GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR

LISA M. MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 10-014

FALAH AL-ROBAIE,
Claimant–Petitioner,

v.

FORT MYER CONSTRUCTION CORP. and LIBERTY MUTUAL INSURANCE CO.,
Employer-Respondent.

Appeal from a Compensation Order by
The Honorable Heather C. Leslie
AHD No. 09-383, OWC No. 642015

Eric May, Esquire for the Petitioner
Gerard J. Emig, Esquire for the Respondent

Before MELISSA LIN JONES, JEFFREY P. RUSSELL,[1] and LAWRENCE D. TARR, *Administrative Appeals Judges*.

MELISSA LIN JONES, *Administrative Appeals Judge*, for the Compensation Review Board.

DECISION AND REMAND ORDER

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board ("CRB") pursuant to §§32-1521.01 and 32-1522 of the District of Columbia Workers' Compensation Act of 1979, D.C. Code, as amended, §32-1501 *et seq*., ("Act"), 7 DCMR §250, *et seq*., and the Department of Employment Services Director's Administrative Policy Issuance 05-01 (February 5, 2005).

FACTS OF RECORD AND PROCEDURAL HISTORY

On April 19, 2007 while working as a helper-electrician for Fort Myer Construction Corp. ("Fort Myer"), Mr. Falah Al-Robaie injured his back. Mr. Al-Robaie eventually came under the care of Dr. Najmaldin O. Karim, and on April 15, 2009, Dr. Karim opined Mr. Al-Robaie had reached maximum medical improvement and had sustained permanent partial impairment to both legs.

[1] Judge Russell has been appointed by the Director of the DOES as a Compensation Review Board ("CRB") member pursuant to DOES Administrative Policy Issuance No. 11-03 (October 5, 2011).

On Fort Myer's behalf, Dr. Robert O. Gordon examined Mr. Al-Robaie on March 17, 2009. Dr. Gordon also opined Mr. Al-Robaie had reached maximum medical improvement and had sustained permanent partial impairment to both legs.

In a Compensation Order dated October 5, 2009, an administrative law judge ("ALJ") denied Mr. Al-Robaie's request for an award for 55% permanent partial disability to his right leg and 30% permanent partial disability to his left leg. The ALJ rejected the impairment ratings provided by Dr. Karim and Dr. Gordon and determined any award of permanency was premature because Mr. Al-Robaie had not reached maximum medical improvement. The ALJ also determined an award of permanency was not appropriate because Mr. Al-Robaie had not "returned to any type of gainful employment."

On appeal, Mr. Al-Robaie contends the ALJ's rulings on these issues require reversal. Fort Myer requests the Compensation Order be affirmed.

ISSUES ON APPEAL

1. Did the ALJ err in finding Mr. Al-Robaie has not reached maximum medical improvement?

2. Is Mr. Al-Robaie not entitled to an award of permanency because he has not returned to any type of gainful employment?

ANALYSIS[2]

When assessing Mr. Al-Robaie's entitlement to permanent partial disability benefits to his legs, the ALJ determined such an award is premature:

> [B]ecause the Undersigned is not persuaded by either the treating physician or the IME, because it is questionable whether or not the injury is permanent in nature, and because the claimant has not returned to any type of gainful employment, the Undersigned is not convinced that a scheduled award is proper at this time.[3]

Although an ALJ has discretion when assessing legal disability and may reject medical opinions regarding impairment[4] and although an ALJ may draw reasonable inference from the evidence,[5] the

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[2] The scope of review by the CRB is limited to making a determination as to whether the factual findings of the appealed 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. §32-1521.01(d)(2)(A) of the Act. Consistent with this standard of review, the CRB is constrained to uphold a Compensation Order that is supported by substantial evidence, even if there also is contained within the record under review substantial evidence to support a contrary conclusion and even if the CRB might have reached a contrary conclusion. *Marriott International v. DOES*, 834 A.2d 882, 885 (D.C. 2003).

[3] *Al-Robaie v. Fort Myer Construction Corp.*, AHD No. 09-383, OWC No. 642015 (October 5, 2009), p.6.

[4] *Negussie v. DOES*, 915 A.2d 391 (D.C. 2007).

[5] See *George Hyman Construction Co. v. DOES,* 498 A.2d 563, 566 (D.C. 1985).

ALJ substituted her own legal judgment on the medical issue of maximum medical improvement.[6] The medical evidence in the record on the issue of whether or not Mr. Al-Robaie has reached maximum medical improvement is unanimous; both doctors opine Mr. Al-Robaie has reached maximum medical improvement, and there is no contrary medical opinion in the record. It may well be that on remand the ALJ provides a reasoned basis for rejecting the medical opinions of Dr. Karim and/or Dr. Gordon regarding impairment when assessing disability; however, the ALJ cannot substitute her opinion for that of Dr. Karim and Dr. Gordon when assessing maximum medical improvement.

Furthermore, the ALJ's ruling that Mr. Al-Robaie is not entitled to permanent partial disability benefits because he "has not returned to any type of gainful employment" also constitutes error. Upon remand, the ALJ is directed to reconsider the Claimant's request for permanent partial disability benefits without any consideration of wage loss except to the extent that such wage loss correlates with or is indicative of loss of wage earning capacity or economic impairment.[7]

CONCLUSION AND ORDER

The October 5, 2009 Compensation Order is not supported by substantial evidence and is not in accordance with the law. The Compensation Order is VACATED, and this matter is remanded for further proceedings consistent with this Decision and Remand Order.

FOR THE COMPENSATION REVIEW BOARD:

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MELISSA LIN JONES
Administrative Appeals Judge

June 6, 2012
DATE

[6] See *Charles v. National Rehabilitation Hospital*, CRB No. 08-196, H&AS No. 03-111B, OWC No. 579673 (October 26, 2009).

[7] See *Jones v. DOES*, No. 10-AA-628, (D.C. April 26, 2012); *Smith v. DOES*, 548 A.2d 95, 100 (D.C. 1988).