

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA M. MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 12-031

BRENDA GARRETT,

Claimant–Respondent,

v.

CARECO, INC. AND PMA MANAGEMENT GROUP,

Employer and Carrier-Petitioners.

Appeal from a Compensation Order issued by
The Honorable Amelia G. Govan
AHD No. 11-184A, OWC No. 672418

John P. Rufe, Esquire for the Petitioner
Eric M. May, Esquire for the Respondent

Before HEATHER C. LESLIE,¹ MELISSA LIN JONES, and HENRY W. MCCOY, *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 Employer - Petitioner (Employer) of the January 31, 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, the ALJ granted the Claimant's request for an award of 41% permanent partial disability to the right leg. We AFFIRM.

¹ Judge Heather C. Leslie is appointed by the Director of DOES as an interim Board Member pursuant to DOES Administrative Policy Issuance No. 11-02 (June 13, 2011).

FACTS OF RECORD AND PROCEDURAL HISTORY

On July 22, 2010, the Claimant was involved in a motor vehicle accident while working for the Employer. The Claimant suffered significant injuries to her ribs, head, back, leg and pelvis, requiring extensive hospitalization, surgery, and therapy. The Claimant has been unable to return to work in any capacity and continues to receive ongoing care for her work related injuries.

On July 19, 2011, the Claimant underwent an Independent Medical Evaluation with Dr. Jeffrey Phillips. After performing a physical examination and review medical records, Dr. Phillips opined the Claimant suffered from a 41% permanent partial disability to her right leg as a result of her work injury. Similarly, the Employer sent the Claimant to an IME with Dr. Anthony Unger who also performed a physical examination and reviewed medical records. Dr. Unger opined it was too premature to provide impairment for the lower extremities and that it was “inappropriate” to provide a rating to the lower extremities because the Claimant suffered a back and pelvic injury.

A Formal Hearing on the Claimant’s entitlement to permanent partial disability to the right leg proceeded on December 14, 2011. The Employer contested the medical causal relationship of the right leg condition and the nature and extent of the alleged right leg disability, if any. A CO was issued which granted in its entirety the Claimant’s claim for relief, that of an award of 41% permanent partial disability to her right leg.

The Employer timely appealed with the Claimant opposing.² The Employer argues that as the Claimant continues to undergo care and treatment for her injuries, that an award of permanent partial disability is premature at this time. The Claimant argues that the ALJ’s conclusion is supported by the substantial evidence in the record and that the care the Claimant is presently receiving is “palliative” in nature and “any further recovery is unlikely.” Claimant’s Argument at 4.

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.* at §32-1521.01(d) (2) (A) of the (“Act”) 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.

² We will note the Employer did not appeal the finding that the Claimant’s right lower extremity condition is medically causally related to the work injury.

DISCUSSION AND ANALYSIS

The Employer's main argument is that the ALJ was in error in awarding permanent partial disability benefits as the Claimant is not at maximum medical improvement³ and that the ALJ fails to address this argument in the CO.

The CRB has recognized that,

The DCCA has defined "permanent disability" and established the standard for determining whether a condition is to be so deemed in a number of cases, most recently in *Logan v. DOES*, 805 A.2d 237 (D.C. 2002), where, discussing the manner in which an OHA ALJ considered the issue, the court wrote:

Relying on prior DOES decisions, the hearing examiner interpreted this definition as requiring a claimant to show (1) that his condition has reached maximum medical improvement and (2) that he is unable to return to his usual, or to any other, employment as a result of the injury. With one small adjustment, these proof elements are consistent with this court's understanding of the statute. Thus, we have said that "[a] disability is *permanent* if it 'has continued for a lengthy period, and it appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period.'" *Smith v. District of Columbia Dep't of Employment Servs.*, 548 A.2d 95, 98 n.7 (D.C. 1988) (emphasis added) (citing *Crum v. General Adjustment Bureau*, 238 U.S. App. D.C. 80, 86, 738 F.2d 474, 480 (1984)); *see also* 4 ARTHUR LARSON, LARSON'S WORKERS' COMPENSATION LAW § 80.04, at 80-13 (Matthew Bender ed. 2002) ("Permanent means lasting the rest of claimant's life. A condition that, according to available medical opinion, will not improve during the claimant's lifetime is deemed to be a permanent one."). *Id.*, at 241 (footnotes omitted).

Thus while the court seemed to dislike the usage "maximum medical improvement", the phraseology utilized in *Logan* and in the case currently before us, as that phrase was used by the ALJs in *Logan* and in this case, appears to satisfy the standard enunciated by the court.

Charles v. National Rehabilitation Hospital, CRB No. 08-196, AHD No. 03-111B, OWC No. 579673 (October 26, 2009).

Turning to the CO, the ALJ did address whether or not the Claimant was at maximum medical improvement, contrary to the Employer's argument. Not only did the ALJ acknowledge the Employer's argument on page 4 of the CO, a fact the Employer concedes, the ALJ gives credit to the opinion of Dr. Phillips who does state that the Claimant is a maximum medical improvement.

³ The term maximum medical improvement, as defined by Black's Law Dictionary, is "the point at which an injured person's condition stabilizes and no further recovery or improvement is expected, even with additional medical intervention." Black's Law Dictionary, Ninth Edition.

The Compensation Order unequivocally states,

It is the considered opinion of the undersigned that the appropriate permanency rating is in that of Dr. Phillips. Dr. Phillips' report has consistency with Claimant's testimony and with the other record evidence, and is not excessive; it is also more persuasive in its application of the medical factors considered.

CO at 6.

We find no error in the ALJ affording the opinion of Dr. Phillips more weight than that of Dr. Unger.

In arguing that the Claimant is not at maximum medical improvement, the Employer only focuses on the opinion of Dr. Unger. While Dr. Unger does opine that a permanency rating is premature, Dr. Phillips states she is at maximum medical improvement, an opinion the ALJ finds persuasive as discussed above. We find no error in this and the ALJ's conclusion that Dr. Phillips permanency rating is more appropriate.

The ALJ also went on to assess the economic impact of the injury on the Claimant, stating,

It is noted that in this case, Claimant's permanent lower extremity impairment has had a currently significant effect on her employment related activities. There has been a clear showing that the inability to use her right lower extremity, in a future work milieu, will impact her consequential industrial capacity. *See Logan v. D.C. Dept. of Employment Services*, 805 A.2d 237 (D.C. 2002); *Smith v. D.C. Department of Employment Services*, 548 A.2d 95 (D.C. 1988); *Wormack v. Fischback & Moore Electric*, CRB No. 03-159 (July 22, 2005); *Negussie v. District of Columbia Department of Employment Services*, 915 A.2d 391 (D.C. 2007).

CO at 7.

Again, we find no error in the ALJ's analysis and ultimate conclusion that the Claimant was entitled to an award of a 41% permanent partial disability to her right leg per the opinion of Dr. Phillips. What the Employer is essentially asking us to do is to re-weigh the evidence and give greater weight to that of Dr. Unger. This is a task we cannot do. The CO is supported by the substantial evidence in the record which we affirm, even though there may be substantial evidence to support a contrary conclusion.

CONCLUSION AND ORDER

The findings of fact and conclusions of law contained in the January 31, 2012 Compensation Order is supported by substantial evidence in the record. It is **AFFIRMED**.

FOR THE COMPENSATION REVIEW BOARD:

HEATHER C. LESLIE
Administrative Appeals Judge

April 23, 2012
DATE