

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 16-093

JASON JONES,
Claimant-Respondent,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
Self-Insured Employer-Petitioner.

Appeal from a June 28, 2016 Compensation Order
by Administrative Law Judge Joan E. Knight
AHD No. 16-152, OWC No. 693786

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2016 NOV 17 PM 1 26

(Decided November 17, 2016)

Ryan J. Foran for Claimant
Mark H. Dho for Employer

Before JEFFREY P. RUSSELL, HEATHER C. LESLIE, and GENNET PURCELL, *Administrative Appeals Judges*.

JEFFREY P. RUSSELL for the Compensation Review Board.

DECISION AND PARTIAL REMAND ORDER

FACTS OF RECORD AND PROCEDURAL BACKGROUND

Jason Jones ("Claimant") had a right sided disc herniation for which he had a lumbar discectomy in 2005.

Claimant's low back was again injured on June 29, 2012 when the bus he was operating as a driver for the Washington Metropolitan Area Transit Authority ("Employer") was struck by a falling tree, causing the bus to come to a sudden halt and Claimant to be forcefully thrust forward.

Claimant sought treatment from Providence Hospital's emergency room, after which he came under the care of Dr. J. Michael Joly and Dr. Leonid Selya. After a period of conservative care, pain management and physical rehabilitation, it was determined that Claimant was unable to

return to work as a bus driver. In March 2015, he began working as a United States Postal System mail carrier, a job he continues to hold.

On December 12, 2014, Claimant was evaluated by Dr. Michael Franchetti at his own request for the purpose of an independent medical evaluation ("IME"), and specifically to obtain an evaluation of the degree of permanent partial medical impairment resulting from the bus accident. Relying upon a magnetic resonance imaging ("MRI") study dated August 28, 2014, his physical examination, and the 5th edition of the American Medical Association Guides for the Evaluation of Permanent Impairment ("the AMA Guides, 5th"), Dr. Franchetti opined that Claimant had sustained a 40% permanent partial impairment to his right leg. He did not rate Claimant's left leg in that report.

On November 10, 2015, Claimant was again evaluated by Dr. Franchetti. Relying again upon the AMA Guides, 5th, Dr. Franchetti opined that Claimant had sustained a 40% permanent partial impairment to his right leg, and added that Claimant had also sustained a 20% permanent partial impairment to his left leg. Dr. Franchetti assigned 10 % of the right leg rating to the pre-existing injury, with 30% attributable to the bus accident.

Employer had Claimant evaluated for the same purpose by Dr. David Buchalter, who opined that Claimant had sustained no partial impairment to either leg.

On April 19, 2016, a formal hearing was conducted before an administrative law judge ("ALJ") in the Administrative Hearings Division ("AHD") of the Office of Hearings and Adjudication in the District of Columbia Department of Employment Services. At the hearing, Claimant sought awards under the schedule of 40% permanent partial disability ("PPD") to the right leg and 20% to the left leg.

Employer opposed the claim, arguing that no injury, and hence, no disability had been suffered to the left leg, and any right leg injury from the accident had resolved without any residual medical impairment related to it.

On May 6, 2016, Dr. Franchetti authored a third IME report, without conducting an additional examination. In this report, the doctor opined that under 6th edition of the American Medical Association Guides for the Evaluation of Permanent Impairment ("the AMA Guides, 6th"), Claimant had sustained a 24% permanent partial impairment to the left leg, and a 49% permanent partial disability to the right leg. This report was obtained following a discussion between Claimant's counsel and the ALJ at the formal hearing, and was admitted into the record post-hearing.

On June 28, 2016, the ALJ issued a Compensation Order ("CO") in which it was determined that Claimant has sustained a 20% PPD to each leg as a result of the bus accident.

Employer appealed the awards to the Compensation Review Board ("CRB") by filing Employer's Application for Review and Employer's Memorandum of Points and Authorities in Support of Application for Review ("Employer's Brief"), arguing that the awards were arbitrary

in amount and counter to the great weight of the evidence as it relates to causation of the alleged right leg disability.

Claimant filed a Response to Employer/Insurer's Application for Review ("Claimant's Brief"), opposing the appeal and arguing that the CO is supported by substantial evidence, and should be affirmed.

We affirm the determination that both disabilities are causally related to the bus accident as it is supported by substantial evidence and in accordance with the law. Because the awards are inconsistent with the law as established by the District of Columbia Court of Appeals ("DCCA") in *Jones v. DOES*, 41 A.3d 1219 (D.C. 2012) ("*Jones*") and *M.C. Dean v. DOES and Anthony Lawson*, No. 14-AA-1141 (D.C. July 7, 2016) ("*Lawson*") they are vacated and we remand the matter to AHD for further consideration of the extent of PPD.

DISCUSSION AND ANALYSIS

Employer's argument regarding the findings on causal relationship is that:

The ALJ's reliance on the medical opinion of Dr. Franchetti was not reasonable and appears arbitrary when considering the MRI of the lumbar spine and the records of the treating physicians. Dr. Franchetti's December 12, 2014 IME report states in its diagnosis section, that claimant suffers from:

1. Left lateral herniated disc impressing upon the left L3 nerve root in the neural foramen.
2. Left-sided herniated disc at L4-L5 impressing the left L5 nerve root.
3. L5-S1 extruded right sided herniated disc compressing the thecal sac and right S1 nerve root and producing chronic severe right lower extremity lumbar radiculopathy.

Claimant's Exhibits (CE) No. 3. Pg. 22.

The findings are clearly contrary to the MRI of the lumbar spine dated January 11, 2013.

L3-4: There's no evidence of disc herniation or central canal stenosis.
Mild facet arthrosis.

CE No. 5.

Employer's Brief at 5.

Review of the referenced MRI report itself reveals the following findings by the interpreting radiologist:

FINDINGS: Conus medullaris is unremarkable. Straightening of the lumbar lordosis which can be seen with muscle spasm. Also the lumbar spine is deviated to the left.

L3-4: There's no evidence of disc herniation or central canal stenosis. Mild facet arthrosis.

L4-5: Moderate disc degeneration with endplate spurring and type II reactive Modic endplate changes. Diffuse disc bulge with bilateral foraminal extension and mild bilateral neural foraminal stenosis. Superimposed small central and left posterior paracentral disc protrusion with slight displacement of the traversing L5 nerve root and mild left lateral recess stenosis. Mild bilateral arthrosis, left greater than right. There is a small facet joint effusion.

L5-S1: Small posterocentral disc protrusion which effaces the anterior epidural fat and contacts the traversing S1 nerve roots bilaterally.

IMPRESSION

1. Straightening of the lumbar lordosis which can be seen with muscle spasm.
2. Small central and left posterior paracentral disc protrusion at L4-5 which results in slight displacement of the traversing left L5 nerve root and in combination with the facet arthrosis mild left lateral recess stenosis at this level.
3. There is a small posterocentral disc protrusion at L5-S1 which contacts the traversing S1 nerve roots bilaterally. These findings could produce the patient's left lower extremity symptoms.

CE 5 (page 26 of Claimant's Exhibits).

It is true that Dr. Franchetti's assessment could be interpreted to be at odds with the January 11, 2013 MRI. However, this is not the MRI study to which Dr. Franchetti refers. Rather, in his December 12, 2014 report, Dr. Franchetti refers to an MRI scan dated August 28, 2014, obtained by a Dr. Tesfayohannes, which, according to the IME report:

revealed a L3-L4 left lateral herniated disc impressing upon the left L3 nerve root in the neural foramen and a broad-based left-sided herniated disc at L4-L5 compromising both the thecal sac and left L5 nerve root, and an extruded right lateral herniated disc at L5-S1 compressing the right S1 nerve root as well.

CE 3.

It is evident from considering the January 11, 2013 MRI referred to by Employer that, despite the single seemingly benign sentence pulled from the MRI report and quoted in Employer's Brief,

the MRI revealed numerous abnormalities, both right and left, and either impingements or “contacts” with nerve roots in multiple places. Further, although not in the record, the August 28, 2014 MRI study quoted by Dr. Franchetti is the one upon which he based his conclusion.

Employer proceeds to argue that “the overwhelming weight of the treatment records is devoid of any reference to any problems with the right leg.” Employer’s Brief at 6. Employer also asserts that “the majority of the treatment history shows that claimant had a hip related contusion with no complaints to the right leg for over two years following the work injury.” Employer’s Brief at 8.

This assertion is directly contradicted by Employer’s own Brief, however, where on page 3 Employer writes “On August 20, 2013, Dr. Selya noted claimant had back pain radiating to both lower extremities. Dr. Selya diagnosis was post laminectomy syndrome at L4-5 associated with a recurrent disc herniation. Claimant had a prior history of lumbar discectomy in 2005 for a right sided disc herniation.”

This is not “over two years after the accident.” Neither was the MRI referred to above and throughout Employer’s Brief. Rather, the MRI pre-dated Dr. Selya’s August 20, 2013 comments, having been obtained on January 11, 2013, about six months following the June 29, 2012 bus accident. And, although Employer correctly asserts that Claimant’s treating physicians focused on what was initially thought to be a left hip bursitis, at least as early as December 27, 2012, Dr. Selya noted that “the symptoms are beginning to look more like radiculopathy than hip bursitis.” CE 2 (CEs page 10).

While the evidence is not overwhelming, and Employer makes a legitimate argument when it points out the somewhat delayed onset of right sided leg complaints. But they are not nearly as late as Employer posits, and their delayed onset was not unknown to the treating physicians or Dr. Franchetti, yet they came to the conclusion that the work-related bus accident preceded the onset of a condition ultimately diagnosed as post laminectomy syndrome related to that accident. We do not agree the evidence is “overwhelmingly” in Employer’s favor, and find the report of Dr. Franchetti alone is substantial evidence supporting the ALJ’s conclusion that the work injury resulted in bilateral and disabling leg impairments.

We reject Employer’s arguments that acceptance of Dr. Franchetti’s opinion concerning Claimant having sustained bilateral radiating injuries to her legs is arbitrary. While our review would be simpler if that the August 2014 MRI had been made part of the record, both parties were aware of Dr. Franchetti’s reliance upon it, yet neither party offered it.

Regarding the extent of the disability to the left leg, Employer argues that the 20% award is arbitrary, asserting the same argument as was raised with regard to causal relationship, that is “Dr. Franchetti’s suggestion of a left lateral herniated disc impressing upon the left L3 nerve root is contrary to the findings on the MRI.” Employer’s Brief at 8. We have already rejected that argument above.

We recognize that the award to the left leg coincides with the 20% rating assigned by Dr. Franchetti and that it therefore is arguably supported by substantial evidence and that the same

cannot be said concerning the award to the right leg. No physician has opined that Claimant sustained a 20% medical impairment to the right leg.

But both awards must be vacated. The following is the CO's concluding analysis regarding how the awards were determined:

While the undersigned accepts that Claimant's medical impairment to the right lower extremity is 15%; [sic] based upon Claimant's testimony concerning the vocation [sic] impact it is appropriate to decrease Dr. Franchetti's medical ratings for atrophy, pain and loss of function and endurance to encompass Claimant's residual impairment deficits. Thus, the record supports a 15% rating with an additional 3% for pain and 2% for loss of endurance for a total permanent partial disability to the right lower extremity of 20%. For the left lower extremity, 15% impairment for left-sided radiculopathy is appropriate with an additional 3% for pain and 2% for loss of endurance is reasonable given his deficits for a total permanent partial disability to the right lower extremity of 20%.

CO at 10, 11.

Although we are not certain exactly what the ALJ meant in this passage, one thing is clear: there is no explanation for the 2% and 3% figures. This is precisely the error that the DCCA found in *Jones v. DOES*, 41 A.3d 1219 (D.C. 2012), and it also runs afoul of *Lawson, supra*:

We conclude that the ALJ erred in failing to demonstrate a nexus between Mr. Lawson's personal and social activities and his wage earning capacity, and therefore the disability award should not have been increased by non-occupational consequences of an injury. *A schedule award should not increase based on functional impairment of personal and social activities because those are beyond the economic scope of the Act.*⁹ While the CRB's observation that personal and social activities may reflect work-related limitations is consistent with our holding, those activities are not independently compensable harms. Contrary to our concurring colleague, we conclude that *consideration of personal and social activities is only consistent with the legislative history and structure of the Act if there is a nexus to wage-earning capacity*, so a remand on this issue is unnecessary.

* * *

We agree that determining "occupational capacity is precisely what an ALJ is tasked to do," but it is not clear that occupational capacity should be an independent factor in a vacuum. *Limitations of occupational activities are assessed under the statutory structure* (with the Maryland factors of pain, weakness, atrophy, loss of endurance, and loss of function), and our recent

decisions have emphasized that *variance from the physical impairment rating to the economic disability rating should be specifically explained*. See *Bowles* [*v. DOES*, 121 A3d 1264 (D.C. 2015)] *supra*, at 1269 – 70 (remanding where disability award could not be derived from summation of the possible evidence: “No combination of 7%, 8%, and 5% add[s] up to just 10%”); *Jones*, [*v. DOES*, 41 A.3d 1219, (D.C. 2012)] *supra*, 41 A. 3d at 1226 (remanding for further findings where the basis of a 7% disability award “and not, for example, 1%, 10% or 30% -- is a complete mystery.”)

⁹ *Smith v. District of Columbia Dep’t of Emp’t Servs.*, 548 A.2d 95, 100 (D.C. 1988), explains that “compensation under the Act is predicated upon the loss of wage earning capacity, or economic impairment, and not upon functional disability or physical impairment.” See also *Upchurch v. District of Columbia Dep’t of Emp’t Servs.*, 783 A.2d 623, 627 (D.C. 2001) (stating “[d]isability is an economic and not a medical concept” based on the “loss of wage-earning capacity”).

Lawson, *supra* at 23 - 25 (footnote in original, emphasis added).

From the italicized portions of the above quote, the DCCA has sanctioned the use of medical impairment as a proxy for PPD under the schedule. See also *Mann v. Knight Networking*, CRB No. 16-001 (July 26, 2016).

And, unlike the causal relationship issue, the ALJ did not accept Dr. Franchetti’s opinion on the extent of medical impairment. Rather, the ALJ found Dr. Franchetti’s ratings to be flawed, and arrived at PPD awards that are as unexplained as the defective award in *Jones*.

We have no choice but to return the matter for further consideration of the extent of permanent partial disability in a manner consistent with *Lawson*, *Jones* and *Mann*.

CONCLUSION AND ORDER

The finding that Claimant has sustained permanent partial disabilities to both legs is supported by substantial evidence, is in accordance with the law, and is affirmed. The extents of the awards are impermissibly arbitrary and are VACATED. The matter is REMANDED to the Administrative Hearings Division for further consideration of the extent of each disability in a manner consistent with *Jones v. DOES*, 41 A.3d 1219 (D.C. 2012), *M.C. Dean v. DOES and Anthony Lawson, Intervenor*, DCCA No. 14-AA-1141 (July 7, 2016), and *Mann v. Knight Networking*, CRB No. 16-001 (July 26, 2016).

So ordered.