

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 (Dir. Dkt.) No. 04-76

ROBERT A. WALKER, III,

Claimant – Respondent,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY.

Self-Insured Employer – Petitioner.

Appeal from a Compensation Order of
Administrative Law Judge Jeffrey P. Russell
OHA No. 04-209, OWC No. 590535

Donna J. Henderson, Esquire, for the Petitioner

Heather C. Leslie, Esquire, for the Respondent

Before LINDA F. JORY, FLOYD LEWIS and SHARMAN J. MONROE, *Administrative Appeals Judges.*

FLOYD LEWIS, *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 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, 32-1522 (2005). In accordance with 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.

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 June 15, 2004, the Administrative Law Judge (ALJ) granted Claimant-Respondent (Respondent) a 26% permanent partial disability to his right leg. Employer-Petitioner (Petitioner) now seeks review of that Compensation Order.

As grounds for this appeal, Petitioner alleges as error that the Compensation Order 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). “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 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 alleges that the ALJ’s decision is flawed because substantial evidence is not the standard of proof in this case, as the ALJ should have applied the preponderance of the evidence test, the ALJ’s determination of which medical opinion was most persuasive was flawed and that the ALJ’s determination concerning Respondent’s functional limitations was based on several errors. Finally, Petitioner argues that the CRB’s decision in *Wormack v. Fischbach & Moore Electric, Inc.* CRB No. 03-159, OHA No. 03-151 (July 22, 2005) requires that his case must be reversed and remanded to the ALJ for further consideration. Respondent counters that the ALJ correctly applied the standard of proof to the evidence in the record, the ALJ correctly applied the law and the case should be affirmed.

Initially, this Panel must reject Petitioner’s argument that the ALJ erroneously used the substantial evidence test and that the correct test in this matter is the preponderance of the evidence standard. As the record reveals and the ALJ correctly noted, the parties stipulated that Respondent’s disability was medically causally related to his work injury and thus, the issue in dispute was the nature and extent of Respondent’s disability, if any. In such cases, the correct

test is the “substantial evidence” standard to the evidence of record. *See Dunston v. Dist. of Columbia Dep’t. of Employment Servs.* 509 A.2d 109 (D.C. 1986).

In the instant matter, the ALJ stressed that at the time the Compensation Order was issued, under the law as established by the Director at the time, fact-finders were constrained and not given any authority in schedule awards to do anything other than accept one of the medical impairment ratings entered into evidence. As such, the ALJ felt that the only choice was to “just ‘hold his nose’ and choose the rating with the least problems, provided, of course, that it is sufficiently reliable to constitute ‘substantial evidence’”. Therefore Claimant is awarded a 26% permanent impairment to his right leg, as of May 10, 2003, despite the fact that my own view is that the award overstates Claimant’s true industrial loss of use and disability.” Compensation Order at 6.

As argued by Petitioner, in the *Wormack* case the CRB has held that it is most appropriate to give the fact-finder broad discretion to reach a conclusion as to the fact of the degree of disability under the Act. As such, there is no impediment to an ALJ making an award that is different than the specific figure requested by a claimant or argued by an employer. The Compensation Order in the instant matter was issued before *Wormack* was decided, however, in light of the CRB’s decision, this Panel concludes that the ALJ should have the opportunity to again resolve this matter after considering the *Wormack* pronouncements.

Accordingly, the Compensation Order of June 15, 2004 is hereby vacated and set aside, and this matter is remanded to the ALJ to reconsider and make required adjustments, if any, to Respondent’s award for permanent impairment to his right leg.

CONCLUSION

The Compensation Order of June 15, 2004 is not in accordance with the law and must be remanded to the ALJ for further findings of fact and conclusions of law to resolve Respondent’s request for an award for permanent partial disability of the right leg.

ORDER

The Compensation Order of June 15, 2004, is hereby REVERSED and this matter is REMANDED to the Administrative Hearings Division for further findings of fact and conclusions of law consistent with the above discussion.

FOR THE COMPENSATION REVIEW BOARD:

FLOYD LEWIS
Administrative Appeals Judge

March 2, 2006
DATE