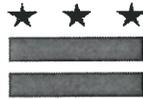


**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

Department of Employment Services

MURIEL BOWSER  
MAYOR



DEBORAH A. CARROLL  
DIRECTOR

COMPENSATION REVIEW BOARD

**CRB No. 16-031**

**PAMELA MOORING,  
Claimant–Petitioner,**

v.

**DISTRICT OF COLUMBIA WATER AND SEWER AUTHORITY  
and PMA MANAGEMENT CORPORATION,  
Employer and Insurer–Respondents.**

Appeal from a Compensation Order issued February 3, 2016  
by Administrative Law Judge Nata K. Brown  
AHD No. 15-015, OWC No. 704709

(Decided July 20, 2016)

David J. Kapson for Claimant  
Douglas A. Datt for Employer

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

HEATHER C. LESLIE for the Compensation Review Board,

**DECISION AND ORDER**

**FACTS OF RECORD AND PROCEDURAL HISTORY**

Claimant was an external communications manager for Employer. On February 2, 2011 Claimant slipped and fell on a wet floor, striking her right side on a security guard's desk and injuring her right shoulder, right hip and the right side of her back.

Claimant came under the treatment of Dr. Jason A. Stein. Dr. Stein recommended an MRI, which revealed a rotator cuff tear. Claimant underwent surgery on March 29, 2011. Thereafter, Claimant underwent physical therapy for several weeks. Claimant subsequently underwent one additional surgical procedure in 2013 and eventually returned to work with Employer.

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Claimant underwent an independent medical evaluation (IME) with Dr. Joel Fechter at her request. Dr. Fechter took a history of Claimant's injury and treatment, and performed a physical examination. Dr. Fechter opined that she suffered from a 40% permanent partial impairment to the right upper extremity as a result of her work injury.

On August 25, 2014, Dr. Stein, at Employer's request,<sup>1</sup> rendered an opinion that Claimant suffered from a 3% permanent partial impairment to her right shoulder. Dr. Stein subsequently issued an addendum on September 10, 2014 opining Claimant suffered from a 9% permanent partial impairment to the right upper extremity due to her work injury. Another addendum was issued on February 11, 2015 wherein Dr. Stein opined Claimant suffered from a 14% permanent partial impairment to the right upper extremity, after taking into consideration the Maryland Five Factors.

A full evidentiary hearing occurred on March 12, 2015. Claimant sought an award of permanent partial disability in the amount of 40% to the right upper extremity. The sole issue presented for adjudication was the nature and extent of Claimant's disability.<sup>2</sup> A Compensation Order (CO) issued on February 3, 2016 which awarded Claimant a 17% permanent partial disability award to the right upper extremity.

Claimant timely appealed. Claimant argues the award is not supported by the substantial evidence in the record. Specifically, Claimant argues she has submitted substantial and credible evidence, in the form of Dr. Fechter's IME and her testimony, to support an award of 40% permanent partial disability to the right upper extremity. Employer opposes the appeal, arguing the CO is supported by the substantial evidence in the record and in accordance with the law.

### ANALYSIS<sup>3</sup>

Prior to addressing Claimant's arguments, we must again point out a misstatement of law that is repeated in Claimant's brief. We refer specifically to the reference to *Corrigan v. Georgetown*

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<sup>1</sup> This request from Employer was rendered through a third party, EVO National Independent Medical Services.

<sup>2</sup> The claim for relief also includes temporary total disability benefits from August 15, 2013 through September 3, 2013. While the joint pre-hearing statement lists this as a claim, it is handwritten in by the ALJ but no signatures or initials appear from either counsel acknowledging this change. Claimant's counsel did not state this was a claim for relief sought at the Formal Hearing nor is it acknowledged anywhere in the Compensation Order. As Claimant has not appealed the lack of any analysis on whether Claimant was temporarily and totally disabled from August 15, 2013 through September 3, 2013, we will assume the inclusion of this issue was an administrative error.

<sup>3</sup> The scope of review by the 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.*, (the 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.

*University*, CRB No.06-094 (September 14, 2007), at page 6 of Claimant’s Brief, which reads:

Whether or not the Claimant has suffered a wage loss is irrelevant to determining the Claimant’s eligibility to received [sic] scheduled member benefits, because of a conclusive presumption that the Claimant will have his or her working life end earlier due to the injury. *See Corrigan v. Georgetown Univ.*, 2007 DC Wrk. Comp. LEXIS 364.

As the CRB most recently admonished in *Hairston v. First Transit*, CRB No. 16-002 (June 17, 2016) (*Hairston*).

[W]e have repeatedly pointed out in connection with this, or nearly identical assertions concerning the continuing vitality of the central holding in *Corrigan*, is that it has been abandoned and no longer represents the law with respect to schedule awards under the Act. *See Al-Robaie v. Fort Myer Construction*, CRB No. 10-014 (June 6, 2012); *Hill v. Howard University*, CRB No. 12-180 (March 27, 2013); *El Masaoudi v. Uno Chicago Grill*, CRB No. 15-093 (October 15, 2015); and *Brown v. WMATA*, CRB 15-115 (December 21, 2015).

While *Corrigan* contains a number a statements of legal principles that are valid, it does not now and has not since June 6, 2012 stood for the proposition for which it has at least by implication been cited and for which we have been required to expend time correcting.

We recognize that the reference to being “eligible” for a schedule award is arguably technically correct. However, Employer in this appeal, and no one to our knowledge in any other appeal has ever argued before the CRB that a claimant’s lack of a demonstrated wage loss from a work injury renders them “*ineligible*” to receive an award under the schedule.

There is no “conclusive presumption that the Claimant will have his or her working life end earlier due to the injury”, nor is it correct to imply that post-injury return-to-work earnings are, as a matter of law, irrelevant when assessing schedule loss awards. That is simply not the case.

*Hairston* at 4-5.

We again urge counsel to discontinue using this misstatement of *Corrigan* in future appeals.<sup>4</sup>

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<sup>4</sup> We also must point out the District of Columbia Court of Appeals recent opinion in *M.C. Dean, Inc., v. DOES and Anthony Lawson, Intervenor*, No. 14-AA-1141 (Slip Op. July 7, 2016) at 22–23, wherein the court states:

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**

Turning to the appeal at hand, Claimant argues the conclusion that she is entitled to an award of 17% permanent partial disability for the right upper extremity is not supported by the substantial evidence. In so arguing, Claimant points this panel to Claimant's testimony, her medical treatment and the IME of Dr. Fechter in support. Claimant also argues that Dr. Stein's permanent partial disability rating should be discounted as it is "biased" in favor of the Employer because, after indicating to the Claimant he did not do disability ratings, Dr. Stein did submit a rating to Employer at the Employer's request. Finally, Claimant argues the Administrative Law Judge (ALJ) committed error in not addressing Dr. Stein's last addendum, in which he took into consideration the Maryland Five Factors and opined Claimant was entitled to a 14% permanent partial impairment.

In addressing Claimant's arguments, we first note the ALJ took into consideration Claimant's testimony, stating:

The record, including the credible testimony of Claimant, medical notes, and reports from her treating medical providers, describe symptoms that affect her ability to use her right upper extremity. She testified that she has a pain in her right shoulder and in the upper right biceps area and limited range of motion -- her right arm doesn't go back as far as the left arm does. (HT 47) She is no longer playing tennis, coaching basketball, or bowling, but she now is a track and field coach. (HT 51) Claimant still swims, however, it is only twice a week and only for 30 minutes--more than that, she experiences pain. (HT 53) She is back at her job with Employer full time.

CO at 7.

The ALJ did take into consideration Claimant's testimony, including her two surgeries as well as the impact the work injury has had on her ability to use her right arm. In arguing that the above testimony supports an award of 40% permanent partial disability, what Claimant is asking us to do is to reweigh the evidence the ALJ took into consideration in her favor, a task we cannot do.

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**not increase based on functional impairment of personal and social activities because those are beyond the economic scope of the Act.<sup>9</sup> While the CRB's observation that personal and social activities may reflect work-related limitations is consistent with our holding, those activities are not independently compensable harms. Contrary to our concurring colleague, we conclude that consideration of personal and social activities is only consistent with the legislative history and structure of the Act if there is a nexus to wage-earning capacity, so a remand on this issue is unnecessary.**

(Emphasis added; footnote omitted).

Thus, the ALJ's consideration of any non-occupational limitations is deemed relevant to consideration of the degree of disability under the schedule only when the ALJ can show a "nexus" between the non-occupational limitations and specific requirements of the pre-injury job.

Furthermore, the ALJ correctly noted that in the District of Columbia, there is a preference for the opinion of the treating physicians, relying on *Stewart v. DOES*, 606 A.2d 1350 (D.C. 1992). The ALJ then went on to accord Dr. Stein the treating physician preference and rejected the opinion of Claimant's IME rating, that of Dr. Fechter's. Specifically,

Dr. Fechter opined that, in accordance with the Fifth Edition of the AMA Guides, Claimant is entitled to a 6% impairment of the right upper extremity, and, taking into account Claimant's additional subjective factors of pain and weakness entitles her an additional 17% impairment. Taking into account Claimant's additional subjective factors of loss of endurance and loss of function, entitles her to an additional 17% impairment, for a total impairment of 40% to the right upper extremity. Dr. Fechter does not explain how he determines the increase in the impairment rating of Claimant's disability to 40%. He examined Claimant only one time, and he does not set forth a percentage for each of the subjective factors. For these reason, the July 16, 2014 report from Dr. Fechter is not credited.

CO at 7.

Although she was not obligated to do so, the ALJ gave several reasons why she rejected the opinion of Dr. Fechter in favor of the treating physician, Dr. Stein. We find no error in this and conclude the ALJ properly accorded Dr. Stein the well established treating physician preference. We decline to follow Claimant's argument that the fact that Dr. Stein provided an impairment rating to Employer taints his opinion. We point out that it is not unusual for the opinions of physicians, either as a treating physician or as an IME, to be rendered at the request of a party for compensation during litigation, including that of Dr. Fechter. We reject Claimant's argument that Dr. Fechter's opinion should be accorded more weight because Dr. Stein's impairment rating was at the behest of Employer.

Finally, we address Claimant's argument that the CO should be remanded because of a lack of discussion of Dr. Stein's last addendum, dated February 11, 2015. A review of the CO does show a lack of discussion regarding this opinion. While normally this could cause the CRB to remand the case for further discussion, we find any such error harmless as ultimately, the ALJ does take into account the Maryland Five Factors in her award, which is in fact *higher* than Dr. Stein's opinion.

First, we note that the ALJ does specifically state in a footnote:

While each documentary exhibit received in evidence is not specifically referenced in the discussion, all evidence of record was reviewed as part of this deliberation.

CO at 3.

In analyzing Dr. Stein's opinions, the ALJ noted:

Dr. Stein, according to the Sixth Edition AMA, opined that Claimant has a

permanent disability rating for the upper extremity of 9%. That rating does not reflect the breadth of Claimant's diminished capacity caused by the work-related injury. There are other factors that may be considered in determining an impairment rating. During her testimony, Claimant complained of four of the DC Five Factors--pain, weakness, loss of endurance, and loss of function. Taking into account the four of the DC Five Factors that she experiences, for each of the factors, Claimant is entitled to a 2% rating. In total, Dr. Stein's' rating of 9% pursuant to the Sixth Edition AMA, and the 8% rating for the DC Five Factors entitles Claimant to a 17% permanent partial impairment to the right upper extremity.

CO at 7.

The ALJ acknowledged that the September 10, 2014 addendum of Dr. Stein did not account for the Maryland Five Factors. With this in mind, the ALJ increased the 9% rating to 17%, giving a 2% rating to each of the four Maryland Factors she testified to. Claimant does not argue that the additional 2% rating to four of the Maryland Factors is wrong,<sup>5</sup> but that the additional 8% should be added to the 14% rating from Dr. Stein for an award of 22% permanent partial disability.

We reject this argument because the 14% impairment rating from Dr. Stein *includes* additional consideration of the Maryland Five Factors. After considering the Maryland Five Factors, Dr. Stein increases his impairment opinion by 5%, taking into consideration the pain Claimant continues to suffer from. Dr. Stein concludes no further increase in the impairment rating is necessary for any of the other Maryland Five Factors, contrary to the ALJ's analysis. Indeed, utilizing the Maryland Five Factors, Dr. Stein's impairment rating of 14% is *less* than the ALJ's award of 17% permanent partial disability to the right arm. Claimant's argument is rejected.

The substance of Claimant's appeal, as asserted in the title of the argument, is that "the ALJ's finding that Ms. Mooring is limited to an award of 17% permanent partial disability for the right upper extremity is not supported by substantial evidence." Claimant's argument at 5. However, as we stated in *Hairston*:

Our task is to determine whether the determination of the ALJ is supported by substantial evidence; we are not concerned with whether there is substantial evidence to support a contrary or different conclusion. *See Marriott International v. DOES*, 834 A.2d 882(D.C. 2003).

*Hairston* at 5.

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<sup>5</sup> As Claimant does not appeal the amount the ALJ awarded based upon the Maryland Five Factors, we need not address whether the ALJ's analysis comports with *Jones v. DOES*, 41 A.3d 1219 (D.C. 2012).

CONCLUSION AND ORDER

The Compensation Order is AFFIRMED.

*So ordered.*