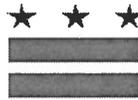


GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 15-090

JIMMIE ALLEN,
Claimant-Respondent,

v.

CORRECTIONS CORPORATION OF AMERICA
and AIG CLAIMS SERVICES, INC.,
Employer/Carrier-Petitioner.

Appeal from a April 30, 2015 Compensation Order by
Administrative Law Judge Nata K. Brown
AHD No. 13-207, OWC No. 668440

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2015 OCT 5 AM 10 53

(Decided October 5, 2015)

Ryan J. Foran for Claimant
Joel E. Ogden for Employer

Before, LINDA F. JORY, HEATHER C. LESLIE, and JEFFREY P. RUSSELL, *Administrative Appeals Judges.*

LINDA F. JORY for the Compensation Review Board.

DECISION AND REMAND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

Jimmie Allen (Claimant) was employed as a correctional officer and a firearms instructor for Corrections Corporation of America (Employer). In 2009, Claimant began treating with Dr. Phillip Bovell for pain in his left knee. An MRI ordered by Dr. Bovell and performed on December 2, 2009 revealed a cyst or lesion on the left knee and a 1.2 cm sized horizontal non-displaced tear through the outer margin of the posterior horn of the left medical meniscus. Dr. Bovell recommended surgery which Claimant declined.

On March 29, 2010, Claimant slipped on a wet floor and landed onto his left knee. He had immediate pain and swelling and sought treatment from Dr. Wiemi A. Douoguih. An MRI was ordered which was performed on April 1, 2010. The radiologist who performed the MRI indicated the results were: no meniscal tear, increased signal in the anterior cruciate ligament

commensurate with an ACL sprain and a high signal in the medical collateral ligament commensurate with a high grade sprain/ partial tear.

Although Dr. Douoguih was of the opinion that there was no clinical evidence of an MCL tear or an ACL tear on April 12, 2010, on April 26, 2010 he diagnosed Claimant with a meniscus tear and recommended arthroscopic partial meniscal resection.

On November 8, 2011, Employer sent Claimant to be examined by Dr. Robert O. Gordon for an Independent Medical Examination (IME) who opined that Claimant suffered from a left knee strain. On October 31, 2012, Claimant underwent an IME by Dr. Joel D. Fechter, who after examining Claimant and his records, stated that Claimant's pain symptoms were significantly worsened by the March 29, 2010 work related injury. Dr. Fechter provided Claimant with a permanent partial disability (PPD) rating of 26% impairment of the left lower extremity. Claimant was sent back to Dr. Gordon on January 9, 2013 for his opinion with regard to any PPD Claimant might have in the left leg. Dr. Gordon opined that Claimant had 0% PPD relying on the 6th edition of the AMA guidelines and the "five factors".

A full evidentiary hearing occurred on July 25, 2013.

Claimant sought a PPD award of the left lower extremity. The Administrative Law Judge (ALJ) who conducted the hearing left the agency without issuing a Compensation Order (CO) and the matter was re-assigned. Following the issuance of a Show Cause Order, neither party objected to another ALJ deciding the matter based on the record that closed on August 6, 2013. An ALJ issued a CO on April 30, 2015. The ALJ concluded Claimant was entitled to a 26% PPD award to his left lower extremity.

Employer timely appealed. Employer asserts that with the presumption rebutted, the ALJ erred in finding Dr. Fechter's opinion supports causation. Employer also asserts the ALJ did not offer "specific grounds by which to completely adopt on a wholesale basis the opinion of one IME over another" and her findings with respect to the Claimant's change in job duties were not supported by substantial evidence.

Claimant has responded asserting that the ALJ's causal relationship conclusion is supported by substantial evidence, as according to Claimant, Dr. Fechter based his opinions, in part, on the diagnostic testing that Dr. Gordon did not address. Claimant also argues with respect to the 26% PPD award that Dr. Fechter reviewed and considered all of the Claimants' medical information related to his left knee and based his opinion, in part, on the diagnostic testing that Dr. Gordon failed to address.

ISSUE ON APPEAL

Is the April 30, 2015 Compensation Order supported by substantial evidence and in accordance with the law?

ANALYSIS¹

Is the ALJ's conclusion that Claimant established a causal relationship between Claimant's left knee complaints and the work injury, supported by substantial evidence?

As Employer correctly points out “The complete analysis of the [ALJ] on the causal relationship issue is contained in the following paragraph”:

On October 31, 2012, Dr. Fechter opined that Claimant's pain symptoms were significantly worsened by the March 29, 2010 work related injury. (CE 2) After a five-month gap after Claimant's initial left knee complaints, there are no other triggering events evidence, other than the fall on March 29, 2010, that explain the onset of Claimant's current pain symptoms and condition. Until March 29, 2010, he continued his normal work duty and no other complaints arose until the work-related injury on that date. Claimant's current condition was an aggravation of an underlying condition by the work related injury that occurred on March 29, 2010.

CO at 6.

Employer asserts that the ALJ's consideration of a “five-month gap” between Claimant's initial left knee complaints and the work injury on March 29, 2010 is erroneous. Employer argues “Any ‘gap’ should be measured from the date of last treatment before the accidental injury. The last treatment of record is the 01/12/10 report of Dr. Bovell which recommended ongoing physical therapy and noted that the knee was still tender with joint line pain persisting along with swelling”. Employer's Brief at 7.

Nevertheless, Employer argues that Dr. Fechter's report does not meet Claimant's burden of establishing by a preponderance of evidence that Claimant's alleged PPD is medically causally related to the work injury of March 29, 2010, as his statement that Claimant's pain symptoms were significantly worsened by the March 29, 2010 work related injury was not an opinion with regard to causation, only an outline of Claimant's allegations.

Upon review of Dr. Fechter's report we note that he stated:

When the patient was seen back on 12/8/09, he was noted to have had improvement. No surgical treatment was recommended. Physical therapy, if

¹ The scope of review by the Compensation Review Board (CRB) is 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. D.C. Code § 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”). “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 Int'l. v. DOES* 834 A.2d 882 (D.C. 2003). Consistent with this scope of review, the CRB and this Panel are bound 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 where the reviewing authority might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885

needed, was discussed. No further visits are noted here. Symptoms were significantly worsened by the injury of 3/29/10.

Employer further asserts the ALJ was under the mistaken impression that there was a requirement that the Employer show some other triggering event to explain the onset of Claimant's current complaints. We must agree with Employer that it is not required to show some other triggering event actually caused Claimant's symptoms, however we do not find that this statement made by the ALJ is the basis for her decision that Claimant met his burden of production. While we agree that Dr. Fechter may have merely recited Claimant's history when he stated Claimant's pain symptoms were significantly worsened by the March 29, 2010 work related injury, we note that this statement is consistent with Dr. Douoguih's April 12, 2010 report, wherein he notes Claimant reported the pain was not present prior to the March 29, 2010 injury. While this Panel could certainly find that substantial evidence supports a finding that Claimant's condition was not worsened by the work injury, we also cannot conclude that Dr. Fechter's report is not sufficient to establish causal relationship between any alleged impairment and the March 29, 2010 incident. *See Marriott, supra at 885.*

Thus, we affirm conclude the ALJ's conclusion that Claimant established by a preponderance of evidence that his current symptoms are causally related to the March 29, 2010 injury.

Is the ALJ's conclusion that Claimant sustained a 26% permanent partial impairment supported by substantial evidence?

With regard to the nature and extent of Claimant's disability, Employer asserts:

The administrative law judge neglects to note that no doctor, treating or otherwise, has indicated that the Claimant is capable of anything less than his pre-injury employment. In fact, at the time that the Claimant was evaluated by both Dr. Gordon and Dr. Fechter, he had returned to work in his full capacity.

The administrative law judge made a finding which was completely inconsistent with the evidence to the effect that the Claimant's job duties were changed 'due to the diminished usage that the Claimant now has in his left knee.' There is no evidence that the Claimant was required to change job duties or that he was restricted in any way. To the contrary, the Claimant took on additional duties at work, and there is no evidence that his choice to do so was for any reason other than professional advancement. (See HT 18-20). Accordingly, this factual finding was not supported by substantial evidence.

The administrative law judge did not offer specific grounds by which to completely adopt on a wholesale basis the opinion of one independent medical evaluator over another. Her findings with respect to the Claimant's change in job duties were not supported by substantial evidence. They must be reversed and this matter remanded for an appropriate analysis.

Employer's Brief at 9, 10.

We agree that the CO does not contain an appropriate analysis to support a finding of 26% PPD to the left leg.

To arrive at the 26% rating, Dr. Fechter explained:

On 3-29-10, while at work for CCA, the patient sustained injury to his left knee. With conservative treatment including a steroid injection there was some improvement. The possibility of surgical treatment was discussed but the patient was not interested in this. At the present time he continues to have significant complaints and findings. In accordance with AMA Guidelines as well as taking into account pain, weakness, atrophy, loss of endurance, and loss of function, the patient is entitled to 26% impairment of the left lower extremity. All opinions in this report have been stated within a reasonable degree of medical certainty.

Despite Dr. Fechter's lack of explanation, the ALJ relied on the 26% rating and added no additional explanation of her own as to how Claimant had established entitlement to the 26% impairment:

On October 31, 2012, Claimant sought Dr. Joel D. Fechter for an Independent Medical Examination (IME). Dr. Fechter noted that Claimant wants to avoid surgery. Dr. Fechter opined that Claimant's pain symptoms were significantly worsened by the March 29, 2010 work related injury. (CE 2) He noted that Claimant was improved when last seen on December 8, 2009; however, presently, Claimant had continued difficulties with pain, swelling, popping and clicking, and buckling in the left knee. (CE 2) According to the AMA guidelines as well as taking into account pain, weakness, atrophy, loss of endurance and loss of function, Dr. Fechter opines that Claimant is entitled to 26% impairment of the left lower extremity. (CE 2).

Claimant's job duties were changed from the "housing block" which consists of managing 150 inmates on hand, to "parole", which consists of managing one or very few inmates at a time. (HT 37) This is due to the diminished usage that Claimant now has in his left knee. Accordingly, Claimant has a permanent partial disability.

I hereby find and conclude, based upon a review of the record evidence as a whole, that Claimant is entitled to a 26% permanent partial disability award to his left lower extremity.

CO at 7.

Employer correctly asserts there is no support in the record for the ALJ's statement that Claimant's job duties were changed "due to the diminished usage that Claimant now has in his left knee". To the contrary, Claimant testified that in addition to his correctional officer job he works as a weapons instructor and was still doing so at the time of the formal hearing. While he

testified that his job has been reclassified to the parole area, he did not testify that he requested the change due to his left knee. HT at 25.

The Administrative Hearing Division ALJ's are tasked with determining the effect of a schedule injury on future wage loss which the District of Columbia Court of Appeals (DCCA) has acknowledged requires the exercise of discretion and prediction. See *Jones v. DOES*, 41 A.3d 1219 (D.C. 2012) (*Jones*) *Negussie v. DOES*, 915 A.2d 391 (D.C. 2007) (*Negussie*); *Bowles v. DOES*, ___A.3d ___ (August 6, 2015).

Specifically, the Court in *Negussie* stated "Hence, we hold that ALJs have discretion in determining disability percentage ratings and disability awards because, as used in the Act, "disability" is an economic and legal concept which should not be confounded with a medical condition, and that in this case the ALJ erred by following decisions of the Director of DOES that require ALJs to choose a disability percentage rating provided either by the claimant's or the employer's medical examiner. *Negussie, supra* at 392.

Thereafter in *Jones*, the DCCA issued a decision that while not limiting the ALJ's discretion has cautioned that in making a legal determination of disability, the ALJ should not arrive at an arbitrary amount but should come to a conclusion based on a complex of factors, taking into account physical impairment and potential for wage loss. *Jones, supra*. .

The Panel agrees that there will be situations where merely choosing a physician's rating over another physician could be supported by the evidence of record if the physician adequately explains the rating and there is no evidence of further wage loss. However, that is not the case here. Dr. Fechter provided no explanation for his conclusion that Claimant's left knee sprain has resulted in a 26% PPD rating. Moreover, the ALJ clearly based her decision to award Claimant PPD benefits on her unsupported determination that Claimant experienced a change in job duties. There is no evidence that the change in job duties would result in future wage loss.

As the DCCA offered in *Jones* "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." Given that the Act specifically approves the use of the American Medical Association Guides to the Evaluation of Permanent Impairment (AMA Guides) and the "Maryland five factors" in determining disability, it is rational to start 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.

However, absent further explanation by the ALJ, we cannot conclude the award of 26% PPD of the left leg is supported by substantial evidence or in accordance with the law and the award is vacated. The matter is remanded for further discussion and analysis consistent with *Negussie*, and *Jones, supra*.

CONCLUSION AND ORDER

The ALJ's conclusion that Claimant's left leg symptoms remain causally related to the March 29, 2010 work injury is supported by substantial evidence; in accordance with the law and accordingly **AFFIRMED**. The conclusion that Claimant has established entitlement to a 26% PPD award is not supported by substantial evidence and is not in accordance with the law and is **REVERSED**. The matter is **REMANDED** for further proceedings and analysis consistent with the DCCA decisions in *Jones and Negussie, supra*.

So ordered.