

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

**Department of Employment Services**

MURIEL BOWSER  
MAYOR



DEBORAH A. CARROLL  
DIRECTOR

**COMPENSATION REVIEW BOARD**

**CRB No. 16-066**

**JESSE LAMBERT,  
Claimant-Petitioner,**

v.

**CROWN CONSULTING, INC.,  
and QBE AMERICAS INC.,  
Employer and Insurer-Respondents.**

Appeal from a Compensation Order issued April 28, 2016  
by Administrative Law Judge Amelia G. Govan  
AHD No. 15-140A, OWC No. 722701

DEPT. OF EMPLOYMENT  
SERVICES  
COMPENSATION REVIEW  
BOARD  
2016 SEP 19 AM 10 40

(Decided September 19, 2016)

Steven H. Kaminski for Claimant  
Jose L. Estrada for Employer

Before LINDA F. JORY, GENNET PURCELL AND JEFFREY P. RUSSELL, *Administrative Appeals Judges.*

LINDA F. JORY for the Compensation Review Board.

**DECISION AND ORDER**

**FACTS OF RECORD AND PROCEDURAL HISTORY**

As a Senior Policy Analyst for Employer, Claimant performed research and coordinated research groups for interagency aircraft drone systems. On October 29, 2014, Claimant took a misstep over an irregular sidewalk dislocating and fracturing his left kneecap as well as tearing a ligament in his left leg. Claimant was treated by orthopedic surgeon, Dr. Frank Pettrone, who surgically repaired Claimant's left knee on November 7, 2014. Claimant no longer works for Employer, but has located other sedentary employment earning \$15,000 more annually.

At Claimant's request, an independent medical examination ("IME") was done on July 16, 2015 by orthopedic specialist David U. Arango, M.D. Dr. Arango provided an impairment rating of 35% of the left lower extremity. Claimant requested an impairment rating from Dr. Pettrone. Dr. Pettrone opined that Claimant had not reached maximum medical improvement at the time of

his last examination on September 17, 2015 but gave Claimant an impairment rating of 25%. Dr. Pettrone further noted that he disagreed with Dr. Arango's rating in that it "almost doubled the rating for weakness". At Employer's request, Dr. Robert A. Smith rated Claimant on January 20, 2016 and found Claimant to have a 9% medical impairment of the left lower extremity.

A full evidentiary hearing occurred on March 2, 2016. Claimant sought an award of permanent partial disability ("PPD") in the amount of 35% to his left lower extremity. The sole issue presented for adjudication was the nature and extent of Claimant's disability.

A Compensation Order ("CO") issued on April 28, 2016 which awarded Claimant a 13% PPD award to the left lower extremity.

Claimant timely appealed. Claimant argues the award is not in accordance with the law or supported by the substantial evidence in the record and must be set aside. Employer opposes the appeal, arguing the CO is supported by the substantial evidence in the record and in accordance with the law.

#### ANALYSIS<sup>1</sup>

Claimant initially asserts the Administrative Law Judge ("ALJ") erred in rejecting the opinion of the treating physician and erred in favoring Employer's IME opinion without explanation. Specifically with regard to the treating physician's opinion, Claimant asserts the CO lacks "any explanation of why the treating physician's opinion was rejected". Claimant's un-numbered brief at 4.

With regard to the ALJ's handling of the opinion of Dr. Pettrone, Employer asserts:

The Compensation Order specifically states that the ALJ credited Dr. Pettrone's opinions that "Claimant had not reached maximum medical improvement by September of 2015, as well as his opinion that Dr. Arango's July 2015 rating was too high" (CO, p.4.) The ALJ found that Dr. Smith's basic findings were consistent with the Claimant's own testimony and condition as described by the medical reports. (CO, p.4-5). As Dr. Pettrone noted that Claimant had not yet reached maximum medical improvement as of September 2015, it is clear why the ALJ chose to decrease Claimant's IME rating from Dr. Arango which was issued in July 2015.

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<sup>1</sup> The scope of review by the Compensation Review Board ("CRB") is generally limited to making a determination as to whether the factual findings of the 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, D.C. Code § 32-1501, *et seq.*, ("Act") at § 32-1521.01 (d)(2)(A), and *Marriott International v. DOES*, 834 A.2d 882 (D.C. 2003). Consistent with this standard of review, the CRB and this review panel must affirm 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 where this panel might have reached a contrary conclusion. *Id.* at 885.

Employer's brief at 5.

With regard to the opinion of Dr. Smith, Employer asserts:

Also, Claimant's contention that the ALJ did not explain why she favored Dr. Smith's opinion is inaccurate, as the ALJ noted Dr. Pettrone's opinion that Claimant had not yet reached maximum medical improvement, as well as that Claimant's testimony and condition as described in the medical records were consistent with Dr. Smith's findings.

We agree with Employer's assertion with regard to the ALJ's handling of both Dr. Pettrone's and Dr. Smith's opinions and find the ALJ did not commit an error in rejecting the opinion of Dr. Pettrone. A finding of a permanent impairment can only follow a finding that the injury has reached maximum medical improvement, which Dr. Pettrone determined Claimant had not reached. In order to prove entitlement to schedule member permanent partial disability benefits, a claimant must prove maximum medical improvement. *Ganthier v. Fairmont Hotel*, CRB No. 12-008 (May 22, 2012).

Claimant's further asserts:

One issue that all the doctors noted in their examinations was that Claimant had either 2 cm of atrophy or 3 cm of atrophy. Yet, the ALJ assigned an additional 1 % impairment each for pain, weakness, loss of endurance, and loss of function. No additional impairment was assigned for atrophy. As such, the decision was not in accordance with the law and not based on substantial evidence.

Claimant's un-numbered brief at 4.

We agree with Employer's position with regard to the ALJ's treatment of Claimant's atrophy. Employer responds:

Claimant's Application for Review states that the ALJ did not assign any additional impairment for atrophy. When referring to Dr. Smith's opinion on permanency, the ALJ stated, "He specifically incorporated only the factors of pain, atrophy, and weakness into the 9% rating, which came directly from Table 16-3 on page 510 of the Sixth Edition. (CO, p.5) (emphasis added). This is in reference to Dr. Smith's IME report which states, "The functional history adjustment (knee pain with activity) and physical examination adjustment (muscle atrophy/weakness and patellofemoral crepitation) would make this a Grade E condition. Therefore the final injury is Class I, Grade E resulting in a 9% lower extremity impairment" (EE-1)(emphasis added). Dr. Smith actually notes 3 cm of atrophy in his examination of the report, while Dr. Arango and Dr. Pettrone noted 2cm. Based on the Sixth Edition of the AMA Guidelines, this rating was appropriate. The ALJ found that the Claimant was entitled to an additional 1 % impairment each for pain, weakness, loss of endurance, and loss of function. The

ALJ took into consideration the fact that Dr. Smith had already accounted for atrophy in issuing a 9% rating.

Employer's brief at 6.

We agree with Employer that Dr. Smith did consider Claimant's atrophy in providing his 9% impairment rating and find no error in the ALJ's assessment of additional 1% each for only Claimant's pain, weakness, loss of endurance and loss of function. In so concluding, we are mindful of the direction the DCCA has gone with regard to "non-occupational" limitations as described in *M.C. Dean, Inc. v. DOES (Anthony Lawson Intervenor)*, No. 14-AA-1141 (July 7, 2016)(*Lawson*) which we cited and applied in *Mann v. Knight Networking & Web Design*, CRB No. 16-001 (July 26, 2016):

We also note that the ALJ's consideration of any non-occupational limitations is now deemed irrelevant to consideration of the degree of disability under the schedule unless the ALJ can show a "nexus" between the non-occupational limitations and specific requirements of the pre-injury job.

Citing *Smith v. DOES*, 548 A.2d 95, 100 (D.C. 1988), the Court in *Lawson* held:

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.

Although the ALJ made a finding with regard to Claimant's ability to walk or bike on hilly terrain, she did not reference this limitation as a "daily activity" that Claimant had to limit or adjust as a result of his left leg injury when she afforded the additional 4% impairment based on the five factors.

#### CONCLUSION AND ORDER

The Compensation Order is supported by substantial evidence, in accordance with the law and is **AFFIRMED**.

*So ordered.*