sent the Claimant for an IME with Dr. Louis Levitt on May 22, 2012. Dr. Levitt also took a history of the Claimant's injury and performed a physical examination. Dr. Levitt opined that the Claimant suffered from a 5% permanent partial impairment to the right upper extremity and an 5% permanent partial impairment to the left upper extremity.

A full evidentiary hearing occurred on October 11, 2012. The Claimant sought an award of 27% permanent partial disability to the right upper extremity and an 8% permanent partial disability to the left upper extremity.[1] The sole issue presented was the nature and extent of the Claimant's disability. A CO was issued on December 7, 2012 which awarded the Claimant 5% permanent partial disability to the right upper extremity and an 5% permanent partial disability to the left upper extremity

The Claimant timely appealed. On appeal, the Claimant argues the CO failed to follow the requirements enunciated in *Wormack v. Fishback and Moore*[2] (*Wormack*) and thus the CO is not supported by the substantial evidence in the record nor in accordance with the law. The Employer, in opposition, argues that the CO is not arbitrary or capricious and is supported by substantial evidence and is in accordance with the law.

STANDARD OF REVIEW

The scope of review by the CRB, 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.[3] *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). Consistent with this standard of review, the CRB and this Review Panel are

[1]The claim for relief and conclusion and award section in the CO refers to permanent partial *impairment* to the right upper extremity and permanent partial *impairment* to the left upper extremity. We acknowledge that medical physicians refer to permanent partial impairment when rendering opinions. However, pursuant to D.C. Official Code § 32-1508(3)(A-L), the ALJ's are to adjudicate claims for permanent partial disability when scheduled members are at issue. We will assume the ALJ meant to refer to permanent partial *disability*, pursuant to the Act.

[2] *Wormack v. Fishback and Moore*, CRB No. 03-159, AHD No. 03-151 (July 22, 2005).

[3] "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. DOES*, 834 A.2d 882 (D.C. 2003).

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.

ANALYSIS

The Claimant's primary argument is that the CO failed to address the requirements outlined in *Wormack*. Specifically, the Claimant argues: 1) the ALJ substituted his own opinion for that of the physicians; 2) that the CO failed to address the five factors outlined in D.C. Code § 32-1508(3)(U-i); and 3) the CO failed to make findings regarding the Claimant's industrial loss.

The Claimant first argues the "ALJ improperly substituted his own medical judgment for that of the physicians." Claimant's argument unnumbered at 6. The Claimant argues the ALJ substituted his own judgment over that of Dr. Phillips and did not adequately explain why Dr. Levitt's opinion was found to be more persuasive. The Claimant also takes issue with the ALJ noting the Claimant did not undergo any physical therapy nor take any prescribed medications after July 8, 2011.

A review of the CO reveals the ALJ found persuasive the medical notes and opinions of the Claimant's treating physician, Dr. Weingold when concluding the Claimant did not suffer from any physical impairment as a result of her injury. Specifically,

> In support of her claim for 27% permanent partial disability to her right upper extremity and 8% permanent disability, Claimant essentially relies on the March 30, 2012 IME of Dr. Phillips who had never had any exposure to her before. Likewise, Employer, in countering the claim, offers the May 22, 2012 IME of Dr. Levitt, who, too, did not examine Claimant previously. Thus, the two IME opinions must be rationalized along with the findings of Claimant's treating physician, Dr. Weingold who first examined her on March 25, 2011. Dr. Weingold diagnosed her with right ulnar shaft fracture and left distal fifth metacarpal shaft fracture and in its resolution recommended a surgical repair. Accordingly, Dr. Weingold performed a surgical procedure consisting of repair of the right ulnar fracture in conjunction with left distal fifth metacarpal shaft fracture at Alexandria Hospital on March 30, 2011. X-rays taken in a post-operative follow up on April 7, 2011 showed satisfactory alignment of both fractures. The subsequent examinations of April 12 and 19, 2011, particularly the x-ray taken on April 19, 2011 was consistent with an early healing of the fractures paired with a good alignment. Claimant was out of the country for about a month and upon return to the United States, she followed up with Dr. Weingold on May 19, 2011 when x-rays of her right and left hand revealed a healed left fifth metacarpal fracture as well as right ulnar fracture. In her last follow up of July 8, 2011, Claimant reportedly felt much better, albeit with occasional right forearm discomfort and her x-rays showed fully healed fractures in good alignment. Dr. Weingold advised her to adhere to a home exercise regimen and to return after six months or sooner if she became symptomatic. In his opinion, Claimant was at an MMI and with no need for further treatment, she could resume a full active lifestyle without any physical restrictions.

CO at 6.

As the treating physician, Dr. Weingold's opinion is preferred over Dr. Levitt and Dr. Phillips. This court has repeatedly held, consistent with prevailing case law, that in situations where there are conflicting medical opinions, the opinion of the treating physician is preferred over those of physicians retained simply to examine the claimant for the purposes of litigation. *Stewart v. District of Columbia Dept. of Employment Services*, 606 A.2d 1350 (D.C. 1992). Although Dr. Weingold did not render an opinion on what permanent partial disability the Claimant may be entitled to, it is clear the ALJ took into consideration Dr. Weingold's opinions regarding the Claimant's apparent successful surgery and recovery when determining that the Claimant's suffered no residual symptoms from her injury. While we do agree with the Claimant's assertions that no doctor recommended physical therapy or prescribed medication, it is clear in the context of the paragraph referring to physical therapy, the ALJ was using the lack of any follow up care, including any physical therapy or medication, as further evidence of the Claimant having recovered from her injuries.

It is also clear that the ALJ did take into account Dr. Phillip's and Dr. Levitt's opinions. The ALJ noted that neither Dr. Phillips nor Dr. Levitt had examined the Claimant before their respective IME's, categorizing the IME of Dr. Phillips as "isolated." CO at 7. The ALJ ultimately rejected Dr. Phillip's opinion having found the opinion of Dr. Weingold the Claimant had recovered from her injuries more persuasive. We find the ALJ did not substitute his own judgment for that of Dr. Phillips. What the Claimant is asking us to do is reweigh the medical evidence, a task we cannot do. We reject the Claimant's first argument.

Addressing the Claimant's second argument, as we have stated before, *Wormack* does not mandate specific findings be made with regard to the factors listed in D.C. Official Code § 32-1508(3)(U-i), commonly referred to as the "Maryland five factors." In *Kane v. WMATA*,[4] when addressing virtually the same argument, the CRB stated,

> Nothing in the APA or Agency precedent requires that an ALJ make specific findings on every potential factual scenario or criteria that might have had a potential effect on a determination. They require that the record be considered as a whole, and that findings of fact be made based thereon. If there is substantial evidence in that record upon which the ALJ relies and which a reasonable mind might accept to support the factual findings, and if the legal conclusion reached by the ALJ flows rationally from those facts, the decision must be affirmed.

Kane, supra at 3.

Moreover, nothing in the Act requires the ALJ to consider the "Maryland five factors," or even the AMA Guides.[5] D.C. Code § 32-1508(3)(U-i) states, in pertinent part,

[4] CRB No. 10-071, AHD No. 09-483 (November 8, 2011).

[5] See *Hill v. Howard University*, CRB No. 12-180, AHD No. 10-117A (December 22, 2011).

> In determining disability … [under the schedule], the most recent edition of the American Medical Association Guides to the Evaluation of Permanent Impairment *may* be utilized, along with the following 5 factors: (i) Pain; (ii) Weakness; (iii) Atrophy; (iv) Loss of endurance; and (v) Loss of function." (Emphasis added.)

The statute clearly utilizes the term "may" to allow the ALJ the discretion to determine what factors, if any, ultimately to use in coming to a conclusion on what permanent partial disability the Claimant may, or may not be, entitled to. We decline to follow the argument put forth by the Claimant.

The Claimant lastly argues that the CO did not make clear findings on industrial loss. Before addressing the Claimant's argument, we do note that a review of the CO reveals the ALJ first correctly noted the claim for relief sought is a scheduled award governed by D.C. Code § 32-1508(3)(A-U).

However, after quoting the correct portion of the Act, the ALJ quoted D.C. Code § 32-1508(3)(V)(i), applicable to non scheduled injuries. We are uncertain why, in light of the ALJ correctly noting § 32-1508(3)(A-U) applies to the claim for relief at hand, the ALJ then goes on to quote the law for non-scheduled injuries, a claim for relief not before the ALJ. Normally, this uncertainty over which law was ultimately applied would require us to remand the case back to the ALJ. However, in the case *sub judice*, we are satisfied that the ALJ recognized that the Claimant was seeking a scheduled award and applied the correct law as the ALJ, in the next paragraph identifies the correct claim for relief as relating the Claimant's arms (upper extremities) and identifying them as a scheduled loss.

Turning our attention back to the Claimant's argument, we note the following discussion regarding the Claimant's industrial loss:

> Claimant admittedly works in full time employment as an administrator wherein she performs without any assistance from others and her alleged infirmities do not seem to interfere with the execution of her duties. Further, the record evidence discloses no incidents of missed time from work on account of her complained of bilateral wrist pains. Predicated on the available evidence, the undersigned is not convinced Claimant has met her burden of proving her entitlement to 27% permanent partial impairment of right upper and 8% permanent partial impairment of the left upper extremity as rated by Dr. Phillips based on an isolated IME. Indeed, because Employer does not oppose 5% permanent impairment attributable to each of Claimant's right and left arms as apportioned by Dr. Levitt, an award thereof can be made consistent with the humanitarian nature of the Workers' Compensation Act. See *Murray v. District of Columbia Department of Employment Services*, 765 A. 2d 980 (D.C. 2001).

CO at 6-7.

As the Claimant concedes, the "CO correctly notes the application of the principles of industrial loss." The ALJ also noted that the Employer did not contest that the Claimant was at least entitled

to 5% permanent partial award to each upper extremity based upon the opinion of Dr. Levitt.[6] Dr. Levitt, after having reviewed the medical records and performing a physical examination opined the Claimant suffered from a 5% impairment to each upper extremity. We find awarding this uncontested percentage of impairment to each of the upper extremity, based upon the Employer's IME and acquiescence to this percentage of permanent partial disability, to be specific enough to satisfy *Jones v. DOES*, 41 A.3d 1219 (D.C. 2012).

CONCLUSION AND ORDER

The findings of fact and the conclusions of law in the December 7, 2012 Compensation Order are supported by substantial evidence in the record and is in accordance with the law.

The Compensation Order on Remand is **AFFIRMED**.

FOR THE COMPENSATION REVIEW BOARD:

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HEATHER C. LESLIE
Administrative Appeals Judge

April 22, 2013
DATE

[6] The Employer, through counsel, conceded in both opening and closing statements that the Claimant was entitled to a 5% permanent partial disability award to each upper extremity based upon Dr. Levitt's opinion. Hearing transcript at 16 and 75-76.