

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA M. MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 11-108

HARRIETT KENNEDY,

Claimant–Petitioner,

v.

WASHINGTON METROPOLITAN TRANSIT AUTHORITY,

Self Insured Employer - Respondent.

Appeal from a Compensation Order by
The Honorable Anand K. Verma
AHD No. 11-150 OWC No. 618906

Timothy Driscoll, Esquire for the Petitioner
Mark Dho, Esquire for the Respondent

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

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

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 August 31, 2011, 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 denied the Claimant’s request for an award of 28% permanent partial disability benefits to her right foot. We VACATE and REMAND.

¹Judge 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

The Claimant was injured on September 11, 2005 while getting off a train. The Claimant fell and injured her right foot. The Claimant followed up with Kaiser Permanente for treatment. The Claimant was diagnosed with a minor fracture of the 3rd metatarsal. The Claimant was treated in a cast for a short period of time which was followed by an ankle brace. The Claimant's condition healed. After April of 2006, the Claimant did not seek treatment until 2009. The Claimant again underwent conservative treatment.

The Claimant underwent an independent medical evaluation (IME) with Dr. Michael Franchetti. Dr. Franchetti took a history of the injury, treatment and performed a physical examination. Dr. Franchetti opined that the Claimant suffered from a 28% permanent impairment to her right foot according to the 4th Edition of the AMA Guides to the Evaluation of Permanent Impairment as well as taking into consideration pain, loss of endurance, and loss of function.

The Employer sent the Claimant to Dr. Clifford Hinkes on two occasions for an IME. On both occasions, April 24, 2006 and February 4, 2011, Dr. Hinkes opined that the Claimant had fully healed and could return to work full duty. On February 4, 2011, Dr. Hinkes additionally opined that according to the 4th, 5th, and 6th Editions of the AMA Guides to the Evaluation of Permanent Impairment, as well as pain, atrophy, weakness, loss of endurance and loss of function, the Claimant did not have an impairment to her right foot.

A Formal Hearing was requested and proceeded on the Claimant's entitlement to permanent partial disability to the right foot, if any, on August 11, 2011. A CO was issued on August 31, 2011 denying the Claimant's claim for relief in its entirety. The ALJ found the IME of Dr. Hinkes, the Employer's expert, to be more persuasive than Dr. Franchetti.

The Claimant appealed with the Employer opposing.

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.

DISCUSSION AND ANALYSIS

Prior to addressing the merits of the Claimant's arguments, we must note that a review of the CO reveals the ALJ first correctly stated the burden of proof when nature and extent is at issue as the

preponderance of the evidence standard. Moreover, as the CO correctly noted, the claim for relief sought is a scheduled award, a foot, governed by D.C. Code § 32-1508(3)(A-U).

However, after quoting the correct part of the statute which applied to the Claimant's request for a scheduled loss award, the ALJ went on to say,

Inasmuch as claimant has attained MMI and returned to work, the Act provision most relevant to her case is D.C. Code § 32-1508(3)(V)(ii) which provides:

The compensation shall be 66 2/3% of the greater of:

(I) The difference between the employee's actual wage at the time of injury and the average weekly wage, at the time of injury, of the job that the employee holds after the employee becomes disabled;
or

(II) The difference between the average weekly wage, at the time the employee returns to work, of the job that the employee held before the employee became disabled and the actual wage of the job that the employee holds when the employee returns to work.

CO at 4.

We are uncertain why, in light of the claim for relief, the ALJ refers to the section of the statute which allows for recovery under "other"² cases not under the umbrella of scheduled losses, such as a foot. Further reading of the CO does not shed any light on what section the ALJ ultimately utilized in coming to his determination. As such, this panel cannot say that the conclusion the ALJ ultimately reaches is in accordance with the *applicable law*, forcing us to vacate and remand the case for analysis under the correct statute.

We are also uncertain why the ALJ referenced the treating physician preference as the treating physician did not render an opinion regarding what permanent partial disability the Claimant suffered to his right foot. The only opinions on this issue were rendered by the two IME physicians. While the ALJ can rely upon the treatment records and weigh them accordingly, any reference to the treating physician preference is in error as the treating physician did not render an opinion on the issue to be decided.

In order to avoid any further unnecessary appeals, we also must point to another error the ALJ made when determining whether or not the Claimant proved, by a preponderance of the evidence, her entitlement to permanent partial disability. The ALJ after discussing the medical evidence, the ALJ then goes on to state,

It has been held that there is nothing in the plain words of the statutory provisions stating explicitly, or even implicitly, that the determination of disability is the sole

² D.C. Code § 32-1508(3)(V)(i) begins with the statement "In *other* cases the employee shall select..." In other words, in cases not falling under the auspices of D.C. Code § 32-1508(3)(A-U).

function of a medical doctor. See *Solomon Negussie v. District of Columbia Department of Employment Services*, 915, A. 2d 391 (D.C. 2007). The Court further held "that ALJs have discretion in determining disability percentage ratings and disability awards because, as used in the Act, "disability" is an economic and legal concept which should not be confounded with a medical condition" *Id.*

CO at 6.

No further discussion ensues after the above paragraph regarding what economic impact the Claimant's injury may, or may not have. Upon remand, the ALJ is reminded to determine what economic impact, if any, the Claimant may have suffered because of the injury. See *Jones v. DOES*, _ A.3d _, 2012 D.C. App. LEXIS 149, (D.C. 2012).

Until such time as the ALJ analyzes the claim for relief under the proper statute, the Claimant's arguments are rendered moot.

CONCLUSION AND ORDER

The findings of fact and conclusions of law contained in the August 31, 2011 Compensation Order are not supported by substantial evidence in the record and not in accordance with the law. It is **VACATED** and **REMANDED** for further discussion consistent with the above.

FOR THE COMPENSATION REVIEW BOARD:

HEATHER C. LESLIE
Administrative Appeals Judge

May 22, 2012
DATE