

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 No. 06-054

LARRY BARRON,

Claimant–Petitioner,

v.

DISTRICT OF COLUMBIA DEPARTMENT OF EMPLOYMENT SERVICES,

Employer– Respondent.

Appeal from a Compensation Order of
Administrative Law Judge Henry W. McCoy
AHD No. PBL 05-010, DCP Nos. MDMPED-0004151

W. Scott Fungler, Esquire, for Claimant-Petitioner

Pamela A. Smith, Esq., for Employer-Respondent

Before JEFFREY P. RUSSELL, LINDA F. JORY and SHARMAN J. MONROE, *Administrative Appeals Judges*.¹

JEFFREY P. RUSSELL, *Administrative Appeals Judge*, on behalf of the Review Panel, SHARMAN J. MONROE, *Administrative Appeals Judge* dissenting.

DECISION AND ORDER

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board pursuant to D.C. Official Code § 1-623.28, § 32-1521.01, 7 DCMR § 118, and DOES Director’s Directive Administrative Policy Issuance No. 05-01 (Feb. 5, 2005).²

¹ Each of the Administrative Appeals Judges (AAJs) on this panel has personal acquaintance with Petitioner, in that Petitioner and the AAJs are employed by the same agency, are and have been involved in administering and adjudicating claims for workers’ compensation benefits within that agency for several years, have been employed within the same buildings throughout that employment, and have on many occasions had both formal and informal interactions with Petitioner as would normally be expected in such circumstances. While ideally such circumstances might call for this appeal to be decided by persons without such acquaintance with a party, the fact that the same conditions exist to a greater or lesser extent between Petitioner and all of the AAJs on the CRB makes simple recusal of these particular AAJs fruitless. In the absence of any alternative course available, the panel members each assert that none of them has anything beyond a workplace relationship with Petitioner, that each feels that they can fairly and impartially consider this appeal, and will so proceed.

BACKGROUND

This appeal follows the issuance of a Compensation Order by the Administrative Law Judge (ALJ) of the Administrative Hearings Division (AHD), Office of Hearings and Adjudication (OHA). In that Compensation Order (the Compensation Order), which was filed on May 11, 2006, the ALJ awarded Petitioner permanent partial disability in the amount of 19% to his right leg, rejecting Petitioner's claim for an award in the amount of 41%.

Petitioner's Petition for Review requests that the Compensation Order be reversed, and that Petitioner be awarded 41% permanent partial disability to the right leg.

In his Petition for Review, Petitioner identifies the grounds for this appeal as follows: Petitioner asserts that (1) the ALJ erroneously reduced the amount of the award by improperly ascribing a portion Petitioner's right leg disability to a pre-existing arthritic condition, and argues not only that (a) the evidence is insufficient to support a finding of such a pre-existing condition, but also that (b) even if the existence of such a pre-existing condition is found to be supportable by substantial evidence, the ALJ nonetheless erroneously reduced the award based thereon because (i) any such condition was not active or symptomatic prior to the work injury and was therefore compensable as an aggravation by the work injury, and (ii) even were the pre-existing condition active or symptomatic prior to the work injury, Petitioner is entitled under the Act to an award representing the entire disability to the right leg where any portion thereof results from the work injury, in other words, there is no apportionment for pre-existing conditions under the Act.

Petitioner argues further that (2) the ALJ erroneously arrived at a disability percentage which differed from the medical anatomical impairment, asserting that the ALJ was bound by and limited to making an award that is numerically identical to whatever percentage of medical impairment the ALJ determines the Petitioner suffers from.

Related to this argument, Petitioner asserts that (3) the ALJ erroneously rejected the treating physician's opinion that Petitioner has sustained a 41% medical impairment as a result of the work injury, failing to accord that opinion the appropriate weight under the treating physician preference rule. Also related to this argument is Petitioner's argument that (4) the ALJ adopted an analytical framework announced by this board in *Wormack v. Fischback & Moore, Inc.*, CRB (Dir. Dkt.) No. 03-159, OHA/AHD No. 03-151, OWC No. 564205 (Decision and Order July 22, 2005), which case is currently on appeal to the District of Columbia Court of Appeals. Petitioner asserts (a) that the ALJ should not have adopted *Wormack*, a private sector case, in this public sector claim, and also

² 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 D.C. Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, D.C. Official Code § 32-1521.01. In accordance with the Director's Directive, 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. Official Code § 32-1501 *et seq.*, and the D.C. Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Official Code § 1-623.1 *et seq.*, 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.

(b) that since that case is pending before the Court of Appeals, it should not have been applied in this matter.

Respondent has not filed any response to Petitioner's appeal.

ANALYSIS

As an initial matter, the scope of review by the Compensation Review Board (CRB) and this Compensation 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. *See*, D.C. Comprehensive Merit Personnel Act of 1978, as amended, D.C. Official Code § 1-623.01, *et seq.*, at § 1-623.28 (a). "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 standard 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, the arguments and objections of Petitioner will be addressed in the context of discussing the two following arguments:

- (1) The ALJ erroneously reduced the amount of the award by improperly ascribing a portion Petitioner's right leg disability to a pre-existing arthritic condition, because the evidence is insufficient to support a finding of such a pre-existing condition, and because the Act does not allow for apportionment.

Review of the Compensation Order, particularly at page 7, the third full paragraph thereof, reveals that the ALJ first considered the degree of medical impairment, and in the next paragraphs it is apparent that following this determination, he then considered the potential for this medical impairment to have an impact upon the future earnings of the Petitioner. And, in reaching his determination regarding the degree of medical impairment, the ALJ wrote that "while Dr. Lavine's [the treating physician] medical rating should be given greater weight than the rating provided by Employer's IME, it is likewise not given total acceptance due to its inclusion of certain degenerative conditions found in the knee that were not related to the work injury and thus outside the parameters for setting a medical impairment of Claimant's knee".

From this, it appears not only that the ALJ decided to accord the opinion of the treating physician greater weight than that of the IME physician, the ALJ also found no fault or defect in that medical opinion itself. That is, the ALJ cites no reason to doubt Dr. Lavine's assessment of the medical impairment of the knee. Rather, in the third full paragraph, the ALJ reduced the 41% anatomical or medical impairment as assessed by Dr. Lavine to 19%, writing that "Claimant has a primarily sedentary job which does not justify a 41% loss of industrial use rating". However, after doing this, the ALJ then proceeded to further analyze the issue of the potential effect on Petitioner's future earnings, in considering whether the medical impairment rating ought to be accepted as the ultimate amount of the schedule award, or be changed in light of those other non-medical factors.

The ALJ concluded that they did not, and therefore stated “in light of the record being devoid of any vocational evidence regarding Claimant’s future wage earning capacity, there exists no basis upon which to merit any further adjustment to his overall disability rating. It is for these reasons that I conclude Claimant has sustained a permanent partial disability of 19% to his right lower extremity”. Compensation Order, page 8, first full paragraph.

The problem is that this lack of “further adjustment” as the ALJ describes it starts from a faulty premise: the medical impairment as determined by Dr. Lavine was not 19%; it was 41%. We agree with Petitioner that reducing a disability award due to preexisting conditions does not comport with the Act, in that such preexisting injuries or conditions may only form the basis of an apportionment where there is compensation “paid or payable under the schedule for an earlier injury” and there is a finding that “compensation payable for the later disability, in whole or in part, would duplicate the compensation payable for the preexisting disability”. See, D.C. Code § 1-623.08 (2006) (formerly D.C. Code § 1-624.8).

This is not a case where the ALJ rejected both medical opinions concerning the degree of medical impairment and came to a conclusion on that issue that differs from either party’s preferred position, or a case where the ALJ relied strictly upon non-medical evidence to arrive at the award for disability under the schedule. Rather, it appears that the ALJ accepted the medical opinion of Dr. Lavine, but decided that Petitioner’s medical impairment did not accurately represent what Petitioner was entitled to receive under the schedule for disabilities *either* because a portion of that impairment was preexisting *or* because even if Petitioner had a 41% medical impairment, that figure is more than the amount of Petitioner’s loss of industrial use, *or* for both reasons.

Because we can not discern which reason or approach the ALJ adopted, a remand for further consideration, explanation and analysis is required. We reiterate that it is error to reduce an award from that to which an injured worker would otherwise be entitled, merely because a portion of the total amount of medical impairment in a scheduled member is due to a preexisting injury, condition or disability in that scheduled member, unless such preexisting condition or disability is subject to payment under a prior compensation award.

- (2) The ALJ erroneously arrived at a disability percentage which differed from the medical anatomical impairment, because the ALJ was bound by and limited to making an award that is numerically identical to whatever percentage of medical impairment the ALJ determines the Petitioner has as a result of the work injury.

Petitioner asserts that the ALJ is bound to resolve this case solely upon the medical evidence, arguing inferentially at least that under the Act, schedule awards are for medical impairment, and are not for loss of industrial use. Error is premised upon the arguments that this is so because (a) *Wormack* was wrongly decided and is under appeal in the Court of Appeals, and (b) regardless, *Wormack* has no applicability under the Act.

It may be that *Wormack*, or any other decision of the CRB or our predecessor appellate authority, the Director of the agency, was wrongly decided, and if so, the Court of Appeals will no doubt so rule in due course, where such matters have been appealed to that body. Until such time as that occurs, however, they remain the prevailing law governing the Act. Petitioner has pointed us to no authority in support of the proposition that because a case establishing a particular approach to statutory interpretation is being reviewed by a higher authority, that case ought not be followed

during the pendency of the appeal,³ and we are aware of none. Such a rule has the potential to frustrate the orderly processing and adjudication of countless cases, and only in the most exigent cases would such a policy be warranted, if ever.

Regarding the fact that *Wormack* is a private sector case while this claim comes under the Act, this is true. And, as our colleague in dissent properly notes, it is also true that the language of the schedule section of the Act is not identical to the language employed by the private sector act, and that some of the provisions are quite different, such as those in the schedule of the Act that cover potential disabilities that are not covered by the private sector act. *See*, for example, D.C. Code § 1-623.07 (c) (22), providing compensation for loss of use of “any important external or internal organ of the body”, a catch-all provision not included in the private sector act.

However, the reasons expressed in *Wormack* for according ALJs broad discretion in assessing the percentage of disability for loss of industrial use independent of (but giving strong consideration to) the degree of medical impairment are equally relevant under the Act. Indeed, one of the differences between the Act and the private sector statute is found at D.C. Code § 1-623.07 (c) (22), where it is provided that “For serious disfigurement of the face, head or neck of a character *likely to handicap an individual in securing or maintaining employment*, proper and equitable compensation not to exceed \$7,500 shall be awarded in addition to any other compensation payable under this schedule” (emphasis added). While obviously not directly applicable to the issue presented, this provision makes even clearer than does the disfigurement provision of the private sector act⁴ that compensation awards which are not calculated by actual wage losses are payable as surrogates for anticipated or presumed future wage loss. And, we respectfully point out that nothing in the difference in language between the acts suggests that either act is intended to make schedule awards for anything other than loss of industrial use, which is a prediction, albeit indirect and imperfect, of the future loss of wages that a schedule injury will cause.

Lastly, discussion is warranted on the argument by Petitioner that suggests that it was error for the ALJ to award something other than the strict medical impairment because that is what the schedule commands. Adding to the discussion in *Wormack*, we direct attention to the following treatment of the subject found in the leading workers’ compensation treatise:

It has been stressed repeatedly that the distinctive feature of the compensation system, by contrast with tort liability, is that its awards, apart from medical benefits, and apart from certain permanent partial awards in four or five states, [footnote omitted] are made not for physical injury as such, but for "disability" produced by such injury [footnote omitted]. The central problem, then, becomes that of analyzing the unique and rather complex legal concept which, by years of compensation legislation, decision, and practice, has been built up around the term "compensable disability."

The key to the understanding of this problem is the recognition, at the outset, that the disability concept is a blend of two ingredients, whose recurrence in different proportions gives rise to most controversial disability questions: The first ingredient is disability in the

³ Petitioner has not requested a stay of these proceedings to await the outcome of that appeal.

⁴ The private sector provision reads: “The Mayor shall award proper and equitable compensation for serious disfigurement of the face, head, neck or other normally exposed bodily area not to exceed \$7,500”, omitting any direct or specific reference to the effect of the disfigurement of employability.

medical or physical sense, [footnote omitted] as evidenced by obvious loss of members or by medical testimony that the claimant simply cannot make the necessary muscular movements and exertions; the second ingredient is *de facto* inability to earn wages, as evidenced by proof that claimant has not in fact earned anything.

The two ingredients usually occur together; but each may be found without the other: A claimant may be, in a medical sense, utterly shattered and ruined, but may by sheer determination and ingenuity contrive to make a living. Conversely, a claimant may be able to work, in both the claimant's and the doctor's opinion, but awareness of the injury may lead employers to refuse employment. These two illustrations will expose at once the error that results from an uncompromising preoccupation with either the medical or the actual wage-loss aspect of disability. An absolute insistence on medical disability in the abstract would produce a denial of compensation in the latter case, although the wage loss is as real and as directly traceable to the injury as in any other instance. At the other extreme, an insistence on wage loss as the test would deprive the claimant in the former illustration of an award, thus not only penalizing his or her laudable efforts to make the best of misfortune but also fostering the absurdity of pronouncing a person nondisabled in spite of the unanimous contrary evidence of medical experts and of common observation. The proper balancing of the medical and the wage-loss factors is, then, the essence of the "disability" problem in worker's compensation.

4-80 Larson's Workers' Compensation Law § 80.02, Larson's Workers' Compensation Law, Copyright 2005, Matthew Bender & Company, Inc., Part 9 DISABILITY AND PERSONAL INJURY BENEFITS, Chapter 80 KINDS AND ELEMENTS OF DISABILITY, "The Two Components of Disability: Medical Disability and Earning Impairment".

It is the "proper balancing" of medical impairment and vocational factors that makes discretion on the part of the ALJ, as discussed in *Wormack*, important. Our fundamental disagreement with our colleague in dissent is that the dissent does not recognize that schedule awards are not awards for *injury*, they are awards for *disability*, which is a concept merging injury and wage loss from that injury. Where the extent of disability is determined by reference to something other than actual lost earnings known at the time of the award, "balance" requires that both medical factors and vocational factors be credited. Given that there is no apportionment for preexisting conditions, and that the degree of medical impairment is current, present and knowable at the time of the award, while the prediction of future wage loss is at best difficult, an injured worker's medical impairment must be fully considered in the calculus. Indeed, a large departure in the award from the medical impairment as determined by the ALJ ought to be justified by articulable reasons supported by record evidence. Thus on remand, the ALJ shall reconsider the award, giving due consideration to the entire medical impairment found to exist in Petitioner's right leg, and consider further such evidence as exists in the record concerning industrial or occupational loss of use, in making said award.

CONCLUSION

The Compensation Order of May 11, 2006 is in accordance with the law insofar as it adopted the approach to disability awards under the schedule in *Womack*, but was not in accordance with the law insofar as the ALJ reduced his finding of the degree of medical impairment by apportioning out and excluding from the award a part of the medical impairment that preexisted the work injury but for which compensation is not payable under a prior award.

ORDER

The award of 19% permanent partial disability to the right leg is VACATED, and the matter is hereby REMANDED for further consideration consistent with the foregoing Decision and Order.

FOR THE COMPENSATION REVIEW BOARD:

JEFFREY P. RUSSELL
Administrative Appeals Judge

September 6, 2006
DATE

SHARMAN J. MONROE, *Administrative Appeals Judge*, dissenting:

I respectfully dissent from the majority in this case. In the District of Columbia, there are two (2) workers' compensation statutes at play: the D.C. Workers' Compensation Act of 1979, as amended, D.C. Official Code §§ 32-1501 to 32-1545 (2005) (private sector) and the D.C. Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Official Code §§ 1-623.1 to 1.643.7 (2005) (public sector).

A review of the statutes reveals that the language in the two differs. Initially, because of this difference, the statutes were interpreted differently. However, as time has progressed, interpretations of provisions in the private sector act, which law has been more developed have been applied to comparable provisions in the public sector act.

For instance, the language in the public sector refers to a work-related injury as a disability sustained "while in the performance of . . . duty", whereas the language in the private sector refers to a work-related injury as an accidental injury "arising out of and in the course of employment". See D.C. Official Code §§ 1-623.02 and 32-1501(12). Under the private sector, the terms "arising out of and in the course of employment" mean that an injury occurs within the time and space limits of the employment, and derives from the obligations or conditions of employment. See *Grayson v. D.C. Department of Employment Services*, 516 A.2d 909 (D.C. 1986). Although not initially, this interpretation of work-relatedness was later applied to the terms "while in the performance of . . .

duty”. *Compare Mills v. D.C. Public Schools*, DDCC No. 336546, H&AS No. XX-762 (August 8, 1990) with *Wright v. D.C. Department of Public Works*, ECAB No. 88-40 (September 13, 1991). Later, the standard used to determine the compensability for psychological or stress injuries in the private sector was applied in the public sector. *See Holt v. Department of Corrections*, H&AS No. PBL-93-25A, ODCVC No. 337008 (October 30, 1995). Likewise, the principle to accord the opinion of the treating physician great weight, initially applied in the private sector, was applied in the public sector. *See Kralick v. D.C. Department of Employment Services*, 842 A. 2d 705 (D.C. 2004).

The issue to be resolved in this case is whether the holding of *Wormack*, a private sector case addressing the method for determining a schedule permanent partial disability award, should be applied to cases arising under the public sector act. I maintain that the answer to this question is no.

Wormack holds that an ALJ has broad discretion to accept either or neither of the proffered medical opinions in reaching a conclusion as to the fact of the degree of disability pursuant to the schedule found at D.C. Official Code § 32-1509. The bases for the *Wormack* holding are the express amendments to the private sector Act which allows for the use of the American Medical Association (AMA) Guides to the Evaluation of Permanent Impairment, *see* D.C. Official Code § 32-1509 (3), and the express legislative intent of the D.C. City Council to adopt the Maryland approach to determine disability. *See Wormack* at p. 5 *citing* COUNCIL OF THE DISTRICT OF COLUMBIA LEGISLATIVE REPORT, OCTOBER 29, 1998, BILL 12-192 at 8.

Schedule permanent partial disability benefits, unlike the other compensation benefits in a workers’ compensation scheme, are payable regardless of whether an injured worker sustained a wage loss. Schedule benefits are a creature of statute, fixed and arbitrary, and represent a legislative attempt to balance the seriousness of the injury with its likely effect on future earnings potential.⁵ *See Smith v. D.C. Department of Employment Services*, 548 A.2d 95, 101 (D.C. 1988); 4-86 LARSON’S WORKERS’ COMPENSATION LAW § 86.01. In the private sector, the D.C. City Council augmented the statute by expressly adopting the Maryland approach for schedule permanent partial disabilities. The Maryland approach imbues the ALJ with broad discretion in adjudicating a case under the private sector act to reach an independent judgment on the degree of schedule permanent partial disability because in Maryland, a factfinder weighs the medical evidence and arrives at an independent judgment on the question of degree of schedule permanent partial disability, either accepting one medical opinion over the other or reaching a different conclusion altogether. *See Wormack* at p. 5-6. Such an expression is not present with respect to the public sector act.

Although an argument can be made that there is a trend afoot to apply the same analysis used in the private sector to the public sector and that the trend encompasses schedule permanent partial disability awards also, a close examination of the trend reveals that the provisions in which the cross-analysis is used are provisions relating to general principles of workers’ compensation law, provisions subject to interpretation. Schedule awards are concrete and statutorily driven and not subject to interpretation. An employee who sustains a work-related loss of his arm receives 312

⁵ Indeed several jurisdictions do not have a schedule benefits. LARSON § 86.01.

weeks of schedule permanent partial disability benefits in the public sector. *See* D.C. Official § 1-623.07(c). The employee cannot successfully argue that his arm is “more loss” and that he is entitled to 400 weeks of schedule permanent partial disability benefits.

Thus, until the D.C. City Council amends the public sector act to reflect its legislative intent to grant broad discretion in awarding schedule permanent partial disability benefits, such discretion is not available. *See generally, Smith, supra*, (the court recognized that while the D.C. City Council specifically permitted the payment of permanent disability in addition compensation for temporary total or temporary partial disability in the public sector, it did not so permit in the private sector act which it enacted one year after the public sector act. Therefore, the claimant was not entitled to temporary total disability benefits for the same injury for which she had received a schedule permanent partial disability award).

SHARMAN J. MONROE
Administrative Appeals Judge