

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

Department of Employment Services

VINCENT C. GRAY  
MAYOR



LISA M. MALLORY  
DIRECTOR

**COMPENSATION REVIEW BOARD**

**CRB No. 11-080**

**CLARICE L. PARRAN,  
Claimant-Petitioner,**

v.

**CASH MANAGEMENT SOLUTIONS and CNA,  
Employer/Carrier-Respondent.**

Appeal from a Compensation Order by  
The Honorable Anand K. Verma  
AHD No. 11-053, OWC No. 669891

DEPT. OF EMPLOYMENT  
SERVICES  
COMPENSATION REVIEW  
BOARD  
2011 DEC 22 AM 10 52

David J. Kapson, Esquire, for the Petitioner  
Allan H. Kittleman, Esquire, for the Respondent

Before MELISSA LIN JONES, JEFFREY P. RUSSELL,<sup>1</sup> 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 January 8, 2010, Ms. Clarice L. Parran broke her ankle when she fell on ice. A dispute arose over Ms. Parran's entitlement to permanent partial disability benefits and to authorization for medical treatment.

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<sup>1</sup> Judge Russell has been appointed by the Director of the DOES as a temporary CRB member pursuant to DOES Administrative Policy Issuance No. 11-01 (June 23, 2011).

Following a formal hearing, an administrative law judge (“ALJ”) awarded Ms. Parran 5% permanent partial disability to her leg but denied additional treatment for her subjective complaints.<sup>2</sup> Ms. Parran has appealed the ALJ’s July 19, 2011 Compensation Order.

Ms. Parran argues the ALJ impermissibly assessed her permanent partial disability by relying upon wage loss, by failing to address the subjective factors, and by failing to discuss the physicians’ opinions. Ms. Parran also argues the evidence supports the necessity of additional medical treatment. Ms. Parran requests we reverse the Compensation Order.

Cash Management Solutions asserts the ALJ did not focus on work status as a critical factor but instead properly applied the criteria necessary to assess permanent partial disability. Similarly, Cash Management Solutions asserts the ALJ’s denial of authorization for surgery is not “arbitrary or capricious” or “an abuse of discretion.” Cash Management Solutions requests we affirm the Compensation Order

#### ISSUES ON APPEAL

1. Did the ALJ properly analyze the evidence to determine Ms. Parran’s permanent partial disability?
2. Is the treating physician preference applicable to a determination of the nature and extent of Ms. Parran’s permanent partial disability?
3. Did the ALJ properly analyze the issue of authorization for additional medical treatment?

#### ANALYSIS

To begin, both parties refer to the wrong standard of review. The order on appeal is a Compensation Order, and 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<sup>3</sup> in the record and whether the legal conclusions drawn from those facts are in accordance with applicable law.<sup>4</sup> 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.<sup>5</sup> It is only when the Order on review is not one based on an evidentiary record produced at a formal hearing that the

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<sup>2</sup> *Parran v. Cash Management Solutions*, AHD No. 11-053, OWC No. 669891 (July 19, 2011).

<sup>3</sup> “Substantial evidence” is relevant evidence a reasonable person might accept to support a conclusion. *Marriott International v. DOES*, 834 A.2d 882, 885 (D.C. 2003).

<sup>4</sup> 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”).

<sup>5</sup> *Marriott, supra*, at 885.

applicable standard of review is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.<sup>6</sup>

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 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.<sup>[7]</sup>

When making that assessment, *Corrigan*<sup>8</sup> prohibits consideration of the degree of any actual loss in wages, but *Corrigan* does not prohibit consideration of the effect of the injury upon the actual ability to function in the workplace. Ms. Parran’s argument that the ALJ relied upon wage loss relies on a misreading of the Compensation Order.

The ALJ recognized a schedule award for permanent partial disability is payable regardless of actual wage loss, but workers’ compensation benefits still rely upon wage-loss principles.<sup>9</sup> Consequently, the ALJ noted Ms. Parran had resumed her pre-injury employment full-time at full salary; however, he did so in the context of her work capacity and subjective complaints:

Claimant testified at the hearing she experiences “pins and needles” type pain in her ankle and sharp back pain, and she clarified further that the pain did not last a long time. On the frequency of her back pain, she testified it occurred two or three days a week and in its amelioration she took over-the-counter Tylenol about four

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<sup>6</sup> See 6 Stein, Mitchell & Mezines, *Administrative Law*, § 51.03 (2001).

<sup>7</sup> *Majano v. Linens of the Week*, CRB No. 07-066, AHD No. 06-285, OWC No. 578369 (April 24, 2007).

<sup>8</sup> *Corrigan v. Georgetown University*, CRB No. 06-094, AHD No. 06-256, OWC No. 604612 (September 14, 2007).

<sup>9</sup> *Parran*, *supra*, at 5-6.

days a week. (HT 23-28). Her testimony further illuminated that she can sit “a little over two hours” before feeling low back pain and she “could walk a mile” before her ankle begins to hurt. (HT 28-30). On cross examination, claimant testified she has resumed her pre-injury employment, wherein she performs 40-hour per week work at the salary she earned before the work injury. (HT 45).

Notwithstanding claimant’s unabated complaints of sharp back pain, the evidence on her behalf is not supportive. The MRI scan of claimant’s lumbar spine of August 18, 2010 was unremarkable in all respects and despite Dr. Cirillo’s repeated prescriptions for a trial of epidural steroid injections to ameliorate the alleged lumbar symptoms, claimant showed no initiative in receiving it. Moreover, the record demonstrates no reasonable grounds, claimant presented, which could justify non-receipt of the epidural injections, especially when she continued to complain of unremitting back pain.<sup>[10]</sup>

Ultimately, the ALJ made his ruling

consistent with the permissible discretion in determination of claimant’s ratable impairment, considering claimant’s MMI from her January 8, 2010 work injury in conjunction with her uncorroborated subjective complaints of pain in her low back and right ankle associated with its residual weakness, loss of endurance and loss of function, the undersigned is not inclined to award more than 5% permanent partial impairment [*sic*] attributable to her lower right extremity.<sup>[11]</sup>

Moreover, it is clear from this portion of the Compensation Order that the ALJ assessed not only Ms. Parran’s physical impairment but her weakness, loss of endurance, and loss of function as well. There is no requirement to state what portion of the percentage awarded is attributable to the D.C. five factors.<sup>12</sup> Thus, we find no error with the analysis of Ms. Parran’s permanent partial

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<sup>10</sup> *Parran, supra*, at 6.

<sup>11</sup> *Parran, supra*, at 7.

<sup>12</sup> Section 32-1508(3)(U-1) of the Act states

In determining disability pursuant to subparagraphs (A) through (S) of this subsection, the most recent edition of the American Medical Association's *Guides to the Evaluation of Permanent Impairment* may be utilized, along with the following 5 factors:

- (i) Pain;
- (ii) Weakness;
- (iii) Atrophy;
- (iv) Loss of endurance; and
- (v) Loss of function.

*See also Jones v. Howard University*, CRB No. 11-095, AHD No. 10-494, OWC No. 649331 (November 1, 2011) (“It is clear that, by utilizing the permissive “may” as opposed to the mandatory “shall”, the legislature was authorizing but not requiring that the analysis of schedule award claims include specific reference to the AMA Guides and/or the five factors.”)

disability.<sup>13</sup>

Next, Ms. Parran asserts the ALJ failed to properly apply the treating physician preference in that the ALJ did not provide specific reasons for rejecting the opinion of Dr. Richard M. Cirillo, purportedly in favor of the opinion of Dr. Robert E. Collins. This argument relies upon a misunderstanding of impairment versus disability.

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>14</sup>

Dr. Cirillo assigned a 15% permanent partial impairment of Ms. Parran's leg as a result of her ankle injury;<sup>15</sup> Dr. Cirillo later amended his opinion to apportion 13% of Ms. Parran's permanent partial impairment to her lower back symptoms. Dr. Collins examined Ms. Parran on behalf of the employer and rated a 5% permanent partial impairment of Ms. Parran's right ankle. These ratings are medical assessments of impairment, not legal assessments of disability, and a physician's opinion about disability (as opposed to impairment) is not a medical opinion

Finally, turning to the issue of authorization for surgery, the Compensation Order lists the sole issue for resolution as "What is the nature and extent of claimant's disability?"<sup>16</sup> This recitation is consistent with the preliminary exchange that took place at the formal hearing:

Judge Verma: All right. Counsel, according to openings and the record, I understand that the main issue to be resolved at this hearing is the nature and extent of Clarice's disability, if any.

The issues that have been stipulated by the parties are, jurisdiction within the District of Columbia, employer employee relationship, Claimant's average weekly wage in the amount of \$782, Claimant's accident [*sic*] injury occurring on

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<sup>13</sup> We are aware of the Decision and Remand Order issued in *Hill v. Howard University*, CRB No. 11-081, AHD No. 10-117A, OWC No. 657973 (December 22, 2011) wherein another panel vacated and remanded a Compensation Order because the same ALJ relied upon wage loss to determine permanent partial disability benefits. This case is distinguishable from *Hill* in that here, the ALJ has considered wages in the context of Ms. Parran's work capacity, not her actual earnings. Had the ALJ relied on an absence of wage loss to support his assessment of Ms. Parran's permanent partial disability (as the panel in *Hill* determined he did) such an analysis would have been contrary to the law (as it was in *Hill*).

<sup>14</sup> *Negussie v. DOES*, 915 A.2d 391 (D.C. 2007).

<sup>15</sup> For purposes of a schedule award for permanent partial disability benefits, an injury to an ankle can result in an award to the foot or to the leg. The critical determination is the situs of the disability. The parties have not raised the issue of whether the ankle should be regarded as part of the leg, part of the foot, or neither.

<sup>16</sup> *Parran, supra*, at 2.

January 8<sup>th</sup>, 2010, timely notice of injury, timely claim, medical causal relationship and other issues being non-issues.

And I would ask both counsel as to the matters for the record, state the issues that I have recited here that have been stipulated by the parties that are true and correct. Ms. Griffith.

\* \* \*

Ms. Griffith: Yes, Your Honor, the stipulations are true and correct as recited.

Judge Verma: All right. Is that so?

Mr. Kittleman: Yes, Your Honor, everything's fine. Thank you.<sup>[17]</sup>

When addressing the claim for relief, however, the issues may have changed.

Judge Verma: All right. I have also received - - before I go any further I would ask that Claimant's Counsel if they'd state for the record the claim for relief that you're seeking today.

Ms. Griffith: Yes, Your honor. The claim for relief today would be authorization for medical treatment and also permanent partial disability benefits in the amount of 28% to the right lower extremity.<sup>[18]</sup>

The law requires we remand this matter for clarification as to the issue regarding authorization for additional medical treatment including surgery. Is the issue causal relationship which would require an analysis of the application of the presumption of compensability or is the issue reasonableness and necessity which would require an analysis of a utilization review report? On remand, the ALJ is directed to clarify the issue and provide the proper analysis of it.

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<sup>17</sup> Hearing Transcript, 6-8.

<sup>18</sup> Hearing Transcript, 8-9.

CONCLUSION AND ORDER

The ALJ properly analyzed the evidence to determine Ms. Parran's permanent partial disability and was not required to give her treating physician's opinion regarding impairment any greater weight over the medical opinion of the physician retained by Cash Management Solutions when determining the legal issue of disability. The award of 5% permanent partial disability to the right leg is affirmed; however, the denial of additional medical treatment is vacated, and this matter is remanded further proceedings consistent with this Decision and Remand Order.

FOR THE COMPENSATION REVIEW BOARD:

  
MELISSA LIN JONES  
*Administrative Appeals Judge*

December 22, 2011

DATE