

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

**Department of Employment Services**

VINCENT C. GRAY  
MAYOR



LISA MARÍA MALLORY  
DIRECTOR

**COMPENSATION REVIEW BOARD**

**CRB No. 13-063**

**KIM HAWKINS,  
Claimant–Petitioner,**

**v.**

**WASHINGTON HOSPITAL CENTER and GALLAGHER BASSETT SERVICES,  
Employer/Carrier-Respondent.**

Appeal from an April 26, 2013 Compensation Order by  
Administrative Law Judge Linda F. Jory  
AHD No. 12-346A, OWC No. 667588

Matthew Pepper, Esquire for the Petitioner  
William S. Hopkins, Esquire for the Respondent

Before MELISSA LIN JONES and HENRY W. MCCOY, *Administrative Appeals Judges*, and  
LAWRENCE D. TARR, *Chief Administrative Appeals Judge*.

MELISSA LIN JONES, *Administrative Appeals Judge*, for the Compensation Review Board.

**DECISION AND ORDER**

**FACTS OF RECORD AND PROCEDURAL HISTORY**

Ms. Kim Hawkins worked for Washington Hospital Center (“WHC”) in a sedentary position as a communications operator. On February 10, 2010, she was working a double shift for WHC because of a snowstorm. Cots were provided for a few employees, and when Ms. Hawkins turned over in her cot, it collapsed.

A dispute arose over Ms. Hawkins’ entitlement to permanent partial disability benefits for her left leg and her left arm. At a formal hearing, Ms. Hawkins contended she was entitled to a 20% permanent partial disability rating to her left leg for radiculopathy from her back injury, a 15% permanent partial disability to her left leg for knee residuals, and a 30% permanent partial disability to her left arm.<sup>1</sup> In a Compensation Order dated April 26, 2013, an administrative law

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<sup>1</sup> We note that the ALJ uses the terms disability and impairment as if they are synonymous; however, these terms are distinct and separate concepts. See *Negussie v. DOES*, 915 A.2d 391 (D.C. 2007).

judge (“ALJ”) granted Ms. Hawkins an award of 5% permanent partial disability to her left leg.<sup>2</sup>

On appeal, Ms. Hawkins contends the ALJ erred by not stating with specificity why she rejected Dr. Michael A. Franchetti’s opinions in favor of Dr. Marc B. Danziger’s opinions. Ms. Hawkins also contends the ALJ failed to address the subjective factors and failed to make specific findings regarding Ms. Hawkins’ industrial loss. Finally, Ms. Hawkins contends the Compensation Order lacks specificity when determining her entitlement to permanent partial disability. For these reasons, Ms. Hawkins requests the Compensation Review Board (“CRB”) reverse the April 26, 2013 Compensation Order.

In opposition, WHC asserts the ALJ did explain why she credited Dr. Danziger’s opinions over those of Dr. Franchetti, the ALJ did consider the five subjective factors and industrial loss, and Ms. Hawkins did not sustain her burden of proof. WHC requests the CRB affirm the Compensation Order because it is supported by substantial evidence and is in accordance with the law.

#### ISSUES ON APPEAL

1. Did the ALJ provide sufficient explanation for rejecting Dr. Franchetti’s opinions?
2. Did the ALJ properly analyze the evidence to determine Ms. Hawkins’ entitlement to permanent partial disability benefits?

#### ANALYSIS<sup>3</sup>

##### REJECTING DR. FRANCHETTI’S OPINION

Following her injury, Ms. Hawkins sought treatment from Dr. Reza Ghorbani. Dr. Ghorbani is Ms. Hawkins’ treating physician; however, Ms. Hawkins solicited permanency ratings from an independent medical examination physician, Dr. Franchetti:

As arranged by counsel for claimant, Dr. Michael A. Franchetti performed an Independent Medical Examination of claimant on March 27, 2012. Dr. Franchetti provided claimant with three permanent partial impairment ratings.<sup>[4]</sup>

Because Dr. Franchetti is not a treating physician, the ALJ was not obligated to explain why she favored WHC’s evidence over that of Ms. Hawkins.<sup>5</sup> It is only with respect to treating

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<sup>2</sup> *Hawkins v. Washington Hospital Center*, AHD No. 12-346A, OWC No. 667588 (April 26, 2013).

<sup>3</sup> 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 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).

<sup>4</sup> *Hawkins, supra*, p. 3.

physicians that an ALJ must give reasons for rejecting that medical testimony;<sup>6</sup> therefore, we find no error in the ALJ's favoring Dr. Danziger's opinions over those of Dr. Franchetti.

#### THE FIVE FACTORS

There is no requirement that an ALJ state what portion of a percentage of permanent partial disability is attributable to the D.C. five factors.<sup>7</sup> Nonetheless, Ms. Hawkins complains that the ALJ did not even acknowledge the existence of those five factors.

Regarding Ms. Hawkins' requests for permanent partial disability, the ALJ accepted Dr. Danziger's opinions:

Dr. Danziger examined claimant on two occasions and on May 22, 2012, reported in pertinent part:

While the patient still complains of subjective pain as she has all along, there have really been no objective findings whatsoever on examination or on her MRI scans that would warrant continued treatment. . . . Her objective findings by clinical exam and MRI have always been negligible and there are no findings that would warrant continued treatment at this time. . . . Examination of both knees and both shoulders is just as benign as the examination of her neck and back and there is no further residual symptomatology that needs treatment. When using the AMA Guides to the evaluation of Permanent Impairment Sixth Edition, the patient receives a 0% PPD rating to the left upper extremity. She has no radicular symptoms and no weakness and there is full range of motion with no instability. She has a completely normal neurologic exam. Even when one includes the additional five factors of pain, weakness, atrophy, loss of function and loss of endurance, I find no additional rating applicable and the entire PPD rating to the left upper extremity is 0%.

With regard to the left lower extremity, she has full range of motion with no atrophy and no instability and there are no residual symptoms. There are no objective findings on examination. Thus her entire PPD rating to the left lower extremity is also a 0% rating. Even when one includes the additional five factors of pain, weakness, atrophy, loss of function and loss of

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<sup>5</sup> See *Metropolitan Poultry v. DOES*, 706 A.2d 33, 35 (D.C. 1998).

<sup>6</sup> *Washington Hospital Center v. DOES*, 821 A.2d 898 (D.C. 2003) (Citation omitted.)

<sup>7</sup> See *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.")

endurance, no additional rating is applicable. Thus her rating from the AMA Guides Sixth Edition and the five factors is 0% to the left lower extremity. . . There are no radicular symptoms on examination today and it would be impossible to have a radiculopathy with the fact she has no neuroforaminal narrowing, no nerve root encroachment and no evidence of any foraminal stenosis seen on the MRI of her back.

An additional 15% rating was given by Dr. Franchetti with regard to the knee injury but her knee exam is completely benign with full range of motion and no instability and there is no atrophy. I have no idea how Dr. Franchetti could come up with a 15% rating to the knee. Her rating for the knee should be 0% as well.<sup>[8]</sup>

Inherent in the ALJ's acceptance of Dr. Danziger's opinions is consideration of the five factors which he addressed.

Similarly, the ALJ's consideration of the five factors is evident from the rejection of Ms. Hawkins' argument that the lack of diagnostic test results to support the claim for relief is inconsequential. Regarding pain, the ALJ wrote:

[I]t is difficult to find claimant's testimony regarding the severity of her symptoms credible based on the lack of substantiating medical evidence in this record. Specifically, the undersigned finds claimant's testimony with regard to her trips to the emergency room because her pain was so bad to be unsupported by the record as Dr. Ghorbani makes no mention to her visits to the emergency room and the record does not contain any records from any emergency room with regard to claimant's visits due to her pain other than Dr. Johnson's reference to her treatment on April 8, 2010 at Doctor's Community Hospital. See CE 4 at 1.<sup>[9]</sup>

Regarding weakness, loss of function, and loss of endurance, the ALJ wrote:

Specifically, although claimant testified that she is right handed, see HT at 57, claimant testified with regard to her left arm weakness:

As far as trying to answer telephones, or say if I'm at home, trying to open a jar. I can't open up jars, and I can't do some of the housework anymore, like vacuuming because I have weakness in my left arm where I cannot hold anything for a period of time without having to put it down. So that's the weakness that I'm experiencing in my left arm along with the numbness.

HT at 57, and:

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<sup>8</sup> *Hawkins, supra*, at pp. 5-6.

<sup>9</sup> *Id.* at p. 8.

As far as like this morning trying to put on my boots, it's -- when I try to zip them up or put on my shoes, I don't have any strength, much strength in my arm or in my hand. [] Other activities is, like I said, vacuuming. It's hard for me to hold my arm up for a period of time vacuuming. I have to stop, and sit down, and rest.

HT at 58.

Claimant did not explain why she would attempt to perform these activities with her left hand as opposed to her dominant right hand. Claimant further described her arm symptoms as "Pain -- pain and numbness. I continue to have numbness from my arm all the way down to my fingers and have throbbing through this part of my arm through the nerve. It feels like it's throbbing.[]" HT at 59.<sup>[10]</sup>

Clearly, the ALJ did consider the five factors because the ALJ rejected Ms. Hawkins' testimony directly related to those subjective factors. Again,

[c]ontrary to counsel's assertion that claimant herself is the best evidence, it is difficult to find claimant's testimony regarding the severity of her symptoms credible based on the lack of substantiating medical evidence in this record. Specifically, the undersigned finds claimant's testimony with regard to her trips to the emergency room because her pain was so bad to be unsupported by the record as Dr. Ghorbani makes no mention to her visits to the emergency room and the record does not contain any records from any emergency room with regard to claimant's visits due to her pain other than Dr. Johnson's reference to her treatment on April 8, 2010 at Doctor's Community Hospital. See CE 4 at 1.<sup>[11]</sup>

Furthermore, the ALJ reviewed the medical records of Ms. Hawkins' treating physician which revealed:

Range of motion of the knees was normal bilaterally.

Strength, sensation, and reflexes of the upper extremities are within normal limits bilaterally.

Strength, sensation, and reflexes of the lower extremities are within normal limits bilaterally.<sup>[12]</sup>

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<sup>10</sup> *Id.* at p. 7.

<sup>11</sup> *Id.* at p. 8.

<sup>12</sup> *Id.*

There simply is no merit to Ms. Hawkins' argument that the ALJ failed to consider the five, subjective factors.

#### INDUSTRIAL LOSS

Ms. Hawkins' argument that the ALJ failed to consider industrial loss also is without merit. First and foremost, when the ALJ determined Ms. Hawkins is not entitled to disability awards for impairment to her left knee and left arm because she has no objective findings or residuals, there was no need to consider industrial loss. As for Ms. Hawkins' remaining left leg claim based on radiculopathy, the ALJ made a specific finding that based upon Ms. Hawkins' work capacity and industrial history, no additional disability was warranted above that assessed for pain:

Inasmuch as the record contains no evidence that claimant's left lower extremity impairment due to her pain results in the potential for wage loss as a communications operator, which is a sedentary position, no additional impairment is warranted under *Jones, supra*.<sup>[13]</sup>

#### SPECIFICITY OF AWARD

The ALJ was fully aware of her responsibilities under *Jones*.<sup>14</sup> She started her analysis with the proposition that the Act intends for medical impairment to be viewed as a baseline for determining permanent impairment before assessing the likelihood (or lack thereof) of an effect upon future earnings as the Court of Appeals in *Jones* suggests.<sup>[15]</sup>

In addition to the medical impairment, the ALJ evaluated Ms. Hawkins' subjective complaints (bearing in mind that Ms. Hawkins' testimony had been found not credible in this regard):

While the undersigned does not find Dr. Franchetti's excessive rating of 20% lower leg impairment considering the objective evidence to be reasonable, the undersigned also does not find Dr. Danziger's rating of 0% impairment to the left lower extremity to be a fair estimation of claimant's subjective complaints of pain. Accordingly, the undersigned concludes that due to her consistent complaints of pain in the lower extremity, claimant is entitled to a 5% permanent impairment rating of the left lower extremity.<sup>[16]</sup>

Finally, the ALJ assessed Ms. Hawkins' industrial loss as set forth previously. Given the thorough nature of the ALJ's consideration and the level of attention to the *Jones* requirements, we find no basis for disturbing the ALJ's findings or conclusions.

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<sup>13</sup> *Id.* at p. 9.

<sup>14</sup> *Jones v. DOES*, 41 A.3d 1219 (D.C. 2012).

<sup>15</sup> *Hawkins, supra*, at p. 5.

<sup>16</sup> *Id.* at p. 9.

#### CONCLUSION AND ORDER

The ALJ was not required to provide comprehensive reasons for rejecting the opinion of Ms. Hawkins' independent medical examination physician, Dr. Franchetti. The ALJ properly analyzed the evidence including the subjective factors and industrial loss to determine Ms. Hawkins' entitlement to permanent partial disability. The findings of fact in the April 26, 2013 Compensation Order are supported by substantial evidence in the record, and the conclusions in that Compensation Order are sufficiently specific so as to be in accordance with the law. The April 26, 2013 Compensation Order is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

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MELISSA LIN JONES

*Administrative Appeals Judge*

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August 27, 2013

DATE