

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA M. MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 11-034

JEFFREY SMITH,

Claimant–Petitioner,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,

Self-Insured Employer–Respondent.

Appeal from a Compensation Order by
Administrative Law Judge Heather C. Leslie
AHD No. 10-530, OWC No. 659236

Michael J. Kitzman, Esquire, for the Petitioner
Donna J. Henderson, Esquire, for the Respondent

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

HENRY W. MCCOY, *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 §§ 32-1521.01 and 32-1522 (2004), 7 DCMR § 230, *et seq.*, and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005).

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OVERVIEW

Claimant-Petitioner (Petitioner) was working for Employer-Respondent (Respondent) as a bus mechanic on April 11, 2009 when he experienced pain and weakness in his left arm while installing a rear suspension bar on a bus. Petitioner initially treated with Dr. Michael Magee who referred him to Dr. Leonid Selya for a surgical consultation. Tests performed by Dr. Selya confirmed a diagnosis of brachial plexus injury.

Dr. Selya released Petitioner to light duty work as of October 19, 2009 with a lifting restriction of not more than eleven pounds and also declared that this condition was permanent. Petitioner eventually returned to work for Respondent in a less physically demanding role as a mechanic performing minor bus repairs. Petitioner continued to experience weakness in his left upper extremity and filed a claim for a 72% permanent partial disability (PPD) of the left upper extremity.

After a formal hearing on the claim, the presiding Administrative Law Judge (ALJ) denied the claim for relief at the percentage requested by Petitioner; but found that he was entitled to an award of 20% PPD to the left upper extremity. *Smith v. WMATA*, AHD No. 10-530, OWC No. 659236 (March 16, 2011) (CO). Petitioner filed a timely appeal, with Respondent filing an opposition.

On appeal, Petitioner argues the ALJ committed error by not properly considering and addressing the requisite factors in determining the percentage of loss sustained and therefore the CO is not supported by substantial evidence. Respondent argues to the contrary and that the CO should be affirmed.

ANALYSIS

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. *See* D.C. Workers' Compensation Act of 1979, as amended, § 32-1501 *et seq.*, at § 32-1521.01 (d)(2)(A). "Substantial evidence", as defined by the District of Columbia Court of Appeals, is such evidence as a reasonable person might accept to support a particular conclusion. *Marriott International v. D.C. Dept. of Employment Services*, 834 A.2d 882 (D.C. 2003). Consistent with this standard of review, the CRB and this Review Panel are constrained to 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 CRB might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

Turning to the case under review, Petitioner initially argues that the ALJ committed error by improperly rejecting the opinion of his treating physician. Claimant's Memorandum of Points and Authority, unnumbered p. 4. Specifically, Petitioner argues that it is established that a schedule loss must be based on an expert medical opinion, citing *Wormack v. Fishback & Moore Electric, Inc.*, CRB No 03-159 (July 22, 2005) and *Corrigan v. Georgetown University*, CRB No. 06-094 (September 14, 2007). *Id.* at unnumbered p. 5. Petitioner asserts the ALJ committed error by failing to make a determination based on expert medical opinion and substituting her own judgment. *Id.* We find no merit in this argument.

The District of Columbia Court of Appeals has stated that for claims filed seeking relief pursuant to D.C. Code § 32-1501(8), compensation is awarded for disability, and disability is an economic concept rather than a medical condition. *Negussie v. D.C. Dept. of Employment Services*, 915 A.2d 391, 397 (D.C. 2007), citing *Washington Post v. D.C. Dept. of Employment Services*, 853 A.2d 704, 707 (D.C. 2004). The Court further stated that “[D]isability, as defined in our statute, ultimately requires a legal determination.” *Id.*

As the Court in *Negussie* concluded, there is nothing in either the plain language or the statutory provisions governing the award of schedule benefits or in the legislative history that suggests “explicitly, or even implicitly, that the determination of disability is the sole function of a medical doctor.” 915 A.2d at 396. Thus, the ALJ here committed no error in not basing her determination on expert medical opinion.¹

In addition, while the ALJ noted that she gave due deference and accepted the opinions of the treating physician on the issue of medical causal relationship, that physician’s opinion of 72% impairment was rejected as being excessive and not supportable given the use Petitioner has in his left arm to perform his current work tasks and activities of daily living. The ALJ also took exception to Dr. Selya’s rating given his express statement that he was unfamiliar with performing impairment ratings. As the ALJ has stated her reasons² for not accepting the opinions of the treating physician and those reasons are supported by substantial evidence in the record, they will not be disturbed.

Next, Petitioner argues that while the ALJ noted his continuing complaints of pain, weakness, and loss of endurance and function, she did not “expressly note if these findings were taken into account in determining the level of disability awarded” and this constitutes reversible error. We disagree.

In *Cook v. Schindler Elevator Corporation*, CRB No. 08-177 (October 16, 2008), this body stated:

The ALJ committed reversible error in failing to take into consideration factors recognized in *Corrigan v. Georgetown University*, *supra*, as legitimate matters to be assessed in determining the degree of disability for schedule awards. Citing *Negussie*, the CRB in *Corrigan* noted the broad range of factors requiring consideration in schedule award claims, including “in addition to the medical impairment rating, a claimant’s ‘pain, weakness, atrophy, loss of endurance, and loss of function’” in determining the degree of disability.

¹ In fact, the CRB previously “noted in *Corrigan*, *supra*, in light of the ... decision in *Negussie*...there can be no doubt about an ALJ’s authority to determine the degree of disability for claims of schedule loss under the Act, and of an ALJ’s inherent discretion in exercising that authority to consider both medical and non-medical evidence.” *Cook v. Schindler Elevator Corp.*, CRB No. 08-177, AHD No. 07-330, OWC No. 601834 (October 16, 2008).

² See *Canlas v. D.C. Dept. of Employment Services*, 723 A.2d 1210 (D.C. 1999).

Id. at 9.

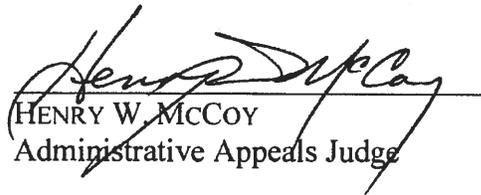
As stated in *Cook*, there is only a requirement to take into consideration the D.C. five factors. There is no concomitant requirement to state what portion of the percentage awarded is attributable to those five factors. As the ALJ here did take into consideration the five factors when arriving at the 20% schedule award, as acknowledged by Petitioner, no error is found.

Finally, Petitioner seeks reversal arguing the ALJ “did not sufficiently compensate [him] for the industrial loss that he sustained.” Petitioner does not question the legal standard used and applied by the ALJ for industrial loss of use; but argues that the evidence supports a “higher” ultimate finding. Petitioner in effect asks that we re-weigh the evidence in his favor; an action we are constrained from taking, especially when the ALJ, as demonstrated in the instant matter, has supported her reasoned decision by substantial evidence in the record.

CONCLUSION AND ORDER

As the Compensation Order of March 16, 2011 is supported by substantial evidence in the record and is in accordance with the law, it is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:


HENRY W. MCCOY
Administrative Appeals Judge

September 9, 2011

DATE