

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

Department of Employment Services

VINCENT C. GRAY  
MAYOR



F. THOMAS LUPARELLO  
INTERIM DIRECTOR

**CRB No. 13-113**

**VERNICE BOWLES,  
Claimant-Petitioner,**

**v.**

**GENTLE TOUCH SENIOR CARE,  
Employer/Respondent.**

Appeal from an August 29, 2013 Compensation Order By  
Administrative Law Judge Linda F. Jory  
AHD No. 09-187A, OWC No. 651454

Michael J. Kitzman for Petitioner  
Tony Graham, Sr. for Respondent

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

MELISSA LIN JONES for the Compensation Review Board.

**DECISION AND ORDER**

**FACTS OF RECORD AND PROCEDURAL HISTORY**

In 2008, Ms. Vernice Bowles worked for Gentle Touch Senior Care as a residential counselor. On May 30, 2008 while working, she injured her lower back and her right knee.

In April 2009, Ms. Bowles began working for Washington Nursing Facility as an escort. She accompanied elderly patients to medical appointments.

By June 2011, Ms. Bowles worked for Washington Nursing Facility as a service representative at the front desk. On June 7, 2011, she strained her right knee when she fell at work.

On July 26, 2011, Dr. Frederic Salter performed a partial lateral meniscectomy and debridement of partial ACL tear on Ms. Bowles' right knee. This surgery had been scheduled prior to Ms. Bowles' second knee injury.

Ms. Bowles returned to work with Washington Nursing Facility in August 2011. She was fired almost a year later for failure to follow proper patient-discharge procedures.

Following a formal hearing, an administrative law judge (“ALJ”) concluded Ms. Bowles’ permanent partial impairment is causally related to her May 30, 2008 injury. The ALJ awarded Ms. Bowles 10% permanent partial disability to the right leg.

Mr. Kitzman finds error in the ALJ’s Compensation Order dated August 29, 2013, and on appeal, he argues the ALJ impermissibly substituted her opinion for a medical opinion by independently analyzing the AMA Guides to Permanent Impairment (“AMA Guides”) apart from Dr. Jeffrey H. Phillips’ medical report. Mr. Kitzman also argues the ALJ went beyond the evidence in the record when considering particular contents of the AMA Guides. Finally, Mr. Kitzman argues that by focusing on Ms. Bowles’ return to work rather than her restrictions limiting her employability, the ALJ improperly incorporated wage loss into consideration of Ms. Bowles’ permanent partial disability. For these reasons, Mr. Kitzman requests the Compensation Review Board (“CRB”) vacate the August 29, 2013 Compensation Order.

In response, Mr. Graham contends the Compensation Order is supported by substantial evidence in the record and is in accordance with the law. Mr. Graham also contends that the ALJ made no error relying upon the AMA Guides to assess Ms. Bowles’ disability and that Ms. Bowles “has not established the existence of an injury-based effect upon her future earnings as a result of the work injury.”<sup>1</sup> Thus, Mr. Graham requests the CRB affirm the Compensation Order.

#### ISSUES ON APPEAL

1. Did the ALJ substitute her opinion for a medical opinion when analyzing the AMA Guides?
2. Did the ALJ go beyond the record when analyzing the AMA Guides?
3. Did the ALJ consider wage loss when assessing Ms. Bowles’ permanent partial disability?

#### ANALYSIS<sup>2</sup>

Pursuant to *Negussie*, when determining permanent partial disability, the role of the ALJ is to weigh competing medical opinions of impairment together with other relevant evidence and to arrive at a determination on the issue of the nature and extent of any disability. In the end, this determination can result in accepting one physician’s medical rating over another or in reaching a different conclusion altogether because the fact-finder is not bound by the opinions of the evaluating physicians, even when one of them is the treating physician.<sup>3</sup>

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<sup>1</sup> Employer’s Opposition to Application [sic] for Review and Points and Authorities in Support Thereof, p. 6.

<sup>2</sup> 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. Section 32-1521.01(d)(2)(A) of the District of Columbia Workers’ Compensation Act, as amended, D.C. Code §32-1501 to 32-1545 (“Act”). Consistent with this standard of review, the CRB is constrained to uphold a Compensation Order that is supported by substantial evidence. *Marriott International v. DOES*, 834 A.2d 882, 885 (D.C. 2003).

<sup>3</sup> *Negussie v. DOES*, 915 A.2d 391 (D.C. 2007).

In this case, the ALJ questioned the reliability of the only permanent partial impairment rating in the record, the rating by Dr. Phillips. In doing so, the ALJ performed an independent analysis of Table 17.5 of the AMA Guides:

The medical records in the instant matter do in fact call into question the basis and reliability of Dr. Phillips' generous rating of 42% permanent impairment to the right leg., *i.e.*, although he found claimant to have only mildly antalgic gait he afforded her 17% impairment from Table 17.5 of the Fifth Edition of the AMA Guides. Review of Table 17.5 reveals that the Guides suggest a maximum of 7% for mild antalgic gait.<sup>[4]</sup>

Regarding the ALJ's use of the AMA Guides, Mr. Graham specifically argues

While a medical doctor may utilize the AMA Guides in evaluation of Permanent Impairment, the court in *Negussie v. D.C. Department of Employment Services*[,] 915 A.2d 391, articulated, in determining disability pursuant to §32-1508(3) (A) through (S) "there is nothing [*sic*] in the plain words of these statutory provisions stating explicitly, or even implicitly, that the determination of disability is the sole function of a medical doctor. *Id.* at 396. In fact, the court made it clear that the legislative history of this code provision cautions against the notion that only doctors may determine disability, as defined in the statute. *Id.* In addition, the court stated that the

"AMA Guides warns against this use stating: 'It must be emphasized and clearly understood that impairment percentages derived according to Guides criteria should not be used to make direct financial awards or direct estimates of disabilities.' Accordingly, the Committee heeds the AMA warning and adopts the Maryland approach to determine disability, which includes the use of multiple factors[.]"

*Id.*<sup>[5]</sup>

We do not dispute that an ALJ can rely upon more than just a physician's medical impairment rating to assess an award of disability, but this argument confounds "impairment" and "disability." Impairment is a medical determination of a claimant's diminished use of a body part as a result of a compensable injury; disability is a legal determination of "physical or mental incapacity because of injury which results in the loss of wages."<sup>6</sup> Assessing impairment is not the

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<sup>4</sup> *Bowles v. Gentle Touch Senior Care*, AHD No. 09-187A, OWC No. 651454 (August 29, 2013), p. 5.

<sup>5</sup> Employer's Opposition to Application [*sic*] for Review and points and Authorities in Support Thereof, pp. 3-4.

<sup>6</sup> Section 1501(8) of the Act.

function of an ALJ; it is the function of the doctor. Assessing disability is not the function of a doctor; it is the function of the ALJ.

The ALJ, nonetheless, is restricted to the evidence in the record when making a determination of permanent partial disability. In this case, the ALJ relied upon more than medical records to “call into question the basis and reliability of the opinion rendered by the treating physician.”<sup>7</sup> The ALJ went beyond the record and relied upon the AMA Guides to assess an appropriate impairment rating for antalgic gait. In essence, the ALJ reached a medical opinion by taking official notice of the AMA Guides without affording the parties an opportunity to rebut any fact officially noticed in the documents.<sup>8</sup> Ordinarily such errors would require a remand; however, the ALJ did not rely solely on the AMA Guides to reduce Dr. Phillips’ impairment rating:

It is further noted that ten months earlier when claimant was examined by Dr. Richard Meyer of Phillips and Green, she was discharged and released to return to work, Dr. Meyer found only a very mild effusion and a mildly right antalgic gait. No other findings were made or difficulties reported. CE 1 at 2.

Dr. Phillips[’] 42% impairment rating is also inconsistent with claimant’s testimony. When asked at the formal hearing, to describe any problems she was having with her knee. Claimant answered “I snap, I crack, I pop, I get stuck, I go through it all.” HT at 28. When asked what she meant by getting “stuck” claimant explained: “If I sit too long, I mean, I can’t -- if I stand up, I can’t walk. I have to stand for a while and then like try to walk it off. But my leg is just -- it give out on me I go through everything with my legs”. HT at 29. While the undersigned is mindful that the undersigned’s role as the fact-finder is not to fill evidentiary gaps, it is reasonable to assume that by “getting stuck”, claimant was describing leg stiffness which is not one of the five factors used in determining disability pursuant to §32-150(3)(U-i). Claimant had similar difficulty answering counsel’s leading questions in an attempt to establish her residual impairment:

Q. Do you have any trouble with stairs?

A. Yes.

Q. What types of trouble do you have with stairs?

A. I try not to go up them. I go up -- I have two flights of steps. I go up; I stay up; not unless I have a reason to come back down. I try to stay away from steps.

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<sup>7</sup> Employer’s Opposition to Application [sic] for Review and points and Authorities in Support Thereof, p. 4 quoting *Golding-Alleyne v. DOES*, 980 A.2d 1209, 1214 (D.C. 2009).

<sup>8</sup> See *Renard v. DOES*, 673 A.2d 1274 (D.C. 1996) (When notice of evidentiary matters outside the record is taken by the ALJ, due process requires the parties be afforded notice and the opportunity to contest the evidentiary matter.)

Q. Okay. Why do you try to stay away from steps?

A. Because I hurt.

Q. So it hurts to go up and down steps?

A. Yes.

Q. And is that your knee that hurts?

A. It's my knee and my back.

HT at 30. Although claimant has not asserted that any trouble she has is due to radiculopathy, the undersigned does find it reasonable that claimant still has pain in her knee while climbing or descending stairs and cannot question Dr. Phillips' minor atrophy finding.<sup>[9]</sup>

Because the ALJ relied on sufficient evidence in the record to discount Dr. Phillips' impairment rating, the error in going beyond the record to do so is harmless.

Finally, to assist in making a permanent partial disability determination, an ALJ may consider actual wage loss insofar as that loss is indicative of an effect upon future wage earning capacity.<sup>10</sup> This ALJ considered Ms. Bowles' evidence of permanent physical limitations and restrictions which impact her work capacity, "With regard to her physical limitations, claimant testified that she has trouble walking up and down stairs and has had her leg give out on her approximately 4 times in the last six months."<sup>11</sup> The ALJ also relied on Ms. Bowles' return to work as evidence of no impact upon her future earning capacity:

Claimant did not testify about how claimant's right leg symptoms affected her ability to be an escort, the position claimant had when she had the arthroscopic partial menis[c]ectomy. As the record does contain a document that establishes that claimant was terminated from her employment for reasons not related to her right leg, claimant has not established the existence of an injury-based effect upon her future earnings as a result of the work injury.<sup>[12]</sup>

Contrary to Mr. Kitzman's argument, the ALJ did not rely on wage loss to reach the award. The ALJ permissibly relied upon the evidence of Ms. Bowles' return to her prior work capacity in conjunction with the lack of evidence of any impact Ms. Bowles' leg symptoms have on her ability to work. We find no error in this analysis.

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<sup>9</sup> *Bowles* at pp. 5-6.

<sup>10</sup> See *Ulloa v. Hotel Harrington*, CRB No. 12-006, AHD No. 10-556A, OWC No. 669607 (August 7, 2012).

<sup>11</sup> *Bowles* at p. 5.

<sup>12</sup> *Id.* at pp. 6-7.

CONCLUSION AND ORDER

Although the ALJ substituted her opinion for a medical opinion when analyzing the AMA Guides which were not in evidence, the ALJ relied upon sufficient evidence in the record to render these errors harmless. The ALJ did not improperly incorporate wage loss into consideration of Ms. Bowels' award of permanent partial disability. The Compensation Order is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

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MELISSA LIN JONES  
*Administrative Appeals Judge*

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April 21, 2014  
DATE