

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
ACTING DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 14-114

JOHN P. AYERS,
Claimant-Respondent,

v.

COASTAL GUNITE CONSTRUCTION and ACE/ESIS
Employer/Carrier-Petitioner.

Appeal from an September 8, 2014 Compensation Order by
Administrative Law Judge Amelia G. Govan
AHD No. 12-526A, OWC No. 675816

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2015 FEB 19 AM 9 59

Eric M. May for Claimant
Anthony J. Zaccagnini for Employer

Before, LINDA F. JORY, HEATHER C. LESLIE, and MELISSA LIN JONES *Administrative Appeals Judges.*

LINDA F. JORY for the Compensation Review Board.

DECISION AND REMAND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

Claimant worked for Employer as a Pump Operator, operating a dry concrete mixing machine. His usual work duties required standing for ten hours each work day, heavy lifting, walking, and climbing in an out of manholes and sewers twice weekly. On November 29, 2010, Claimant fell from a ladder and twisted his right ankle. After returning to his home state of Tennessee, Claimant underwent a right subtalar ankle fusion. After completing post-operative physical therapy in April 2012, Claimant returned to modified work as a flagman and subsequently he returned to full duties of a pump operator. Claimant had the operative screws in his ankle removed in August 2012. Claimant is currently working for Employer as a pump operator without any change in his rate of pay. Claimant continues to have pain, soreness, cramps and swelling in his right foot and ankle which requires that he sit down to rest whenever the work allows.

A full evidentiary hearing occurred on July 30, 2014. The claimant sought an award of permanent partial disability (PPD) benefits pursuant to the schedule set forth at D. C. Code, § 32-

1508(a)(3) for a fifty percent (50%) permanent partial disability of the right lower extremity. Following the formal hearing before an administrative law judge (ALJ), a Compensation Order (CO) issued on September 8, 2014. Therein, the ALJ concluded Claimant established he was entitled to a PPD rating of 30% of the right lower extremity due to his November 29, 2010 work injury.

Employer timely appealed. Employer asserts that the ALJ erred in determining Claimant presented substantial and sufficient evidence to support a finding of 30% PPD of the right lower extremity. Claimant opposed Employer's appeal, asserting the ALJ applied the law correctly and utilized her discretion pursuant to the current case law in *Jones v. DOES*, 41 A.3d 1219 D.C. 2012).

STANDARD OF REVIEW

The scope of review by the Compensation Review Board (CRB) and this Review Panel as established by the Act and as contained in the governing regulations 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). "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. App. 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.

ISSUE ON APPEAL

Is the September 8, 2014 Compensation Order supported by substantial evidence and in accordance with the law?

ANALYSIS

In support of its request for review, Employer asserts the ALJ made findings that have no evidentiary support and made conclusions of law that did not rationally follow the factual findings. Specifically, Employer asserts:

The Claimant is currently working in his pre-injury position earning the same wage. The ALJ erred in her factual determination that the Claimant was working in a less strenuous job. The ALJ also incorrectly indicated the Claimant testified that his impairment impedes his ability to perform in a full duty capacity. There was no such testimony and the factual finding[s] of the ALJ represent clear and obvious error because they are contrary to the record. The Claimant testified the reason he was not working his usual duties on the date of the hearing was because the Employer did not need concrete pumping performed. In fact, the Claimant

testified he was preparing to return to work as a pump operator in Glen Burnie. As a result, there lacks evidence to support the ALJ's finding that the Claimant will never return to his pre-injury position and no evidence to support a finding of wage loss.

Employer did not provide any specific page numbers of the hearing transcript (HT) to support its assertion. However, upon review of the record in its entirety, this panel must agree with employer's assertion that the ALJ made conclusions of law that do not rationally flow from the evidence or testimony of record.

With regard to employer's initial assertion that the ALJ erred in her factual determination that Claimant was working in a less strenuous job, the panel agrees that claimant's testimony does not support this conclusion as claimant testified that after he worked the flagman's job he returned to the pump operator position and the kind of work did not change. HT at 21. Claimant further testified that for the six months prior to the hearing he was primarily being used as truck driver because there was no concrete to be pumped. HT at 30.

The panel also agrees with employer that the ALJ incorrectly stated "Claimant testified that his impairment impedes his ability to perform in a full duty capacity" as the panel can find no such testimony in the transcript. The panel does not agree that claimant is unable to work at any level other than at full capacity notwithstanding his swelling at the end of the day or other symptoms such as stiffness and soreness. As employer properly asserts, claimant did not offer any testimony that his impairment impaired his ability to perform at full capacity. While claimant testified that he does experience swelling after 6 to 8 hours standing, he testified that he is about to begin a job as a pump operator in Glen Burnie that will last a year and a half.

Moreover, we can find no evidence or testimony to support the ALJ's conclusion that "although Employer has been good about accommodating his disability, he experiences swelling, pain and cramping of the right lower extremity every work day". CO at 5. To the contrary, when asked if he has pain or discomfort in his right foot and ankle, Claimant responded "It swells at the end of the day. I mean, it cramps up *sometimes*. *Sometimes* the bottom of it goes numb." (italics added) HT at 19.

We do not overturn the ALJ's determination that the record evidence fully supports the twenty-four percent rating provided by Dr. Pesut, notwithstanding claimant's concession that he is working a more vigorous occupation now than he was when Dr. Pesut rated claimant's impairment in 2012. Hearing Transcript (HT) at 28¹. We note however that the ALJ increased Dr. Pesut's 24% rating to 30% with an explanation of:

It was appropriate to significantly increase Dr. Pesut's medical rating for the right lower extremity to fully encompass Claimant's limitations. Claimant is a young man who will never be able to return to the performance of the full physical duties

¹ The opinions of a treating physician are accorded great weight, and are generally to be preferred over a conflicting opinion by an IME physician. See, *Short v. DOES*, 723 A.2d 845 (D.C. 1998); *Stewart v. DOES*, 606 A.2d 1350 (D.C. 1992).

of his usual employment.

CO at 6.

The Administrative Hearing Division ALJ's are tasked with determining the effect of a schedule injury on future wage loss which the Court of Appeals has acknowledged requires the exercise of discretion and prediction. See *Jones v. DOES*, 41 A.3d 1219 (D.C. 2012); *Negussie v. DOES*, 915 A.2d 391 (D.C. 2007). The panel finds the ALJ's conclusion that Claimant will never return to his pre-injury position is starkly contradicted by his actual return to his position of pump operator in 2013 and that there is no evidence of current or future wage loss.

Contrary to claimant's assertion in his response, the panel does not find supportive of the ALJ's decision, the CRB's recent decision in *Lawson v. M.C. Dean*, CRB No. 14-056, AHD No. 06-431E (September 2014)(*Lawson*). In *Lawson*, the CRB did not disturb the ALJ's reliance on the fact that *Lawson* had work taken away from him and reassigned to someone else because *Lawson* could not perform particular types of work or duties. The ALJ further accepted *Lawson's* testimony that while *Lawson* "still continues to work as an electrical engineer, but is unable to perform some tasks due to a loss of strength in his upper extremities, and physical limitations regarding overhead work. As a result some work assignments he was previously able to perform in his April 1, 2006 work injury, are not given to him". In affirming the ALJ, the CRB held "there is a conclusive presumption that actual wage loss would sooner or later result" *Lawson, supra* at 6. Citing *Smith v. DOES*, 548 A.2d 95 (D.C. 1988).

As there is no evidence or testimony in the instant matter that claimant is unable to perform certain tasks of a pump operator, which could lead to re-assignment to someone else, speculation that Claimant would sooner or later suffer a wage loss is not warranted.

CONCLUSION AND ORDER

The ALJ's determination that the record evidence fully supports the twenty-four percent rating provided by Dr. Pesut is affirmed. The ALJ's addition of 6% impairment is arbitrary; not supported by substantial evidence; not in accordance with the law and is accordingly vacated. The matter is remanded to the Administrative Hearings Division for entry of an award of 24% PPD of the right lower extremity.

FOR THE COMPENSATION REVIEW BOARD:

/s/ Linda F. Jory

LINDA F. JORY

Administrative Appeals Judge

February 19, 2015

DATE