GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

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MAYOR

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DIRECTOR

COMPENSATION REVIEW BOARD

DEPT. OF EMPLOYMENT SERVICES
COMPENSATION REVIEW BOARD
2015 DEC 30 AM 8 49

CRB No. 14-008 (R)

ZACHARIAH PETERS,
Claimant-Petitioner,

v.

NEXTGEN CORP.AND RENOVATIONS. INC., and XCHANGING,
Employer/Third-Party Administrator-Respondent.

On Remand from the District of Columbia Court of Appeals
DCCA No. 14-AA-526 (October 15, 2015)

Appeal from a December 19, 2013 Compensation Order by
Administrative Law Judge Linda F. Jory
AHD No. 13-475, OWC No. 607572

(Decided December 30, 2015)

Michael J. Kitzman for Claimant
John P. Rufe for Employer

Before JEFFREY P. RUSSELL, *Administrative Appeals Judge*, and LAWRENCE D. TARR, *Chief Administrative Appeals Judge.*[1]

JEFFREY P. RUSSELL for the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

On July 12, 2004, a chimney collapsed on Mr. Zachariah Peters (Claimant) while he was working as a laborer for Nextgen Corporation and Renovations (Employer). At Washington Hospital Center, Claimant was diagnosed with a stable L-4 lateral wedge compression fracture

[1] This matter only is decided by Judge Tarr and Judge Russell because Judge Jory authored the Compensation Order at issue, and Judge Leslie recused herself from consideration of this case.

and possible non-displaced fractures in his right foot. In addition, his right shoulder was separated.

By May 2005, Claimant's back fracture had healed as had his foot fractures. His treating physician released him to work in his normal capacity with an exercise program to improve "strength and mobility of his lumbar spine prior to resuming full duty." Compensation Order, December 19, 2013 (the CO), at 2.

After treatment with other doctors, two independent medical examination physicians, Dr. Joel Fechter and Dr. Jonathan S. Fish, evaluated Claimant at his request for permanent partial impairment ratings. At Employer's request, Dr. James Tozzi examined Claimant for the same purpose.

At a formal hearing, Claimant sought "scheduled loss awards of permanent partial disability based upon a rating of 50% permanent partial impairment to the right leg and 24% to the left leg and 17% to the right arm." CO, p. 2. In the CO, the Administrative Law Judge (ALJ) awarded Claimant "payment of permanent partial disability benefits based on the schedule representing a 10% permanent partial impairment of the right foot and 17% permanent partial impairment of the right upper extremity." *Id.* at 6.

On appeal to the Compensation Review Board (CRB), Claimant argued the ALJ erred in concluding there is no basis for Dr. Fechter's opinion that there are ratable, radicular symptoms because the ALJ did not address Claimant's physical complaints and the impact those complaints have on his ability to function. Claimant also argued the ALJ presented no basis for rejecting Claimant's leg ratings in favor of a foot rating and no determination of the location of the disability awarded. Finally, Claimant argued:

> Here, the Compensation Order does not even focus on actual wage loss, but rather reaches the conclusions that there is [sic] no need to review future earnings based solely on the minimum wage in the claimant's state of residency. This conclusion is both arbitrary and capricious. The minimum wage rate in Washington State, in addition to being irrelevant is not supported by any evidence of the record. Further, the conclusion that it has the highest minimum wage in the United States is not supported by any evidence of the record.
>
> In addition, adjusting the level of disability based on a claimant's zip code is not in accordance with either the Act or any of the decisions of the Court of Appeals. As a result, the Compensation Order's decision to rely on this 'evidence' is not in accordance with the law and means that the Compensation Order is not supported by the substantial evidence.

Memorandum of Points and Authorities in Support of Application for Review, at ii (which is the seventh page of the memorandum).

For these reasons, Claimant requested the CRB reverse the Compensation Order.

In response, Employer presented a fact-based argument that the record is devoid of objective clinical findings and testing results or evidence of wage loss. Employer requested the CRB affirm the Compensation Order.

In a Decision and Order issued May 1, 2014, the CRB upheld the 17% award of permanent partial disability benefits to the right arm, but vacated the 10% award to right foot, writing:

> Although disability experienced in a schedule member may be compensable even if the anatomical situs of the injury is in a non-schedule body part, any award of such permanent partial disability benefits must be substantiated by appropriate findings of fact [citing *Washington Metropolitan Area Transit Authority v. DOES*, 683 A.2d 470 (D.C. 1996)]. In this case, there are no findings of fact that establish an injury to either leg; the finding [sic] of fact do reference a back injury which may have a disabling impact on Mr. Peters' legs, but there are no specific findings to that effect. The ALJ's fails to accept any impact Mr. Peters' back injury has on his legs:
>
>> At the outset, the undersigned must point out that the scant medical evidence does not contain any diagnostic test results which establish that claimant has radiculopathy or disc herniations which would result in radiculopathy in any extremity. Dr. Fechter's ratings of 24% to the right and lower extremities is not only excessive but not supported by any diagnostic tests. The evidence does establish that claimant had a fracture at the L4 and fractured transvers processes from L1 to L4 level, however according to Dr. Tozzi on May 19, 2005, x-rays taken showed the fractures had healed. Although also not made part of the record Dr. Fechter also refers to Dr. Lauerman's July 6, 2007 report and that the lumbar MRI ordered by Dr. Lauerman did not reveal any evidence of fracture or disc injury.
>>
>> When asked by the undersigned at the hearing if he obtained any treatment in Seattle, WA claimant answered "no" although Dr. Fechter refers to a May 23, 2012 visit at the Everett Clinic and that claimant believed he had MRI scans performed of the lumbar spine and perhaps the shoulder but the reports were not provided to Dr. Fechter. HT at 46. The record does not contain any MRIs. [citing the CO at p. 5.]
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> To the contrary, the ALJ's statement that "the undersigned must point out that the scant medical evidence does not contain any diagnostic test results which establish that claimant has radiculopathy or disc herniations which would result in radiculopathy in any extremity" leads to a conclusion that Mr. Peters has not suffered any leg disability; however, the ALJ goes on to award permanent partial disability benefits for his foot:
>
>> With regard to claimant's healed fractured fourth and fifth metatarsals, Dr. Fechter has rated claimant's right extremity as opposed to his right foot and has not converted his 26% rating of the entire extremity to

> permanent partial impairment of the right foot. Similarly Dr. Tozzi did not provide a converted rating to the right foot. *See Lopez v. York Building Services* CRB No. 09-025, AHD No. 03-134B (June 29, 2009).
>
> The only rating to the right foot is provided by Dr. Fish and the undersigned finds Dr. Fish's 10% right foot impairment rating to be reasonable in light of the injury he sustained to the right foot. The remaining ratings of Dr. Fish are to body parts not included in §32-1508, *i.e.*, whole person and right shoulder and cannot be considered.
>
> A review of the Joint Pre-Hearing Statement and the hearing transcript reveals Mr. Peters did not request permanent partial disability benefits for his foot. Consequently, the award for 10% permanent partial disability benefits for the foot was beyond the ALJ's consideration and must be vacated.

Decision and Order, at 3, 4.

Then, in conclusion the CRB wrote:

CONCLUSION AND ORDER

> The award of 10% permanent partial disability benefits for the right foot is not in accordance with the law and is VACATED. The award of 17% permanent partial disability benefits for the right arm is in accordance with the law, is supported by substantial evidence, and is AFFIRMED.

CO, at 6.

Claimant appealed the CRB's decision to the District of Columbia Court of Appeals (DCCA). On October 15, 2015, in a Memorandum Opinion and Judgment, the court affirmed the CRB's decision affirming the 17% award to the right arm, but remanded the matter to the CRB "to review the merits of the ALJ's permanent partial disability awarded related to the foot." *Peters v. DOES and Nextgen Corp. and Renovations, Inc., Intervenor*, No. 14-AA-526, Mem.Op. & J. at 3. (D.C. October 15, 2015) (the MOJ).

In its discussion of the issue and the reasoning behind its mandate, the court wrote:

> With respect to the ALJ's award for permanent partial right-foot disability, DOES in its brief acknowledges the possibility of our agreeing with petitioner's challenge to "the validity of the CRB's procedural ruling," and so, as a fall-back position, "would voluntarily accept a remand on this point " for the CRB to "provide further explanation of or, reconsider its decision to rule the claim was not properly presented without first remanding to the ALJ" (Brief for DOES at 17 n.2). We choose instead to remand to the CRB for it to review on the merits the ALJ's disability award related to the right foot.
>
> First, the hearing transcript does not support the CRB's conclusion that petitioner "did not request … benefits for his foot." In opening statement petitioner's

counsel cited "fractures that [petitioner] sustained in his right foot" and the "pain and swelling" that "he continued to have … in his right foot" as a result. In his testimony, petitioner referred to "the pain and swelling [that] still persists in my foot" which was "constantly swollen" and "hard to keep … weight on," such that "I can't walk … for a continuous amount of time without … having to sit down." And, in his written closing argument, petitioner's counsel cited this testimony and a medical report (from Dr. Fechter) recommending an impairment rating based partly "on the crush fracture … sustained to the right foot as well as the continuing limitations" petitioner had testified to, specifically the swelling in the right foot and pain from standing and walking that "limited his ability to do either task."

On this record, the ALJ could readily resolve ambiguities in the Joint Pre-Hearing Statement as to what disability ratings petitioner was seeking to include for right-foot injury, among others. Although the Pre-Hearing Statement defined petitioner's claim as "seek[ing] permanent partial disability of the right arm and right & left legs," it did so immediately after describing the injuries he suffered to "the ribs, forehead, rig[ht] arm, back, right foot, right shoulder, [and] neck …." The ALJ herself perceived a close relationship between petitioner's claimed "right extremity" and "right foot" disabilities:

> … Dr. Fechter has rated claimant's right extremity as opposed to his right foot and has not converted his 26% rating of the entire extremity to permanent partial impairment of the right foot. Similarly Dr. Tozzi did not provide a converted rating to the right foot…. The only rating to the right foot is provided by Dr. Fish….

The CRB's determination of the extent of petitioner's claim for compensation must be upheld if it is supported by substantial evidence in the record. *See* D.C. Code § 2-510 [sic] (a)(3)(A), (E) (2012 Repl.). At the same time, too strict a reading of the record to preclude a claim on the merits may frustrate "the principle that 'workers' compensation statutes should be liberally construed to achieve their humanitarian purpose." *McCamey v. District of Columbia Dep't of Emp't Servs.*, 947 A.2d 1191, 1197 (D.C. 2008) (en banc)(citations omitted). That is particularly true when the trier of fact, whose compensation order "we cannot ignore," *Georgetown Univ. Hosp. v. District of Columbia Dep't of Emp't Servs.*, 916 A.2d 149, 151 (D.C. 2007), has implicitly found a claim of right foot injury to be presented and contested, requiring a determination on the merits.

Accordingly, we will affirm the decision of the CRB, except we remand the case for it to review the merits of the ALJ's permanent partial disability award related to the foot.

MOJ, at 2, 3 (footnote omitted).

ANALYSIS

The DCCA makes it abundantly clear that a claim for permanent partial disability to the right foot had been presented, which renders our duty with respect to the mandate fairly simple: we must determine whether the ALJ's award is supported by substantial evidence.

That is not a difficult decision to make. As the court noted in the quotation from the CO, the record contained but one rating of medical impairment to the foot. In the portions of the CO affirmed by the court, the CRB affirmed the ALJ's permanent partial disability award of 17%, which was equivalent to the medical impairment found by the ALJ.

Similarly, therefore, the uncontested facts are that there is but one medical impairment rating to the right foot in this record, the 10% rating by Dr. Fish. The ALJ's decision to accept that rating as representing the degree of impairment, and her decision that the degree of that impairment, as with the other award, correlates with the permanent partial disability Claimant has sustained, is rationally explained in the language cited by the court, and is supported by substantial evidence.

Accordingly, in keeping with the mandate of the court, the CO is affirmed.

So ordered.