GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR

F. THOMAS LUPARELLO
INTERIM DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 13-150

DEPT. OF EMPLOYMENT SERVICES
COMPENSATION REVIEW BOARD
2014 MAY 2 AM 11 00

DARRELL GIST,
Respondent,

v.

INTER-CON SECURITY,
and GALLAGHER BASSETT SERVICES, INC.
Employer/Insurer-Petitioners.

Appeal from a October 31, 2013 Compensation Order By
Administrative Law Judge Nata K. Brown
AHD No. 13-109, OWC No. 684908

Eric M. May for the Respondent
Jennifer Ward for the Petitioner

Before HEATHER C. LESLIE, JEFFREY P. RUSSELL, and MELISSA LIN JONES, *Administrative Appeals Judges.*

HEATHER C. LESLIE for the Compensation Review Board.

DECISION AND ORDER

OVERVIEW

This case is before the Compensation Review Board (CRB) on the request for review filed by Employer - Petitioner (Employer) of the October 31, 2013, Compensation Order (CO) issued by an Administrative Law Judge (ALJ) in the Hearings and Adjudication Section of the District of Columbia Department of Employment Services (DOES). In that CO, the ALJ granted, in part, Claimant's request for permanent partial disability benefits to the right lower extremity. We AFFIRM.

BACKGROUND AND FACTS OF RECORD

Claimant was employed by Employer as a security officer. On September 23, 2011[1], Claimant was involved in an altercation while at work. Claimant injured his right leg and hip. Prior to the work accident, Claimant suffered from undiagnosed coxa magna of the hip.

[1] The parties stipulated to an accidental injury date of September 23, 2011. There is a reference to a September 3, 2011 injury date in the CO. See CO at 2. We will treat this reference as a typographical error.

Claimant came under the care and treatment of Dr. J. Michael Joly. After a course of conservative treatment, Dr. Joly recommended a total hip replacement, which Claimant had on April 30, 2012. After the operation, Claimant underwent 6 months of physical therapy. Claimant was ultimately released to work, with restrictions after conservative treatment, and was placed in vocational rehabilitation.

Claimant sought an independent medical evaluation (IME) with Dr. Jeffrey Phillips on December 18, 2012. Dr. Phillips, after performing a physical examination, opined the Claimant suffered from a 58% permanent partial impairment to his right lower extremity as a result of his work injury.

Employer sent Claimant for an IME with Dr. Louis Levitt on two occasions. At the second IME on January 7, 3013, Dr. Levitt opined that all treatment Claimant endured, including surgery was medically causally related to the work injury and necessary. Dr. Levitt also agreed with Dr. Joly that Claimant was unable to return to his job as a security officer and would be permanently restricted from working in any security capacity due to his injury. Dr. Levitt opined Claimant suffered from a 30% impairment to his right lower extremity.

A full evidentiary hearing occurred on March 19, 2013.[2] Claimant sought an award of 58% permanent partial disability to the right lower extremity. The sole issue raised was the nature and extent of Claimant's disability, if any. A CO was issued on October 31, 2013 which granted Claimant's claim for relief, in part, finding Claimant was entitled to an award of 48% permanent partial disability to the right lower extremity.

Employer timely appealed. Employer argues the ALJ's conclusions are not supported by the substantial evidence in the record and do not flow rationally from the evidence in the record. Specifically, Employer argues Claimant failed to carry his burden of proving any economic impact that would justify the ALJ's increase in Dr. Levitt's rating.

Claimant opposes the application for review, arguing the CO is supported by the substantial evidence in the record and should be affirmed.

THE STANDARD OF REVIEW

The scope of review by the Compensation Review Board ("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, 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. *Marriott International v. DOES*, 834 A.2d 882, 885 (D.C. 2003).

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[2] The CO erroneously refers to April 2, 2013 as the date the Formal Hearing.

DISCUSSION AND ANALYSIS

Employer argues the evidence in the record "does not support a finding that Claimant's inability to work as a court security guard would result in wage loss or Claimant's loss of any kind in relation to 'future vocational capacity.'" Employer's argument at 6. Specifically,

> Claimant is a high school graduate, with a steady work history, and held a Top Secret Security Clearance. Claimant is employable and being provided vocational rehabilitation services. There is no evidence in the record that the restrictions Claimant has will prevent him from gainful employment earning the same or a greater amount. Without such evidence there is no indication of economic impairment and thus the ALJ's increase of 18% to the impairment rating provided by Dr. Levitt, who clearly understood Claimant's work as a security officer when he reference Claimant's ability to protect others, is not supported.

Employer's argument at 7.

Claimant, in opposition, argues,

> The ALJ properly recognized that permanent partial disability is both a medical and economic concept. CO at 4. She clearly indicated that medical impairment ratings must be considered in determining the extent of Claimant's disability. She directly addressed non-medical question of loss of industrial use and pointed to the broad discretion permitted to consider the D.C. Five Factors.

Claimant's argument at 4.

Claimant relies on the District of Columbia Court of Appeals decision in *Jones v. DOES*, 41 A.3d 1219 (D.C. 2012). We agree with Claimant.

The ALJ found more persuasive the Employer's IME, Dr. Levitt, when determining the medical impairment the Claimant suffered. Neither party appealed this finding. Further, as Employer acknowledges, disability is an economic concept, not to be confused with a medical condition. In arriving at a determination of what disability Claimant suffers from, the ALJ must take into account all the evidence and come to a determination.

After determining that Claimant suffered from a medical impairment rating of 30%, the ALJ then turned to any economic impact the work injury may have on Claimant. The ALJ noted,

> There are other factors that may be considered in determining an impairment rating. *Negussie* [*v. DOES,*915A.2d 391, 392 D.C. 2007] and *Corrigan* [*v. Georgetown University,* CRB No. 06-094, AHD No. 06-256, OWC No. 604612 (September 14, 2007), *supra*. Claimant's impairment has resulted in a negative impact on his industrial capacity. He cannot go back to his previous line of work as a security guard. Claimant is in vocational rehabilitation, and must start over in a new career. Dr. Levitt opined that activities that put him at risk for contact or aggressive demands at work will cause premature wearing of his hip replacement, requiring additional surgery in the future. He cannot be in a position to protect himself or others. He can walk, operate a car, and handle clerical functions, but should restrict lifting to not exceed 50-75 pounds. He should avoid running, jumping, and awkward postures.

> Accordingly, the 30% impairment rating submitted by Dr. Levitt is increased by 18% to reflect the effect of the impairment on Claimant's future vocational capacity. Considering all the evidence, Claimant has shown that he has a 48% permanent partial medical impairment to his right lower extremity.

CO at 5.

We find no fault in the above explanation. The ALJ gave adequate reasons, supported by the Claimant's credible testimony[3], when adding an additional 18% to Dr. Levitt's rating to conclude that Claimant suffers from a 48% permanent partial disability as a result of the work injury. The Claimant must start a new job, is restricted from his old occupation as he must avoid any physical activities or risk re-injury. As he cannot perform his pre-injury job in security, Claimant is in vocational rehabilitation. Thus, the record supports an additional amount, 18%, to the medical impairment, to reflect Claimant's permanent partial disability to his right lower extremity as a result of the work injury. Or stated another way, because of the work injury and the restrictions on Claimant's past vocational profession, the ALJ determined that the potential industrial impact to be 18%, for a total of 48% permanent partial disability. As *Jones* states,

> The ALJ comes to a conclusion based on a complex of factors, taking into account physical impairment and potential for wage loss, and the application of judgment based on logic, experience and even "prediction."

Jones, supra 41 A.3d at 1224.

We believe the ALJ's explanation to satisfy and be in accordance with *Jones*. What Employer is essentially asking us to do in argument is to reweigh the evidence in Employer's favor, a task we are prohibited from performing.

CONCLUSION AND ORDER

The October 31, 2013 Compensation Order is supported by the substantial evidence in the record and in accordance with the law. It is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

/s/ Heather C. Leslie

HEATHER C. LESLIE
Administrative Appeals Judge

May 2, 2014
DATE

[3] A finding not appealed by Employer.