GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR

LISA MARÍA MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 13-057

AIESHA R. NICKENS,
Claimant-Petitioner,

v.

FORT MYER CONSTRUCTION COMPANY and LIBERTY MUTUAL INSURANCE,
Employer and Insurer-Respondent.

Appeal from a April 30, 2013 Compensation Order of
Administrative Law Judge Saundra M. McNair
AHD No. 12-455, OWC No. 687767

Eric M. May, Esquire for Petitioner
Gerard M. Emig, Esquire for the Respondent

Before: Before: JEFFREY P. RUSSELL and MELISSA LIN JONES, *Administrative Appeals Judges* and LAWRENCE D. TARR, *Chief Administrative Appeals Judge*.

DECISION AND REMAND ORDER

BACKGROUND AND FACTS OF RECORD

On March 30, 2011, the claimant, Aiesha Nickens, was employed as an apprentice with the Laborer's Union, having been so employed for about four months with this employer. She also was employed as a waitress during this time.[1]

On March 30, 2011, Ms. Nickens injured her right leg and knee when she was struck by a Bobcat machine at work. She was taken to Howard University Hospital where her fractured right tibia was surgically repaired. About a month later the claimant underwent a second surgery because the surgical site had become infected.

[1] Although the Compensation Order recited that the parties stipulated "Claimant's average weekly wage for the purposes of this claim", there are no findings concerning whether any of the stipulated wage included stacked wages from her waitress job, what her pay rates were for either employment, or how many hours per week she worked at either job.

The claimant underwent a period of recuperation and was authorized to return to light duty work on November 27, 2011. No light duty work was available. After remaining unemployed for about a year, she obtained employment as a stock clerk working 30 hours per week in a grocery store.[2] After the accident, Ms. Nickens also enrolled full-time student at the University of the District of Columbia.

She was evaluated by two physicians for the purpose of independent medical examinations (IMEs). Dr. Jeffrey Phillips, hired by the claimant, opined that under the American Medical Association Guides to the Evaluation of Permanent Impairment (the Guides) Ms. Nickens has sustained a 10% right leg impairment, and an additional 8% for lost function and decreased endurance, for a total of 18% permanent partial impairment to the right leg.

Dr. Samuel Matz, hired by the employer, opined that Ms. Nickens had sustained a 25% permanent partial impairment to the right ankle, which he also opined is equivalent to 17.5% impairment to the right leg.

In a Compensation Order issued April 30, 2013, the ALJ found "that the Claimant has suffered an 18% rating [sic] to her right leg." The ALJ awarded disability benefits for the 18% permanent partial disability to her right leg. No date of having obtained that status is included in the Compensation Order.

Ms. Nickens timely appealed the award to the Compensation Review Board (CRB), arguing that the award should be greater because the ALJ failed to take into account the degree to which the injury resulted in a probable loss of future earnings, citing *Jones v. DOES*, 41 A.3d 1219 (D.C. 2012) and *Negussie v. DOES* , 915 A.2d 92 (D.C. 2007).

Fort Myer Construction (Fort Myer) filed an opposition, arguing that there is no basis to award anything more than 18% because Ms. Nickens now is earning more working in the grocery store than she did during some weeks while working as an apprentice, that any future wage losses from construction labor are speculative because they assume that Ms. Nickens would successfully complete an additional year of apprenticeship and become a higher skilled laborer, and that Ms. Nickens voluntarily changed career paths, in that she currently is pursuing a business management degree and plans to open a restaurant.

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[2] The Compensation Order recites that Ms. Nickens received unemployment benefits during the year that she was unable to work in her pre-injury job. The parties also stipulated that Fort Myer is entitled to a credit of $6,433.00 against any permanency award. The Compensation Order does not explain the basis of the credit, nor does it address whether the claimant received temporary total disability benefits during this time.

Moreover, although the ALJ stated the claimant took "a significant pay decrease", the amount of that decrease is not subject to a finding of fact, nor does the Compensation Order indicate whether the decrease includes wages lost from her waitress position, or whether anything prevents her from returning to that job.

The Compensation Order also stated that the claimant testified that Ms. Nickens is unable to return to her pre-injury job as a Labor Union apprentice. However, there is no finding of fact with respect to this testimony.

DISCUSSION AND ANALYSIS[3]

On review, Ms. Nickens argues that the ALJ failed to properly evaluate the vocational impact of the right leg impairment, contrary to *Jones* and *Negussie*, supra. She asserts that the record contains various data points from which the ALJ could have extrapolated a prediction concerning the degree to which the impairment will affect her future earnings. In her memorandum, for example, the claimant postulates that had there been no injury, she might have chosen not to continue her education, as she is presently doing, and continued to work in the construction trades, and someday gone on to earn far more than she currently earns or might eventually earn after she completed her education.

We note that claimant's argument implicitly acknowledges the difficulty in making an award that includes a rational, record-based prediction of the effect the medical impairment will have upon her future earnings, if any, in that nowhere in her memorandum or in the transcript of the formal hearing did the claimant identify what the appropriate award is nor did she suggest any method for calculating the award on the record evidence. Rather, claimant merely argues that the award should be "substantially higher" than 18%.

It should also be noted that the claimant failed to present any expert testimony from a labor market or occupational economist, expressing an opinion as to what the appropriate award should be or the method of calculating an appropriate award. Rather, it appears that the error about which the claimant complains in this appeal is that the medical impairment rating that she herself proffered was accepted by the ALJ as a fair representation of the degree of disability.[4]

It would be proper for the ALJ to make a determination as to the degree of medical impairment as one step in analyzing the extent of the claimant's disability. However, it is incumbent upon the ALJ to consider whether the record contains sufficient specific, non-speculative evidence upon which to assess whether the impairment sustained is such that the medical impairment overstates, understates, or fairly represents the effect of the impairment on future earnings.

In this case, the ALJ asserted that there is such an effect demonstrated, but she made no specific findings of fact to support her assertion. The ALJ made general conclusory statements concerning the fact that the injury has caused a wage earning capacity loss, but has not identified specifically what degree of vocational impairment the evidence demonstrates. We must remand this case because we are unable to discern whether the award is premised solely upon a finding of an 18% medical impairment, which is suggested by the lack of any specific non-medical findings of a vocational variety.

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[3] The CRB reviews a Compensation Order to determine whether the factual findings are based upon substantial evidence in the record, and whether the legal conclusions drawn from those facts are in accordance with applicable law. The CRB will 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.

[4] We note that the ALJ on occasion appears to use the terms "disability" and "impairment" as if they are synonymous. However, these terms are distinct and separate concepts. See, *Negussie, supra*.

As noted above, the Compensation Order also does not indicate whether and to what degree the stipulated average weekly wage included stacked wages from Ms. Nickens's second employment, it contains no findings as to whether the injury sustained is likely to impact her ability to perform either her pre-injury job with Fort Myer, or her second employment as a waitress. There are no findings concerning what the claimant earned working in the grocery store, nor is there any specific finding as to whether or how the decision to return full time to school affects the outcome.

The statute permits considering the Guides when assessing the extent of a schedule disability. The court in *Jones* prohibits disability awards that are not of a numerical value derived from identifiable record evidence through some method that can be explained, not merely in principle, but in sufficient detail so as to allow one to understand why an ALJ awarded "7% -- and not for example 1%, 10% or 30%." The court posed this query despite the fact that the court believed that the ALJ had made a finding of a 6% medical impairment to the relevant body part. In the *Jones* case, the court faulted the ALJ for not stating the reason for going from a 6% medical impairment to a 7% permanency award.

While prior to *Jones*, ALJs were possessed of very wide discretion in assessing schedule disability, *Jones* changed that, and severely restricted that discretion. What *Jones* appears to now require is an award whose arithmetic computation is reviewable.

In light of this required specificity, the Act's embrace of the Guides takes on greater significance. The Guides result in a number expressed as a percentage; the schedule requires an award expressed as a percentage. Thus, the schedule in the statute impliedly permits the use of the degree of medical impairment as a baseline for the extent of disability.

It would not be error for an ALJ to make a finding as to the degree of medical impairment if the finding is supported by substantial evidence, and it would not be error to accept the degree of medical impairment as fairly representing the extent of disability under the schedule if the record fails to contain specific, identifiable, calculable and non-speculative evidence to the contrary. A disability award may be composed of a medical impairment rating to which may be added or subtracted an amount representing future wage earning loss.

In the present case, the ALJ might have applied the correct calculation and found that 18% is the extent of disability because the claimant did not present specific evidence of the affect of her injury on her future wage impairment. However, the CRB must vacate the ALJ's award because the Compensation Order did not state this nor did it identify the basis for the ALJ's award.[5]

[5] While the Compensation Order fails to discuss several necessary matters in assessing the degree of disability to a schedule body part that was fractured in the accident, the Compensation Order seems to discuss several immaterial issues. The Compensation Order includes numerous and apparently inapposite references to wage-loss cases (*Washington Post v. DOES and Abdil Mukhtar, Intervenor*, 675 A.2d 37 (D.C. 1996), *Hughes v. DOES*, 498 A.2d 567 (D.C. 1985), or *Logan v. DOES,* 805 A.2d 237 (D.C.2002). The Compensation Order inexplicably refers to *Kovac v. Avis Leasing Corporation*, OHA No. 84-177, OWC No. 000792 (July 17, 1986) and some other cases which

CONCLUSION AND ORDER

The Compensation Order contains incomplete findings concerning the vocational impact of the injury on the claimant's future earnings and is therefore not in accordance with the law as set forth in *Jones, supra.,* Accordingly, the award is vacated and the matter remanded for further consideration, including specific findings of fact on the issues identified in the above Decision and Remand Order as having been omitted from fact finding and consideration.

FOR THE COMPENSATION REVIEW BOARD:

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JEFFREY P. RUSSELL
Administrative Appeals Judge

August 6, 2013
DATE

address the question of whether and when an injury with an anatomical situs other than a schedule member can nonetheless lead to an award of disability under the schedule. Additionally, the Compensation Order contains a lengthy discourse, with citations, concerning the treating physician preference but the present case contains no treating physician opinion as the two impairment ratings were authored by independent medical evaluators.