

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 16-023

MICHAEL D. REID,
Claimant-Petitioner,

v.

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

Appeal from a January 27, 2016 Compensation Order
by Administrative Law Judge Gwenlynn D'Souza
AHD No. 15-462 OWC No. 664966

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2016 AUG 24 PM 9 01

(Decided August 24, 2016)

Mark H. Dho for Employer
Krista N. DeSmyter for Claimant

Before GENNET PURCELL and LINDA F. JORY, *Administrative Appeals Judges* and LAWRENCE D. TARR, *Chief Administrative Appeals Judge*.

GENNET PURCELL for the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

Michael D. Reid (“Claimant”) is currently employed as a station manager for the Washington Metropolitan Area Transit Authority (“Employer”). On August 15, 2004, while working in a previous role as a train operator, Claimant sustained a work-related injury to his left upper extremity and cervical spine, which was diagnosed as a herniated nucleus pulposus. Medical reports related to Claimant’s 2004 injury also reference symptoms of left arm cramping, discomfort and grip weakness.

In May of 2005, Claimant underwent two cervical spine procedures including a fusion from C3 to C7, to treat his 2004 injury.

On September 26, 2008, Dr. John K. Starr opined Claimant suffered a 28% permanent partial impairment of the “whole person” as a result of his 2004 injury. Dr. Starr’s rating was based

upon a documented loss of motion, cramping and persistent radicular complaints in the left upper extremity.

On January 20, 2009, Claimant received an award of compensation based on a 26.5% permanent partial rating of the “whole person” under “Other Cases, industrial loss of use of the body” from the Maryland Workers’ Compensation Commission for the 2004 injury (the “Maryland Award”).

In August 2009 Claimant worked for Employer in a new role as a utility supervisor. As a utility supervisor, Claimant was required to troubleshoot immobile trains, and to lift train seats to manually operate a brake located underneath. He was also required to climb through doors and step up to access the operating cab above each train.

On August 18, 2009, Claimant sustained a repeat injury to his neck and upper body when train doors closed on his upper body area for approximately five (5) minutes. On March 31, 2010, Dr. Starr confirmed that the 2009 injury exacerbated Claimant’s 2004 injury and resulted in a nonunion at the previously fused C6 – C7 level.

On January 13, 2011, Dr. Starr removed the segmental hardware from Claimant’s spine from C4 to C7, performed a fusion of C6 to C7, a revision arthrodesis with interbody prosthetic bone morphology protein at C6 to C7, an anterior discectomy at C3 to C4 with spinal cord nerve decompression, interbody arthrodesis using cage prosthetic bone morphology protein, and anterior segmental fixation from C3 to C7.

In 2013, Dr. Starr placed Claimant on a 10 pound lifting restriction and upon further training, Claimant returned to work as a station manager, the position which he presently occupies. Claimant’s station manager job duties entail opening the station gates, overseeing the platform, restocking brochures, reading fare cards, standing to greet and assist customers.

On January 28, 2015, in preparation for an application for formal hearing that Employer filed with the Administrative Hearings Division (“AHD”) of the Department of Employment Services (“DOES”), Claimant sought an independent medical evaluation (“IME”) from orthopedic surgeon Dr. Joel D. Fechter. Dr. Fechter did not give any impairment based on the American Medical Association Guides (“AMA Guides”) to Permanent Impairment. Dr. Fechter noted reduced range of motion of the neck and good range of motion for the shoulders. Using the Maryland Five Factors, Dr. Fechter assigned a total impairment rating of 34% for Claimant’s left arm (17% for pain and weakness and 17% for loss of endurance and loss of function) and a 30% impairment of the right upper extremity (15% for pain and weakness and 15% for loss of endurance and loss of function).

On April 2, 2015, Claimant twisted his neck and felt pain from the base of his neck down to the thoracic area around C8 to T1. On April 22, 2015, Dr. Starr noted that Claimant’s January 13, 2011 surgery, particularly the fusion from the C3 – C7, created a significant “lever arm” with focus at the C7 – T1 level.

On June 29, 2015, at Employer’s request, Claimant underwent an independent medical evaluation by Mark J. Scheer, M.D. Dr. Scheer assessed that despite Claimant stating he only had residual symptoms to the left upper extremity, he noted residual symptoms to his neck and left arm prior to the 2009 injury. EE 1 at 5. Using the Sixth Edition of the AMA Guides, Dr. Scheer assigned a 10% permanent partial impairment rating for the left arm. Dr. Scheer assigned

no impairment rating to Claimant's right arm opining that the Claimant denied any complaints to the right arm.

On January 27, 2016, the ALJ issued a Compensation Order ("CO") granting in part, and denying in part, Claimant's claim for benefits related to the 2009 injury and granting a dollar-for-dollar credit for Claimant's Maryland Award. *Reid v. Washington Metropolitan Area Transit Authority*, AHD No. 15-462, OWC No. 664966 (January 27, 2016). The ALJ awarded:

4% permanent partial disability rating to the upper left extremity based on a finding of:

3% for intermittent weakness; and,
1% for pain, less the applicable credit of \$32,727.50 (for the Maryland Award);

5% permanent partial disability rating to his left upper extremity for loss of function;

7% permanent partial disability to his right upper extremity based on a finding of:

5% for loss of function; and
1% for intermittent weakness; and
1% for loss of pain.

Claimant timely appealed the CO to the Compensation Review Board ("CRB") by filing Claimant's Application for Review and Memorandum of Points and Authorities in Support of Application for Review ("Claimant's Brief") arguing that the ALJ: (i) erred when finding that Employer was entitled to a credit, as the Maryland Award was for injuries sustained to Claimant's neck, not his left arm, (ii) conflated "disability" and "injury" in rendering her decision, and (iii) substituted her own judgment over the judgment of the doctors by finding less than 10% left upper extremity disability." Claimant's Brief at 5 - 6. Claimant concludes that the CO is not based on substantial evidence and must be reversed. Claimant's Brief at 5.

Employer opposed the appeal by filing Employer's Opposition to Claimant's Application for Review ("Employer's Brief"), arguing that the ALJ properly applied the credit against the findings from the independent medical evaluation and the award made is based by substantial evidence in the record and should not be reversed. Employer's Brief at 7.

ANALYSIS¹

We begin with Claimant's first assertion that the ALJ made an error of law in finding that Employer was entitled to a credit for the previous permanent partial disability awarded to

¹ The scope of review by the CRB as established by the District of Columbia Workers' Compensation Act ("Act") and as contained in the governing regulations is limited to making a determination as to whether the factual findings of a Compensation Order on appeal are based upon substantial evidence in the record, and whether the legal conclusions drawn from those facts flow rationally from those facts and are otherwise 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 ("DCCA"), 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) ("*Marriott*"). Consistent with this scope of review, the CRB is also 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 members of the CRB review panel considering the appeal might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

Claimant in Maryland. Claimant argues that the Maryland Commission awarded Claimant disability under the “Other Cases” section of the Maryland code; that the Maryland Award was for injuries sustained to Claimant’s cervical spine, and not to his left arm, the site of his 2009 disability. Claimant argues that there “is no case law indicating that a credit is to be awarded when the disability is awarded to two different parts of the body, as in [his] case.” Claimant’s Brief at 4.

Claimant explains that while he “suffered an injury to the same general body part, the neck, in 2004 as he did in 2009” he was awarded a disability award based on a 26.5% permanent partial rating of the “*whole person*” pursuant to the Maryland Code and under the “*Other Cases*” designation for his neck, not a scheduled body part. Claimant argues that this distinction in the designation of the Maryland Award, *i.e.* the “other cases” award vs. the “upper left extremity” schedule-based award granted by the ALJ in the CO (and subjected to the credit at issue), negates the legal applicability of a credit.

Where the injury is to the same body part, Claimant is incorrect in his attempt to distinguish the actual wording of the Maryland Award from his claim for benefits for permanent partial disability to the upper left extremity under the Act. It is not the case that a claimant’s choice to pursue an award under the “Other Cases” provision of the Maryland law renders that claimant eligible to pursue another award under the Act for the same injury, and specific body part at issue. Notwithstanding the general terminology used by the Maryland Commission in the Maryland Award, Claimant’s present injury (to his neck) and the resulting disability (to his left arm) assessed in the CO are the same subject body parts assessed and compensated by the Maryland Award.

Accordingly, Claimant is also incorrect in arguing that:

[T]he previous disability suffered by [Claimant] is to a different part of his body in the current injury than the subsequent disability, and thus there is no basis for which to award the Employer a credit[.]

Claimant’s Brief at 6.

Claimant also argues that the ALJ improperly conflated “disability” and “injury” in finding that Employer was entitled to a credit. We do not agree with this assertion. In fleshing out the distinction between a “disability” and an “injury” Claimant is correct that the ALJ is required to consider the ‘site of the disability’, as opposed to the ‘site of the injury’. The ALJ’s analysis is consistent with this requirement. The Worker’s Compensation Act (“Act”) does not provide for the payment of a schedule award for the neck (spine). However, the Act does provide a claimant an entitlement to a scheduled member award “payable regardless of whether the cause of the disability originates in a part of the body other than that member.” *See Sullivan v. Boatman & Magnani*, CRB No. 03-74, OHA No. 90-597E (August 31, 2005) (*Sullivan*).

With regard to payments for permanent partial disabilities, the District of Columbia Court of Appeals (“DCCA”) has also held that in determining whether a schedule award is payable it is not the site of the injury but the site of the disability resulting from the injury that is controlling. *Morrison v. DOES*, 736 A.2d 223 (D.C. 1999).

Claimant is incorrect in the assertion that the subject disability of his Maryland Award is distinguishable from his left arm claim discussed in the CO. In both accidents at issue, Claimant's injuries were to his neck (spine). Both injury instances also resulted in assessed disability to include, *inter alia*, a loss of motion and persistent radicular complaints in the left arm. CE 3 at 52 – 58, CE 3 at 38. Claimant's injury in the present claim is clearly related to disability arising from his neck injuries, which is not a scheduled member according to the Act, but for which Claimant sought out an impairment rating pursuant to the theory of "situs of disability"; his left arm.

Further, the record contains medical evidence supporting the ALJ's findings that Claimant underwent two surgical procedures with instrumented fusion from C3 – C7 both prior to, and after the 2009 injury. The medical records submitted by Drs. Starr, Fechter and Scheer are replete with notations related to Claimant's consistent complaints of neck pain, left arm tingling, intermittent pain, and weakness stemming from the neck injury, both prior to, and after, the 2009 injury.

In concluding that a credit was warranted, the ALJ relied on *Fisher v. Providence Hospital*, OHA No. 03-300, OWC No. 51508 (2003); and, *Majett v. Old Glory Bar-B-Que*, Dir. Dkt. No. 99-23, H&AS No. 97-443, OWC No. Unknown (September 20, 1999). The ALJ opined that "where the injury is to the same body part [as a previously compensated body part], the credit is calculated based on the dollar amount [previously] awarded and concluded, a credit was due to Employer as a "new award [for the 2009 injury] would result in a double recovery for pain and weakness related to the left upper extremity." CO at 8.

Notably, the Act provides:

If an employee receives an injury, which combined with a previous occupational or non-occupational disability or physical impairment causes *substantially greater disability* or death, the liability of the employer shall be as if the subsequent injury alone caused the subsequent amount of disability and shall be the payment of:

- (i) All medical expenses;
- (ii) All monetary benefits for temporary total or partial injuries; and
- (iii) Monetary benefits for permanent total or partial injuries up to 104 weeks.

D.C. Code § 32-1508(6)(A)

Nowhere in the medical evidence however is there an opinion stated, or any substantial support offered, to assert that Claimant's 2009 injury and resulting disability combined with his 2004 injury to cause a 'substantially greater disability' pursuant to § 32-1508(6)(A).. Indeed, Claimant's injuries at issue here are materially and substantially the same.

The terms of the Maryland Award stipulated that the parties agreed to a permanent partial disability of 26.5% permanent partial disability of the whole person. Attached as exhibits to the Maryland Award were medical impairment ratings issued by Drs. Starr and Rosenthal; each which detailed a disability rating based on Claimant's medical history. Dr. Starr noted

Claimant's two previous cervical spine procedures, left arm hand cramping, left side grip weakness, loss of motion and persistent radicular complaints and assigned Claimant a 28% whole person impairment taking into account the five factors of pain, weakness, atrophy, loss of function, and loss of endurance. EE 2 at 4. Dr. Rosenthal noted the Claimant was at maximum medical improvement, and based on the AMA Guides assigned Claimant a 25% whole person impairment rating taking into account the five factors of pain, weakness, atrophy, loss of function, and loss of endurance. EE 2 at 5.

Most importantly, the ALJ limited the credit for the Maryland Award to the benefits awarded under the Act for Claimant's left arm disability which were identical in nature to the permanent loss sustained by Claimant in the 2004 accident. The credit award, and appropriately so, was a credit "in kind"; restricted to the portion of the 2009 Award specific to pain and weakness.

The ALJ explained:

The [Maryland Award] was based on a 26.5% permanent partial rating of the whole person. At that time, the medical records revealed Claimant had a documented loss of motion and persistent radicular complaints in the left upper extremity, including complaints of cramping. (EE 2) . . . Because a new award would result in a double recovery for *pain and weakness* related to the left upper extremity, I find Employer is entitled to a dollar-for-dollar credit towards any new award for *pain and weakness* in the left upper extremity. [Emphasis added]

CO at 8.

We affirm that the dollar-for-dollar credit for the \$32,727.50 paid to Claimant in the Maryland Award under the "Other Cases" provision against the pain and weakness findings in the CO is based on substantial evidence in the record, and determine no error by the ALJ in the analysis and credit application in this case.

Next, Claimant asserts that the ALJ substituted her own medical judgment over the judgment of the permanency evaluators in finding that Claimant sustained a total 9% permanent partial disability of the left arm in light of Dr. Fechter's opinion of 34% impairment and Dr. Scheer's opinion of 10% impairment.

With regard to the left arm claim, the ALJ made the following findings:

Based on the record evidence before me, I adopt Dr. Fechter's opinion in part. I find that Claimant has a 5% permanent partial impairment rating to each upper extremity for loss of function, particularly the inability to lift more than 10 pounds . . . Claimant has a 3% permanent partial impairment rating to the left upper extremity . . . for intermittent weakness, particularly weakness due to cramping. . . Claimant has a 1% permanent partial impairment rating for a low level pain in each upper extremity. I do not find a loss of endurance because Claimant testified he is able to do most things that he could do before, but certain tasks are difficult.

CO at 7.

With regard to the left arm award, the ALJ concluded:

Claimant is entitled to a 4% permanent partial disability rating to his upper left extremity based on a finding of 3% from intermittent weakness and 1% for pain less the applicable credit of \$32,727.50. In addition, Claimant is entitled to a 5% permanent partial disability rating to his left upper extremity for loss of function, particularly the inability to lift weight.

CO at 8, 9.

Our reading of the CO reveals that the ALJ rejected an impairment rating based upon the AMA Guides and offered by Dr. Scheer as being inadequately supported by the record medical evidence. In adopting Dr. Fechter's opinion in part, the ALJ rejected the "Maryland" factor of loss of endurance due to conflicting testimony offered by Claimant as to his ability "to do most things he could do before...", and downgraded three of the four remaining factors of loss of function, weakness and pain to amounts she concluded were supported by the facts and evidence of record. In addition to the medical impairment, the ALJ evaluated Claimant's subjective testimony in concluding that Claimant did not prove any significant or discernable loss of endurance. The ALJ acknowledged that Dr. Fechter also based his ratings on purely subjective factors and without reference to any particular table of the AMA Guides and made her conclusions accordingly.

The DCCA has held that when determining permanent partial disability, the role of an ALJ is to weigh competing medical opinions together with other relevant evidence, and to arrive at a determination on the issue of the nature and extent of any schedule loss. In the end, this determination can result in accepting one physician's rating over another or, in reaching a different conclusion altogether because the ALJ is not bound by the opinions of the evaluating physicians. *Yousuf v. Colonial Parking*, CRB 10-006 (May 14, 2010) citing *Negussie v. DOES*, 915 A.2d 391 (D.C. 2007).

Claimant misapprehends the role of the ALJ in the process of arriving at a disability award under the schedule. Claimant's argument assumes that the ALJ must adhere to, and accept, the disability rating of the medical doctor in arriving at a disability award figure. However, that is not what the Act requires, is not what the ALJ did, and is not what the AMA Guides referred to in the Act as guidance in this area, contemplate.

Under D.C. Code § 32-1508 (8), a claimant may be entitled to "compensation for disability;" "[di]sability" means physical or mental incapacity because of injury which results in the loss of wages." An award may be paid for permanent partial disability, in which case "[c]ompensation for permanent partial loss or loss of use of a member may be for proportionate loss or loss of use of the member." D.C. Code § 32-1508 (3)(S). Furthermore, "[i]n determining disability pursuant to the Act, the most recent edition of the AMA Guides may be utilized, along with "the Maryland factors of pain, weakness, atrophy, loss of endurance and loss of function." There is nothing in the plain words of these statutory provisions stating explicitly, or even implicitly, that the determination of disability is the solely the function of a medical doctor. And, the legislative history of this code provision cautions against the notion that only doctors may determine disability, as defined in the statute.

The AMA Guides, after discussing some of the technical methodologies employed in arriving at percentage impairment ratings, caution as follows:

The medical judgment used to determine the original impairment percentages could not account for the diversity or complexity of work but could account for daily activities of most people. Work is not included in the clinical judgment for impairment percentages for several reasons: (1) work involves many simple and complex activities; (2) work is highly individualized, making generalizations inaccurate; (3) impairment percentages are unchanged for stable conditions, but work and occupations change; and (4) impairments interact with such other factors as the worker's age, education, and prior work experience to determine the extent of worker disability. For example, an individual who receives a 30% whole person impairment due to pericardial heart disease is considered to have a 30% reduction in general functioning as represented by a decrease in the ability to perform activities of daily living. For individuals who work in sedentary jobs, there may be no decline in their work ability although their overall functioning is decreased. Thus, a 30% impairment rating does not correspond to a 30% reduction in work capability. Similarly, a manual laborer with this 30% impairment rating due to pericardial disease may be completely unable to do his or her regular job and, thus, may have a 100% work disability.

As a result impairment ratings are not intended for use as direct determinants of work disability. When a physician is asked to evaluate work-related disability, it is appropriate for a physician knowledgeable about the work activities of the patient to discuss the specific activities the worker can and cannot do, given the permanent impairment.

See Majano v. Linens of the Week, CRB No. 07-066 (April 24, 2007).

Indeed, D.C. Code § 32-1508(3) (U-i) authorizes ALJs to consider a claimant's "pain, weakness, atrophy, loss of endurance, and loss of function." *See also Muhammad v. DOES*, 774 A.2d 1107, 1113-14 (D.C. 2001) (ALJs must "address [a claimant's] symptoms, such as pain, dysfunction, and loss of mobility, as a possible basis for a schedule award"). The DCCA has held 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. *Id.*

We determine that the ALJ appropriately acknowledged and took into consideration the undisputed and credible testimony of the Claimant regarding his current physical complaints, his symptoms and his ability to do his job as a station manager. The ALJ's reasoning is sufficiently detailed and explained so as to allow one to understand why she awarded a reduced percentage of 9% impairment to the left arm. The ALJ's findings and conclusions are supported by substantial evidence and in accordance with the law.

We find no error in the ALJ's analysis, and *affirm* the *Compensation Order*.

CONCLUSION AND ORDER

The ALJ's conclusion that Claimant is entitled to a 4% permanent partial disability rating to his left arm based on a finding of 3% for intermittent weakness and 1% for pain, less the applicable Employer credit of \$32,727.50, is supported by substantial evidence and is in accordance with the law. The Compensation Order is affirmed.

So ordered.