

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

Department of Employment Services

MURIEL BOWSER  
MAYOR



DEBORAH A. CARROLL  
ACTING DIRECTOR

**COMPENSATION REVIEW BOARD**

**CRB No. 14-107**

**DANA BUCKNER**  
**Claimant-Petitioner**

v.

**WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY**  
**Employer-Respondent.**

Appeal from an August 19, 2014 Compensation Order  
by Administrative Law Judge Karen R. Calmeise  
AHD Nos. 13-312, 13-326 and 13-329,  
OWC Nos. 692520, 642570 and 580668

Krista DeSmyter for Claimant  
Mark H. Dho for Employer

Before JEFFREY P. RUSSELL, MELISSA LIN JONES, *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**

Ms. Dana Buckner sustained three injuries on three separate dates.

On June 7, 2002, she tripped on a rock or slipped on uneven pavement while working as a bus driver. She treated with Dr. Lyza Charles for right ankle, left knee and low back complaints, was off work for about five months, and returned to work on November 16, 2002.

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COMPENSATION REVIEW  
BOARD  
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She was working as a station manager on January 13, 2008 when she tripped over a floor mat in the station. Although she treated for injuries to her right knee with Drs. Pour and Sims, she lost no time from work.

While still working as a station manager, on May 29, 2012, she again slipped, this time on a loose step in the station kiosk. She returned to Dr. Pour and treated at George Washington University hospital. She was released to return to work as of July 2, 2012.

Employer voluntarily accepted all three claims and provided medical care and wage loss benefits for lost time.

Claimant sought an independent medical evaluation (IME) from Dr. Michael Franchetti in order to present a claim for permanent partial injury under the schedule to her legs. Dr. Franchetti examined Ms. Buckner on December 5, 2012, and authored three separate evaluation reports. In the report concerning the June 7, 2002 incident, he opined that Ms. Buckner had sustained a 20% impairment to the left leg due to complaints of pain, endurance and function relative to the left knee, and 13% to the left ankle per the A.M.A. Guides to the Evaluation of Permanent Impairment (4<sup>th</sup> Edition) (the Guides).

He opined that Ms. Buckner had sustained a 20% permanent partial impairment to the right leg under the Guides and 6% for pain, endurance and function loss in connection with the January 13, 2008 incident, for a 26% total impairment rating.

In regards to the May 20, 2012 injury, Dr. Franchetti again opined that Ms. Buckner had sustained a 26% permanent partial impairment to the right leg, combining an 11% Guides rating with a 15% additional for lost motion, endurance, and function.

Washington Metropolitan Area Transit Authority (WMATA) also had Ms. Buckner evaluated for the purposes of an IME by Dr. David Dorin. On February 12, 2013. He authored a report on that date and an addendum on February 26, 2013. Although his reports only discussed his findings concerning his examination of the right ankle, he opined that Ms. Buckner had sustained 0% impairments to either leg, the left knee or the ankle. His evaluations were said to be premised upon the 6<sup>th</sup> Edition of the Guides.

The parties being unable to reach agreement on the issue of Ms. Buckner's entitlement to awards under the schedule for permanent partial disability to the legs, the matter was presented for resolution by and Administrative Law Judge (ALJ) in the Administrative Hearings Division (AHD) of the Department of Employment Services (DOES) on August 29, 2013, which resulted in Compensation Order issued August 19, 2014. In the Compensation Order, no award for any

permanent partial disability to either leg was made. The Compensation Order was signed by the ALJ who conducted the formal hearing.

Ms. Buckner appealed the Compensation Order to the Compensation Review Board (CRB), asserting first that the Compensation Order ought to be vacated and remanded because she alleged that the ALJ who heard the case did not author the Compensation Order. She argued further that the denials of the claims were impermissibly beyond the scope of the issue presented because the Compensation Order denied the claims in part due to lack of causal relationship, an issue that had been stipulated.

WMATA opposed the appeal, arguing that the denials were all based upon substantial evidence, particularly, the lack of credibility of Ms. Buckner, the reports of Dr. Dorin, and inconsistencies between the testimony of Ms. Buckner and the contents of the medical reports. WMATA also argued that Ms. Buckner's assertion that the Compensation Order was not authored by the same ALJ who heard the formal hearing was without basis.

#### ANALYSIS

Initially we address Ms. Buckner's argument that the Compensation Order be vacated and the matter remanded for a new hearing because the ALJ who heard the claim at the formal hearing did not author the Compensation Order. The sole basis upon which this claim is made is that in footnote 1 of the Compensation Order, the author parenthetically refers to "ALJ Calmeise", as opposed one presumes to something like "the undersigned" or some personal pronoun.

The Hearing Transcript demonstrates that the ALJ who conducted the hearing was Karen R. Calmeise. The caption of the Compensation Order identifies the author thereof as Karen R. Calmeise, and it is purportedly signed by Karen R. Calmeise. This ground of appeal is absolutely without record support of any kind and is denied.

Our analysis of the merits begins by noting that although the claims presented for awards under the schedule included alleged disabilities from combined effects of knee and ankle conditions of both legs, the schedule has no separate disability provisions for knees and ankles. Rather, the combined effects of an injured knee and ankle on a leg must be considered together to arrive at a single award to the leg, or in this case, to each leg.

We note further that the only issue presented for resolution to the ALJ in this case was the nature and extent of disability to each leg. The parties stipulated that any disability found is causally related to the stipulated work injury.

Claimant argues in this appeal that the ALJ's analysis of both these claims is fatally flawed by the injection into each claim of the issue of causal relationship.

Regarding the left leg, the ALJ commenced her analysis with a discussion and assessment of Ms. Buckner's left ankle, concluding this part of the discussion with:

[Ms. Buckner's] statements to Drs. Franchetti and Sims are ... questionable. Like Dr. Sims' report, Dr. Franchetti's report is insufficient to conclude [Ms. Buckner's] [left] ankle disabled her because of the 2002 fall.

Claimant's own testimony, which was provided over a decade after the injury, is insufficient evidence of an injury to her left ankle. Dr. Franchetti's report is inconsistent with reports from 2002 and lacks a rationale for his disability rating. Dr. Sims' report does not link her ankle sprain to the 2002 injury. Only Dr. Charles' reports were contemporaneous and detailed. There is no compelling reason to reject the evidence in those reports, which give no reason to find a disability based on her left ankle. Claimant has not proven by a preponderance of the evidence that she sustained an injury to her left ankle that led to a disability under the Act.

Compensation Order, pp. 5 - 6.

At least twice the ALJ includes references to the failure to link the alleged left ankle injury to the work injuries, so it appears from these portions of the Compensation Order suggest that the ALJ has injected causal relationship into the claim for the left leg, where that issue was stipulated. While it is certainly possible that the ALJ could find that Ms. Buckner has no injury to the ankle, that does not appear to be what she is conveying in her analysis. The Compensation Order is ambiguous in this regard, and the ALJ makes no finding on the issue regarding whether there is any left ankle injury. Hence, the conclusions reached concerning the overall disability to the left leg must be vacated for further consideration and clarification as to whether Ms. Buckner sustained an injury to the left ankle, and if so, to what extent any such injury contributes to a disability to the left leg.

We note also that the ALJ concluded that Ms. Buckner sustained an injury to her left knee "but it is also fully healed". Compensation Order, p. 7. Ms. Buckner argues in this appeal that this finding must be overturned because it is "not an opinion expressed within any of the medical records". Claimant's Brief, p. 6. That is not exactly accurate. While the words "fully healed" are nowhere to be found, the ALJ wrote:

Contemporaneous reports also paint a different picture [than Ms. Buckner's IME report from Dr. Franchetti diagnosing "chronic left knee posttraumatic internal derangement as a result of June 7, 2002 injury"]. An x-ray of her left knee, taken only days after the injury, was normal. EE 7. Although her left knee suffered an initial contusion, [treating physician] Dr. Charles gave her permission to return to regular work by November 16, 2002. EE 7. (She has sufficiently recovered to be able to return to regular work duties on 11-16-02.") Claimant's Disability Certificate, issued by Dr. Charles on November 14, 2002, *did not diagnose her with a knee injury*. EE 7 ("Diagnosis: lumbar strain; (r) ankle sprain").

Compensation Order, p. 6 (emphasis added).

Although subject to other possible interpretations, the ALJ's inference from the normal post-injury x-ray, the release to return to work, and the disability certificate's omission of an ongoing left knee injury in the diagnosis could lead a reasonable person to conclude that Dr. Charles had determined that the left knee contusion had healed by November 14, 2002. It is not a medical opinion reached by the ALJ; rather, it is the ALJ's inference of the doctor's view from the records of the treating physician, which is reasonable and supported by inference from substantial evidence in the record, and is affirmed.

Regarding the right leg claim, we again note that it is premised upon the claimed alleged combined effects of injuries to the right knee and right ankle.

Without reciting the entire medical evidentiary record, it appears that Ms. Buckner's claim is premised, both as to the right knee and right ankle, solely upon her own testimony, and the IME report of Dr. Franchetti.

Regarding the right ankle's contribution to a disability award, the ALJ weighed all the medical evidence and Ms. Buckner's testimony, and concluded

Only Dr. Franchetti concluded she was medically disabled. Viewed in a vacuum, his report might warrant more weight. But part of his examination was based upon statements of the Claimant, who was not credible, and none of the other doctors reinforce his description of the sprain's severity. The emergency room doctors only identified mild swelling. Dr. Pour noted some tenderness and put her off work until July 2, 2012. When she returned on July 9<sup>th</sup>, she was able to do her regular work duties. Dr. Dorin felt that her sprain had healed without impairment. Three other doctors provided Claimant care, but only Dr. Franchetti argued that over a quarter of her right leg was disabled. His report is outweighed by the other

evidence. Claimant has not proven by a preponderance of the evidence that she is disabled as a result of an injury to her right ankle in 2012.

Compensation Order p. 12.

A preponderance of the evidence “the greater weight of the evidence; superior evidentiary weight that, though not sufficient to free the mind wholly of all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other”, and it is “the burden of proof in a civil trial, in which the jury is instructed for the party that, on the whole, has the stronger evidence, however slight the edge may be.” BLACKS’ LAW DICTIONARY, 7<sup>th</sup> Edition, Bryan A. Garner, Editor in Chief, *West Publishing 1999*, p. 1201.

Given the ALJ’s credibility findings to which we defer, and the fact that neither Dr. Dorin nor Dr. Franchetti are treating physicians, we find no fault in the ALJ giving greater weight to Dr. Dorin’s opinion concerning the lack of a medical impairment to Ms. Buckner’s right ankle, and that assessment is affirmed.

However, as regards the right knee, the only medical opinion expressed which contradicts that of Dr. Franchetti is that of Dr. Dorin, WMATA’s IME physician. However, as the ALJ points out, Dr. Dorin’s report does not contain any reference to an examination of the right knee, having been limited to the right ankle. Compensation Order, p. 8.

The ALJ acknowledges that this renders his opinion that Ms. Buckner’s “impairment to the body part-right knee/leg—is zero (0) percent” of “limited value” regarding the extent of medical impairment to the knee (Compensation Order, p. 8). In her assessment of the overall record she hardly gives it a ringing endorsement, commenting that “To the extent it merits noting, Dr. Dorin concluded she had no disability.” Compensation Order, p. 10.

The ALJ states that “Dr. Franchetti’s 26% disability conclusion overreaches when considered with the other evidence.” While this may be true, the ALJ cites no other medical evidence that Ms. Buckner has *no* medical impairment to her right knee. The ALJ declined to consider making any award premised upon a right knee impairment because “she has not proved, by a preponderance of the evidence, that she suffers a disability” to the right knee from the 2008 injury. Compensation Order, page 10.

While it may be fair to characterize Ms. Buckner’s right knee evidence as weak, by the ALJ’s own admission concerning the lack of value of Dr. Dorin’s views concerning the right knee, there does not appear to be *any* medical evidence that Ms. Buckner’s right knee is unimpaired.

Weak evidence preponderates over no evidence. While disability and impairment are not the same thing under the Act, the finding that Ms. Buckner failed to adduce a preponderance of the evidence concerning an impairment to her right knee is erroneous. On this record, it appears uncontradicted that Ms. Buckner suffers some degree of medical impairment to her right knee. A remand for further consideration of what that impairment is and to what extent the impairment has resulted in a disability to the right leg under the schedule is necessary.

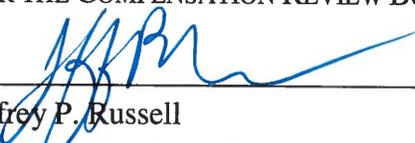
**CONCLUSION AND ORDER**

The ALJ's determinations and conclusions that Ms. Buckner has sustained no medical impairment to the left knee or right ankle are supported by substantial evidence, and the failure to make an award to the left or right legs premised upon such impairments is in accordance with the law, and is affirmed.

The determination that Ms. Buckner is not entitled to consideration of an award to her left leg based upon a claimed impairment to her left ankle was premised upon a lack of medical causal relationship, which was not an issue, and the denial is vacated and the matter is remanded for further consideration of the claim for a schedule award to the left leg after consideration of the question as to whether and to what extent Ms. Buckner suffers from a left ankle medical impairment.

The determination that Ms. Buckner is not entitled to consideration of an award to her right leg based upon a claimed impairment to the right knee is not in accordance with the law because the ALJ erroneously determined that Ms. Buckner failed to adduce a preponderance of the evidence that she has sustained an impairment to her right knee, and is vacated, and the matter is remanded for further consideration of the extent of disability, if any, Ms. Buckner has sustained to her right leg due to the impairment to her right knee.

FOR THE COMPENSATION REVIEW BOARD:

  
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Jeffrey P. Russell  
*Administrative Appeals Judge*

\_\_\_\_\_  
February 19, 2015  
DATE