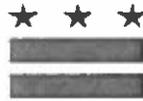


GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 15-115

ANGELA BROWN,
Claimant–Petitioner,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
Self-Insured Employer–Respondent.

Appeal from a Compensation Order issued June 19, 2015 by
Administrative Law Judge Nata K. Brown
AHD No. 14-466, OWC No. 692619

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2015 DEC 21 AM 11 10

(Decided December 21, 2015)

Krista N. DeSmyter for Claimant¹
Sarah O. Rollman for Employer

Before **JEFFREY P. RUSSELL** and **LINDA F. JORY** *Administrative Appeals Judges*, and **LAWRENCE D. TARR**, *Chief Administrative Appeals Judge*.

JEFFREY P. RUSSELL for the Compensation Review Board.

DECISION AND REMAND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

Angela Brown (Claimant) was employed by the Washington Metropolitan Area Transit Authority (Employer) as a bus driver.

In 2009 she injured her right knee while employed by Employer. After a period of time during which she was off work and received medical care, Claimant and Employer agreed by Stipulation that Claimant had sustained a 16% permanent partial impairment to her right leg as a result of that injury. Employer paid the amount as set forth in the Stipulation.

¹ Michael Kitzman represented Claimant at the formal hearing before the Administrative Hearings Division. Ms. DeSmyter filed the Application for Review before the Compensation Review Board.

On June 4, 2012, Claimant was again injured while working. The injury occurred when the bus she was operating was rear-ended by another of Employer's busses while sitting at a stop light. Claimant injured her neck, low back and right hip.

As a result of these injuries, Claimant remained off work and received temporary total disability benefits until September 2012, when she returned to a light duty position, and eventually she was able to return to full duty.

She also received medical care from Dr. Frederic Salter and Dr. Richard S. Meyer in the offices of Phillips & Green.

On April 2, 2014, Dr. Meyer authored a report, addressed to Claimant's counsel. Because the report consisted of six "answers" to questions that were not included in the report, it is difficult to completely understand. However, answer number 1 states "Chronic sprain, right hip"; number 2 states "Yes"; number 3 states "With specific reference to the Fifth Edition of the AMA Guide to the Evaluation of Permanent Impairment, the patient has a 0% permanent partial impairment as far as the tables and charts"; number 4 states "Pain, 5% lower extremity, loss of endurance 5% lower extremity"; number 5 states "10% right leg", and number 6 states "No specific restrictions have been proffered during the last visit". CE 3.

A week later, on April 9, 2014, Dr. Meyer wrote another report in which he stated that he had reevaluated Claimant. In this report, after detailing his findings on examination regarding range of motion, neurological conditions and complaints of pain, he wrote:

Based on the reevaluation of 4/9/14 with reference to the Fifth Edition of the AMA Guides to Evaluation of Permanent Impairment, Table 17-9, the patient has a total of 4% lower extremity permanent partial impairment of her right hip which equals 10% lower extremity permanent partial impairment. This should be added to the already documented permanent partial impairment resulting from weakness, pain and loss of function and endurance which was 10% lower extremity coming to a total of 20% lower extremity permanent partial impairment from the 6/4/12 injuries.

CE 2.

Then, on July 16, 2014, Dr. Meyer issued a third report, addressed to Claimant's counsel, stating in its entirety:

In response to your inquiries of July 7, 2014, as previously noted, I did issue a reevaluation report on 4-9-14 at which time I assigned the patient a 30% lower extremity permanent partial impairment which I attributed to the 6-4-12 injuries. This was specifically related to the hip problem and not affected in any way by any preexisting orthopedic problems.

CE 1.

Prior to this third report from Dr. Meyer, Claimant had been seen by Dr. Mark Scheer at Employer's request for the purpose of an independent medical evaluation (IME). After detailing his review of the medical records, the history as related by Claimant, and the results of his physical examination, Dr. Scheer opined that, under the AMA Guide, Claimant had sustained a 0% permanent partial impairment to the right lower extremity, and further that, taking into account the "5 factors of pain, weakness, atrophy, loss of function and loss of endurance [Claimant has a] 1% lower extremity impairment rating for her subjective right hip complaint ...". EE 1.

Employer made a voluntary payment equivalent to 4% permanent partial disability to the right leg.

Claimant file an Application for Formal Hearing in the Administrative Hearings Division (AHD) of the Department of Employment Services (DOES), contending that the payment by Employer was insufficient, and seeking an award of 20% permanent partial disability (PPD) to the right leg under the schedule. Claimant argued that Dr. Meyer's opinion should be read as clearly stating that regardless of any preexisting problems Claimant had, the instant injury to the hip caused a 20% PPD to the right leg.

Employer opposed the award of any additional PPD, arguing that the 20% PPD that Claimant was claiming had been fully paid, considering that she had already been compensated 16% per the prior stipulation. Employer also argued that any PPD Claimant currently experiences is unrelated to the work injury, and is the result of an intervening non-work related automobile accident.

A formal hearing was conducted on November 20, 2014 before an Administrative Law Judge (ALJ) in AHD, following which the ALJ issued a Compensation Order on June 19, 2015 (the CO).

In the CO, the ALJ reached the following Conclusion and made the following Order:

CONCLUSION OF LAW

I hereby find and conclude, based upon a review of the record evidence as a whole, that Claimant's current condition is medically causally related to her June 4, 2012 work related injury. Claimant is entitled to a 4% permanent partial disability award to her right lower extremity.

ORDER

It is **ORDERED** that Claimant's claim for a 20% permanent partial disability award to the right lower extremity is hereby **DENIED**. Claimant is **GRANTED** a 4% permanent partial disability award to the right lower extremity.

CO, p. 7.

Claimant filed an Application for Review of the CO and a memorandum of points and authorities in support thereof (Claimant's Brief) with the CRB, seeking reversal of the CO and asking that it be remanded to AHD.

Employer filed an Opposition to Claimant's Application for Review and a memorandum of points and authorities in support thereof (Employer's Brief) seeking affirmance of the CO. Employer did not file a cross-appeal challenging the finding of a causal relationship between Claimant's condition and the instant work related injury.

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. "Substantial evidence", as defined by the District of Columbia Court of Appeals (DCCA), is such evidence as a reasonable person might accept to support a particular conclusion. *Marriott Int'l. v. DOES* 834 A.2d 882 (D.C. 2003) (*Marriott*). Consistent with this scope of review, the CRB is bound 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 reach a contrary result.

DISCUSSION

Before undertaking review of the CO, we make two observations.

First, in the CO, citation is made to *Corrigan v. Georgetown University*, CRB No. 06-094, AHD No. 06-256, OWC No. 604612 (September 14, 2007). It is cited as support for the proposition that "In addressing the non-medical question of industrial use, the ALJ has broad discretion to consider the medical impairment, the D.C. Five Factors, and the effect of the work injury on Claimant's industrial capacity in arriving at a percentage of disability under the Act." CO, p. 5.

While there is nothing wrong with the statement of the principle of law the ALJ references, we remind all concerned that:

... *Corrigan* no longer represents the applicable law, and hasn't since the CRB issued *Al-Robaie v. Fort Myer Construction Company*, CRB No. 10-014, AHD No. 09-383, OWC No. 642015 (June 6, 2012), where it was held that the effect of a work injury upon a claimant's actual earnings are relevant and can be considered "to the extent that such wage loss correlates with or is indicative of loss of wage earning capacity or economic impairment." The move away from *Corrigan* was in response to the District of Columbia Court of Appeals' (DCCA) decision in *Jones v. DOES*, 41 A.3d 1219 (April 26, 2012), wherein the DCCA explicitly referenced the percentage of wage loss that the claimant in that case had suffered subsequent to the injury.

El Masaoudi v. Uno Chicago Grill, CRB No. 15-093, AHD No. 14-040A, OWC No. 703747 (October 15, 2015), p. 7.

It would be a better practice to discontinue citation to *Corrigan* for any proposition, given its close association with the now inoperative rule prohibiting consideration of actual post-injury wage loss when assessing PPD schedule claims.

Second, the ALJ cites an AHD case, *Kevin Thomas v. WMATA*, AHD No. 11-196A, OWC No. 667989 (April 26, 2013). While there is no error in referring to an AHD compensation order in explaining an ALJ's thinking, citation to AHD cases such as *Kevin Thomas* that were not appealed to the CRB and/or the DCCA is not generally accepted as citing to precedential authority. While there is nothing wrong with referring to an AHD case's analysis or reasoning as a basis for according it persuasive value, where that is done it behooves the author to discuss the rationale of the cited case, and explain why it was found to be persuasive.

Turning to the instant appeal, Claimant first argues that the CO must be reversed because it contains "no analysis", and that one cannot tell from the CO why the ALJ reached the conclusion that Claimant's June 2014 injury caused a 4% PPD, as opposed to some other figure, citing *Jones v. DOES*, 41 A.3d 1219 (D.C. 2015).

As noted above, The ALJ did make reference to *Kevin Thomas v. WMATA*, *supra*. The reference may have been to illustrate the proposition that an award may be made for additional PPD benefits for an increased level of disability over that which had previously been paid for a prior compensable PPD paid by the same employer.

The CO contains no analysis that permits us to discern where the 4% came from. The ALJ does not state whether she accepts any part of Dr. Meyer's opinions, and if so which, whether and why the medical impairment correlates to the PPD award. As stated in Claimant's Brief:

The Compensation Order's denial of [Claimant's] request for permanent partial disability benefits for his [sic] right leg due to her hip condition is not based on substantial evidence. An ALJ should not arrive at an arbitrary decision when making a determination of disability: there must be an explanation. *See Jones v. D.C. Dep't of Empl. Sers.*, 41 A.3rd 1219, 1225 (D.C. 2012). The reviewing court must know the reasons that underlie the decision made by the agency. *Id.* Here, the Compensation Order does not contain any analysis as to why [Claimant] is only entitled to 4% permanent partial disability to her right leg. CO at 6 -7. The 4% could be based on the opinion of Dr. Meyer that [Claimant] has 4% impairment to the right hip per the AMA Guides. If that was the case, then the award should be for 10% of the right leg since 4% of the right hip equals 10% of the right leg.

Claimant's Brief, p. 3.

While Employer does not agree with this argument, we don't see how it is faulty.

Employer asserts the ALJ "was adopting the opinion of the treating physician, which was that Claimant had a 4% impairment to the right lower extremity pursuant to the Fifth Edition of the AMA Guides". Employer's Brief, p. 6.

This is not accurate: the ALJ never says she accepted the April 9, 2014 opinions, in whole or in part, and he never expressed the opinion Employer ascribes to him. What the report says is "the patient has a total of 4% lower extremity permanent partial impairment of her right hip which equals 10% lower extremity... ." Claimant's Brief, p. 3.

The ALJ clearly did not accept the IME opinion, because she made an award in excess of the 1% which Dr. Sheer opined was appropriate. The ALJ also overtly rejected *parts* of Dr. Meyer's opinion for lack of explanation, both as to why his third opinion was 30% as opposed to the 20% expressed previously, and because the first report didn't contain enough information (including the questions) for the ALJ to understand how 10% of the rating was determined.

However, the CO contains no analysis that permits us to discern where the 4% came from. The ALJ does not state whether she accepts any part of Dr. Meyer's opinions, nor does she state how any the medical impairment correlates to the PPD award.

CONCLUSION AND ORDER

The CO fails to contain adequate analysis and explanation concerning the ALJ's rationale in concluding that Claimant had sustained a 4% PPD to the right leg. The award is vacated, and the matter remanded for further consideration and explanation consistent with this Decision and Remand Order.

So ordered.