

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR



DR. ROCHELLE L. WEBB
ACTING DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 10-168

MICHAEL S. GAMBOA,
Claimant-Respondent,

v.

DISTRICT OF COLUMBIA DEPARTMENT OF YOUTH REHABILITATION SERVICES,
Self-Insured Employer-Petitioner.

Appeal from a Compensation Order by
The Honorable Fred D. Carney, Jr.
AHD No. PBL07-013D, DCP No. 761032-0001-2003-0003

Matthew J. Pepper, Esquire for the Respondent
Frank McDougald, Esquire, for the Petitioner

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 ORDER

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board ("CRB") pursuant to D.C. Official Code § 1-623.28, 7 DCMR § 118, and Department of Employment Services Director's Administrative Policy Issuance No. 05-01 (Feb. 5, 2005).

FACTS OF RECORD AND PROCEDURAL HISTORY

In May 2003, Mr. Michael S. Gamboa worked as a correctional officer. During a riot, he was physically attacked and contracted septicemia which caused him to need two surgeries. Mr. Gamboa received wage loss benefits for a closed period of time. Thereafter, he requested permanent partial disability benefits as a result of his work-related, arm injury.

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At a formal hearing, Mr. Gamboa requested a 78% permanent partial disability award for his right arm. In a Compensation Order dated August 31, 2010,¹ he was awarded a 95% permanent partial disability to his right arm. *Gamboa v. D.C. Department of Corrections*, AHD No. PBL07-013D, DCP No. 761032-0001-2003-0003 (August 31, 2010).

In an uncontested appeal, the Department of Corrections disagrees with the award of 95% permanent partial disability to Mr. Gamboa's right arm. The Department of Corrections states Mr. Gamboa only requested a 78% permanent partial disability of his right arm and argues the administrative law judge ("ALJ") "failed to provide any reason for ignoring [Dr. Stephane Corriveau's May 28, 2010 report assessing a 78% impairment rating]." Memorandum of Points and Authorities in Support of Petitioner's Application for Review, p.6.

ISSUE ON APPEAL

Is the ruling regarding Mr. Gamboa's permanent partial impairment to his right arm supported by substantial evidence in the record?

ANALYSIS

The scope of review by the CRB is limited to making a determination as to whether the factual findings of the Order are based upon substantial evidence in the record and whether the legal conclusions drawn from those facts are in accordance with applicable law.² § 1-623.28(a) of the District of Columbia Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Official Code § 1-623.1 *et seq.* ("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, supra*.

At the formal hearing, Mr. Gamboa sought a permanent partial disability award for his right arm injury. *Gamboa, supra*, unnumbered p.2. The ALJ considered that Mr. Gamboa physically is unable to perform his pre-injury job and permanently is limited to work that requires no contact with inmates. The ALJ also considered that Mr. Gamboa suffers instability, decreased range of motion, weakness, diminished grip strength, and constant pain. *Id.* at pp.3, 4. Furthermore, the ALJ specifically noted,

[t]he reports of Dr. Corriveau are consistent with the medical evidence regarding the level of pain Claimant experiences in the area of his right upper extremity.

Dr. Corriveau's opinion is consistent with Claimant's testimony that he can no longer participate in sports as he once did, has limited use and function of his right upper extremity. Based on Claimant's testimony regarding his work history

¹ The ALJ signed the Compensation Order on August 30, 2010; however, the Certificate of Service indicates it was mailed to the parties the next day.

² "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).

Claimant cannot compete in the open economy for the type of jobs he has been trained to perform in that he is restricted permanently from having any inmate contact. Considering the physical impairment to Claimant right upper extremity and the loss of industry resulting from the impairment to his dominant arm I found the rating of 95% appropriate in this matter.³

and

[a]lthough Claimant requested a permanency rating of 78%, the reports of Dr. Corriveau, indicate his permanent physical impairment is closer to 95%. Considering Claimant's loss of industry his permanent impairment is closer to 95% than to 78% as Claimant will never be able to compete for a correctional officer's position again due to his permanent restrictions. *Corrigan v. Georgetown University*, CRB No 06-094 (September 14, 2007) in which the CRB opined that the ALJ may award a different percentage of partial disability than both physicians where the ALJ relied considered the non-medical industrial effects of the injury, without regard to wage loss. See *Negussie v. DOES* 915 A.2d 391 (DC 2007).⁴

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

³ *Gamboa, supra*, at unnumbered p. 6.

⁴ *Id.*

system.

Majano v. Linens of the Week, CRB No. 07-066, AHD No. 06-285, OWC No. 578369 (April 24, 2007).⁵

The ALJ conducted a thorough review of all the medical evidence along with other relevant evidence regarding Mr. Gamboa's disability and determined Mr. Gamboa is entitled to 95% permanent partial disability to his right arm. The Department of Correction's argument on appeal that Dr. Corriveau's most recent impairment rating creates a ceiling confounds a medical impairment with the legal and economic concept of disability. In other words, 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 fact finder is not bound by the opinions of the evaluating physicians. *Negussie, supra*.

Finally, in asserting that "the report of Dr. [Marc B.] Danziger should be accorded greater weight than the May 28, 2010 report of Dr. Corriveau,"⁶ the Department of Corrections asks this tribunal to re-weigh the evidence; however, such a request is beyond our authority. The CRB must uphold a Compensation Order that is supported by substantial evidence, even if there is also contained within the record under review substantial evidence to support a contrary conclusion, and even if the reviewing authority might have reached a contrary conclusion. *Marriott, supra*.

CONCLUSION AND ORDER

Because the ALJ properly considered the record evidence and because the ALJ committed no error in the manner in which the law was applied, the Compensation Order is supported by substantial evidence. The Compensation Order of August 31, 2010 is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:


MELISSA LIN JONES
Administrative Appeals Judge

January 14, 2011

DATE

⁵ Although *Majano* and *Negussie* are private sector workers' compensation cases, they are not premised upon the specific wording of the D.C. Workers' Compensation Act of 1979, D.C. Code, as amended, §32-1501 *et seq.* They are premised upon general workers' compensation principles and, therefore, apply equally to adjudication of both public sector and private sector claims. *Kralick v. DOES*, CRB No. 07-043, OHA/AHD No. PBL XX-885, DCP No. 10092 (March 27, 2007).

⁶ Memorandum of Points and Authorities in Support of Petitioner's Application for Review, p.8.