GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR

LISA M. MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 11-031

DEPT. OF EMPLOYMENT SERVICES
COMPENSATION REVIEW BOARD
2011 AUG 15 AM 10 18

CHUKWUMANYA E. UNIGWE,
Claimant–Respondent,

v.

DOMINION ENTERPRISES and ST. PAUL TRAVELERS,
Employer/Insurer–Petitioner.

Appeal from a Compensation Order by
The Honorable Heather C. Leslie
AHD No. 10-387A, OWC No. 659883

Kathryn Lea Harman, Esquire for Petitioner
Jennifer H. Griffith, Esquire for Respondent

Before MELISSA LIN JONES, LAWRENCE D. TARR, and HENRY W. MCCOY, *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 D.C. Code §§32-1521.01 and 32-1522 (2004), 7 DCMR §250, *et seq.*, and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005).

FACTS OF RECORD AND PROCEDURAL HISTORY

On March 10, 2007,[1] Mr. Chukwumanya E. Unigwe injured his left shoulder on-the-job. Mr. Unigwe was a manager for Dominion Enterprises ("Dominion").

Initially, Mr. Unigwe sought treatment with his primary care physician, Dr. Michael Lieberman. Dr. Lieberman referred Mr. Unigwe to Dr. Stephen C. Saddler.

[1] The stipulations listed in the Compensation Order misidentify the date of Mr. Unigwe's accident as September 28, 2008.

Dr. Saddler treated Mr. Unigwe both before and after Mr. Unigwe's November 21, 2007 arthroscopic surgery. Mr. Unigwe grew dissatisfied with Dr. Saddler's treatment and began authorized treatment with Dr. John J. Klimkiewicz for bilateral shoulder conditions.[2]

Dr. Klimkiewicz intended to treat Mr. Unigwe's right shoulder before reassessing the status of the left shoulder injury. In October 2010, Dr. Klimkiewicz completed a fill-in-the-blank letter indicating Mr. Unigwe's left shoulder would improve with further treatment and was not at maximum medical improvement.

Mr. Unigwe has been assessed by multiple independent medical examination doctors. On March 9, 2010, Dr. Jeffrey H. Phillips opined Mr. Unigwe had reached maximum medical improvement and had sustained a 29% permanent partial impairment of his left arm; Dr. Frank L. Barnes opined Mr. Unigwe had sustained a 15% permanent partial impairment of his left arm.

The parties disagreed as to the extent of Mr. Unigwe's permanent partial disability. Following a formal hearing, an administrative law judge ("ALJ") awarded Mr. Unigwe a 25% permanent partial disability to his left arm.

On appeal, Dominion asserts Mr. Unigwe has not reached maximum medical improvement per Dr. Klimkiewicz. In the alternative, Dominion argues the ALJ should have accepted Dr. Barnes' opinion regarding permanent impairment over Dr. Phillips' opinion regarding permanent impairment.

In requesting that the Compensation Order be affirmed, Mr. Unigwe asserts Dr. Klimkiewicz is not his treating physician and is not entitled to the treating physician preference. Mr. Unigwe also asserts the ALJ afforded proper weight to Dr. Phillips' opinion.

ISSUES ON APPEAL

1. Does substantial evidence in the record support the finding that Mr. Unigwe has reached maximum medical improvement?

2. Does substantial evidence in the record support the ALJ's rejection of Dr. Barnes' opinion in favor of Dr. Phillips' opinion?

ANALYSIS

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[3] in the record

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[2] Mr. Unigwe's right shoulder injury is not part of this case.

[3] "Substantial evidence" is relevant evidence a reasonable person might accept to support a conclusion. *Marriott, supra.*

and whether the legal conclusions drawn from those facts are in accordance with applicable law.[4] 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.[5]

When Mr. Unigwe grew dissatisfied with the treatment provided by Dr. Saddler, he took the steps necessary to obtain an authorized change of physician to Dr. Klimkiewicz. Having done so, it is hypocritical and unnecessary in this case for Mr. Unigwe now to assert Dr. Klimkiewicz is not his treating physician.

It is beyond doubt that a treating physician's opinion is entitled to a preference; however, the preference is not absolute. When there are specific reasons for rejecting the opinion of the treating physician, the opinion of other physicians may be given greater weight.[6]

The ALJ rejected Dr. Klemkiewicz's opinion regarding maximum medical improvement:

> The Employer argues primarily that the Claimant has not reached maximum medical improvement (MMI) and thus an award is premature. The Employer relies upon the opinion of Dr. Klimkiewicz who states at one time the right shoulder should be treated first prior to addressing the residual left shoulder problems. The Employer also rests this argument on the October 7, 2010 letter where Dr. Klimkiewicz simply checks off yes or no answers to questions, including a negative response when asked if the Claimant was at maximum medical improvement. This argument is rejected.
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> The phrase "maximum medical improvement" refers to "[t]he point at which a injured person's conditions stabilizes, and no further recovery or improvement is expected, even with additional medical intervention." BLACK'S LAW DICTIONARY 1000 (8th ed. 2004). The Claimant testified that Dr. Klimkiewicz verbally told him that no further treatment would improve his underlying condition and that pain management and injections would be used to treat his symptoms. Moreover, the Claimant's right shoulder was addressed, per the recommendation of Dr. Klimkiewicz. Symptomatic treatment, the injections to the left shoulder, was recommended to the Claimant after the surgery and treatment to his right shoulder.
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> As I find the Claimant to be a credible witness, I find his recollection of what Dr. Klimkiewicz said to him regarding the lack of need for further treatment to be

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[4] Section 32-1521.01(d)(2)(A) of the District of Columbia Workers' Compensation Act of 1979, D.C. Code, as amended, §32-1501 *et seq.* ("Act").

[5] *Marriott International v. DOES*, 834 A.2d 882, 885 (D.C. 2003).

[6] *See, Butler v. Boatman & Magnani*, H&AS No. 84-348, OWC No. 044699 (Remand Order December 31, 1986) citing *Murray v. Heckler*, 624 F. Supp. 1156 (D.C. 1986).

> accurate. As Dr. Klimkiewicz was treating both the right and left shoulder, it is plausible to the Undersigned that when he was filling out the Employers letter, he could have been confusing the right shoulder with the left. Regardless, the letter is not a medical report and sheds no light on what, if any, further treatment the Claimant may need to improve his situation. The lack of a medical document to explain why the Claimant is not at MMI, coupled with Dr. Phillips unambiguous opinion that the Claimant is at MMI as well as Dr. Barnes opinion that the Claimant is entitled to a permanent impairment rating, defeats the Employer's argument that an award of permanent partial disability is premature.[7]

Clearly, the ALJ provided specific reasons for rejecting Dr. Klemkiewicz's opinion, and we will not disturb her ruling on appeal.

Turning to Dominion's argument that the ALJ should have accepted Dr. Barnes' more recent opinion regarding permanent impairment over that of Dr. Phillips, at the heart of Dominion's argument is a request that we reconsider the weight to be afforded to Dr. Barnes' opinion; such a request is beyond the scope of our authority.[8]

Finally, the D.C. Court of Appeals has held that when determining permanent partial disability, the role of an ALJ is to weigh competing medical opinions together with other relevant evidence and to arrive at a determination on the issue of the nature and extent of any schedule loss. In the end, this determination can result in accepting one physician's rating over another or in reaching a different conclusion altogether because the ALJ is not bound by the opinions of the evaluating physicians.[9] In other words, when determining disability percentage ratings, disability is an economic and legal concept which should not be confounded with a medical condition.[10] Consequently, when reviewing a Compensation Order that awards permanent partial disability benefits for a schedule member, we are mindful that

> unlike other questions that ALJs are called upon to decide in connection with contested compensation claims, there is no dichotomous answer in schedule award cases. That is, there is no "a" or "b" choice in schedule disability awards, as there is in cases where the ALJ must make a choice between compensable or non-compensable, causally related or not causally related, employment relationship or no employment relationship, timely notice or untimely notice, etc. Those questions present scenarios in which there is presumably a right answer and a wrong answer. However, schedule loss cases present the problem of prediction: the goal is to make the best approximation of the effect of a scheduled injury on future wage loss, and then to express that approximation in percentage terms of the member in question, which in the words of the Court of Appeals result in an award based upon an "arbitrary" number of weeks of benefits. See, *Smith v. District of*

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[7] *Unigwe v. Dominion Enterprises*, AHD No. 10-387A, OWC No. 659883 (March 10, 2011), 5-6.

[8] See, *Marriott, supra.*

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

[10] *Id.*

> *Columbia Department of Employment Services*, 548 A.2d 95 (1988), at 101. Only time will determine whether, in any given case, the approximation arrived at through the hearing process is close to "the right answer", or is wildly under reality, or wildly over it. That may be unfortunate, for either the employer or the worker, but as the Court of Appeals has recognized, that is the nature of the system.[11]

The ALJ conducted a review of the medical evidence along with other relevant evidence regarding Mr. Unigwe's disability and determined he is entitled to a 25% permanent partial disability to his left arm.[12] Here is where the problem lies.

The ALJ found that on March 10, 2007, Mr. Unigwe injured his left shoulder when he twisted it at work. Mr. Unigwe was diagnosed with left rotator cuff tendonitis and was treated with physical therapy, medication, and injections, but he continued to have problems with his left shoulder which led to arthroscopy of the left shoulder with rotator cuff repair.[13]

The ALJ also found that as a result of ongoing left shoulder complaints, Mr. Unigwe changed physicians to Dr. Klimkiewicz who recommended conservative treatment to Mr. Unigwe's left shoulder. Following treatment to his right shoulder, Mr. Unigwe's left shoulder continued to limit his activities.[14]

The Compensation Order is devoid of facts or legal justification for a finding that Mr. Unigwe has sustained a permanent partial disability to his left arm; however, pursuant to the *Chang* case,[15] a disability experienced in a schedule member such as the arm may be compensable despite the fact that the anatomical situs of the injury is in a non-schedule body part such as the shoulder. Thus, it is possible the record supports Mr. Unigwe's left shoulder injury results in a left arm disability.

CONCLUSION AND ORDER

Substantial evidence in the record supports 1. finding Mr. Unigwe has reached maximum medical improvement and 2. rejecting Dr. Barnes' opinion in favor of Dr. Phillips' opinion; however, the March 10, 2011 Compensation Order is VACATED IN PART and REMANDED for clarification as to the basis, if any, for a finding that Mr. Unigwe has sustained a left arm

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[11] *Majano v. Linens of the Week*, CRB No. 07-066, AHD No. 06-285, OWC No. 578369 (April 24, 2007).

[12] *Unigwe, supra*, 7-8.

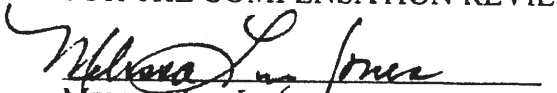
[13] *Id.* at 2-3.

[14] *Id.* at 3.

[15] *Washington Metropolitan Area Transit Authority v. DOES*, 683 A.2d 470 (D.C. 1996).

disability as a result of a left shoulder injury.

FOR THE COMPENSATION REVIEW BOARD:



MELISSA LIN JONES
Administrative Appeals Judge

August 15, 2011
DATE