GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR

LISA M. MALLORY
DIRECTOR

Compensation Review Board

CRB No. 12-049

GLADYS K. PUPLAMPU,
Claimant–Petitioner,

v.

CONTRACT CLEANING SERVICES AND GALLAGHER BASSETT SERVICES,
Employer/Carrier-Respondent

Appeal from a Compensation Order by
The Honorable Anand K. Verma
AHD No. 10-255A, OWC No. 659012

Krista N. DeSmyter, Esquire, for the Claimant/Petitioner
Mary G. Weidner, Esquire, for the Employer-Carrier/Respondent

Before: HENRY W. MCCOY, HEATHER C. LESLIE,[1] AND MELISSA LIN JONES, *Administrative Appeals Judges*.

HENRY W. MCCOY, *Administrative Appeals Judge*, for the Compensation Review Board.

DECISION AND REMAND ORDER

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board (CRB) pursuant to D.C. Official Code §§ 32-1521.01 and 32-1522 (2004), 7 DCMR § 230, et seq., and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005).

[1] Judge Leslie has been appointed by the Director of the DOES as an interim CRB member pursuant to DOES Administrative Policy Issuance No. 11-04 (October 5, 2011).

OVERVIEW AND FACTS OF RECORD

This appeal follows the issuance on February 27, 2012 of a Compensation Order (CO) from the Hearings and Adjudication Section, Office of Hearings and Adjudication in the District of Columbia Department of Employment Services (DOES). In that CO, Claimant's request for a schedule award of 25% permanent partial disability impairment to her left upper and lower extremities was denied.

Claimant worked for Employer as a housekeeper. On April 3, 2009, Claimant slipped and fell while entering a doorway on the worksite sustaining multiple injuries, including her left arm and left leg. Employer voluntarily paid temporary total disability benefits from April 27, 2009 through May 3, 2009.

Following her accident, Claimant started treating with Dr. Ramaswamy Rangarajan. Claimant was diagnosed with multiple soft tissue contusions involving the pelvis, bilateral hip joints and knees, acute thoracic, lumbar, and cervical sprains, and left shoulder sprain. Claimant was kept off work until June 3, 2009, at which time Dr. Rangarajan released her to return to work full duty. While Dr. Rangarajan noted on May 26, 2009 that the range of motion in Claimant's left shoulder had decreased by 25%, he at no time provided a permanent partial impairment rating.

At Claimant's counsel's direction, Claimant submitted to an independent medical evaluation (IME) by Dr. Harvey Mininberg on May 10, 2011 to be rated for a permanent partial impairment. In his report, Dr. Mininberg referenced the AMA guidelines and took into account pain, weakness, loss of endurance and/or function and deemed Claimant was entitled to 25% permanent impairment to the left upper extremity and 25% permanent impairment to the left lower extremity.[2]

At Employer's request, Claimant was evaluated by Dr. Robert Gordon on October 6, 2009 and June 22, 2011. On both occasions following examinations, Dr. Gordon opined, using the 6th Edition of the AMA Guides to the Evaluation of Permanent Impairment that Claimant had a "0% permanent physical impairment rating of her left upper and left lower extremities" related to her work injury.

Claimant filed for a formal hearing seeking an award for 25% permanent partial disability to both the left upper and left lower extremities. In a February 27, 2012 CO, the presiding ALJ

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[2] In an August 1, 2011 addendum and clarification (CE 2), Dr. Mininberg stated:

> 2) With reference to the left upper extremity in accordance to the AMA Guides, figure 38, 41, 44 the patient is entitled to 13% of the left upper extremity and taking into account pain, weakness, loss of endurance and/or loss of function the patient was entitled to 12% impairment. With reference to the left lower extremity taking into account table 75, table 81, table 82 the patient is entitled to 13% impairment of the whole person. 3) Taking into account pain, weakness, loss of endurance and/or loss of function the patient is entitled to 12% impairment. Thus, the patient is entitled to 25% impairment of the whole person, 10% of which would result in 25% impairment to the left lower extremity.

determined that Claimant had not sustained her burden of proving her entitlement to the requested level of benefits.[3] Claimant timely appealed with Employer filing in opposition.

On appeal, Claimant argues that the ALJ erred by substituting his medical judgment for that of the treating physician, Dr. Rangarajan, and erred further in factoring in Claimant's lack of actual wage loss in determining the degree of her loss of industrial capacity. Employer argues the CO should be affirmed in that the ALJ was within his discretion in evaluating the medical evidence and properly focused on Claimant's ability to do her pre-injury job when determining her industrial loss of use.

STANDARD OF REVIEW

The scope of review by the CRB, 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.[4] *See* D.C. Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §§ 32-1501 to 32-1545 (2005), at § 32-1521.01(d)(2)(A). Consistent with this standard of review, the CRB and this Review Panel are constrained 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.

ANALYSIS

In the case under appeal, Claimant sought an award of 25% permanent partial disability (PPD) to both the left upper and left lower extremities. As such and as correctly stated by the ALJ, Claimant was not afforded a presumption of compensability as to the nature and extent of her disability[5], but rather had the burden of proving by a preponderance of the evidence her entitlement to the requested level of benefits.[6]

In the findings of fact, the ALJ found that Claimant's IME physician, Dr. Mininberg, provided the 25% PPD rating upon which Claimant's claim is based. The ALJ also found that in two separate examinations, Employer's IME physician, Dr. Gordon, determined that Claimant had no ratable permanent partial impairment. As to Claimant's treating physician, Dr. Rangarajan, the ALJ found that in his examination report of May 26, 2009, he noted a 25% decrease in range of motion

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[3] *Puplampu v. Contract Cleaning Services*, AHD No. 10-255A, OWC No. 659012 (February 27, 2012).

[4] "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 International v. D.C. Dept. of Employment Services*, 834 A.2d 882 (D.C. 2003).

[5] *Dunston v. DOES*, 509 A.2d 109, 111 (D.C. 1986).

[6] *WMATA v. DOES*, 926 A.2d 149 (D.C. 2007).

of both knees, a 25% decrease in movement of the left shoulder, and a 10-15% reduction in the movement of the right shoulder. There is no record of the treating physician providing an impairment rating and the ALJ made no such finding.

In his analysis of the medical evidence, the ALJ conducted a thorough review of the treating physician's examination reports. And, even though the treating physician did not provide an opinion as to Claimant's PPD, the ALJ essentially weighed those reports against the impairment rating provided by Claimant's own IME physician. In doing so, the ALJ applied the preference accorded the opinions of treating physicians over that of physicians engaged solely for litigation[7], found the treating physician to be more persuasive in order to conclude Claimant suffered no residuals from her work injury that interfered with her ability to perform full duty employment, and thereby determined that Claimant had not met her burden. The errors inherent in this analysis require us to vacate and remand this matter.

First, the ALJ should not have referenced the treating physician preference as the treating physician did not render an opinion regarding the degree of permanent partial disability, if any, Claimant incurred to her left upper and/or lower extremities. The only impairment ratings were rendered by two IME physicians, one for Claimant; the other for Employer. Thus, it was error for the ALJ to use the treating physician preference, where there was no treating physician opinion on the dispositive issue, to make a determination on that issue.

It was the two IME impairment rating opinions that the ALJ should have weighed against each other to determine the nature and extent of Claimant's disability. While the ALJ could use the treating physician's treatment reports to either support or discount either IME physician's rating, we take issue with the ALJ's interpretation of the treating physician's reports to ultimately deny entitlement to PPD. Although the treating physician did not render an opinion on the issue of permanent impairment, he did note percentage decreases in Claimant's range of motion in the effected extremities.

In addition, the ALJ appears to be under the misapprehension that a release to return to full duty carries the implication that a worker is fully recovered from their work injury and if they suffered no "significant sequelae" from the work injury are determinative factors permitting a denial of PPD. We disagree and find this to constitute error on the part of the ALJ as it is now accepted in this jurisdiction that a schedule award is to be paid "despite [the claimant's] return to work on a full time basis and even if she were not to miss any work thereafter."[8] In addition, we find no statutory or case law support for the position that the injured worker must show that they have suffered a significant sequelae from their work injury as part of their burden of proof.

We also take issue with the ALJ's reasoning finding the treating physician's assessment of Claimant's current symptoms more persuasive on the issue of permanent impairment when compared to Dr. Mininberg's IME assessment. As already noted, while Dr. Rangarajan did not render an impairment rating, he did find percentage decreases in Claimant's upper and lower

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[7] *Lincoln Hockey, LLC v. DOES*, 831 A.2d 913 (D.C. 2003).

[8] *Corrigan v. Georgetown University*, CRB No. 06-094, AHD No. 06-256, OWC No. 604612 (September 14, 2007), quoting *Smith v. D.C. Dept. of Employment Services*, 584 A.2d 95, 101-102 (D.C. 1988).

extremities comparable to Dr. Mininberg. In addition, while Dr. Rangaragan released Claimant to return to full duty, his final medical report of record still carried a diagnosis of acute thoracic and lumbar pain, with persistent back pain, acute cervical sprain, left shoulder sprain, and that she was to continue taking Flexeril.[9] This runs counter to the ALJ determination that Claimant has fully recovered and suffers no residuals from her work injury. As the ALJ's determinations are not supported by substantial evidence in the record, this matter must be returned for a proper consideration of the evidence.

As this matter is being returned and in order to avoid any further unnecessary appeals on the issue, we point to another error the ALJ committed in determining whether Claimant proved her entitlement to PPD benefits. The ALJ found that Claimant "presently works 40 hours per week in her pre-injury employment" and that the record evidence showed "no record of Claimant's absenteeism from work" as a result of her "symptomatic left shoulder and low back."[10] In the discussion, the ALJ stated, in reference to Dr. Mininberg's impairment rating

> The apportioned loss of endurance and function also do not coincide with Claimant's uneventful performance of her full duty employment for 40 hours per week and the ratable impairments are further unsupported by any record of missing work necessitated by those factors.[11]

And, after noting Claimant's "unequivocal testimony" that her residual symptoms in her left arm and left leg did not interfere with the performance of her job, the ALJ further stated

> Claimant acknowledged in her testimony she works 40 hours per week in her pre-injury employment without suffering any set backs in performing her duties, although her co-workers occasionally assist her in doing some of the assigned tasks.[12]

The ALJ therefore reasoned

> Accordingly, considering the absence of any significant sequelae from the April 3, 2009 work incident undermining her capacity to perform the duties of her employment or otherwise carry out the responsibilities of her daily living, the undersigned is not persuaded Claimant has met her burden of proving by a preponderance of the evidence that she is entitled to 25% permanent partial disability benefits ascribable to each of her left upper and lower extremities.[13]

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[9] CE 3, p. 8.

[10] CO at 4.

[11] *Id.*, at p, 5.

[12] *Id.*

[13] *Id.*, at p. 6.

The ALJ's reliance on Claimant's ability to return to full duty work, perform her work duties with minimal assistance, and to do so without suffering any absenteeism to determine the extent of her disability runs counter to established case law when assessing PPD. It is now well established that an injured worker can receive a schedule award notwithstanding having returned to work full time and having missed no days from work.[14] It was the ALJ responsibility to assess Claimant's industrial loss of use, that is, in addition to any residual effects from her work injury, whether Claimant suffered any diminished ability to compete in the labor market. On remand, the ALJ shall undertake the appropriate analysis of Claimant's disability in keeping with the current state of the law in this jurisdiction.[15]

CONCLUSION AND ORDER

The findings of fact and the conclusions of law in the February 27, 2012 Compensation Order are not supported by substantial evidence, nor are they in accordance with the applicable law. The Compensation Order is VACATED and this matter is REMANDED for further consideration consistent with this Decision and Remand Order.

FOR THE COMPENSATION REVIEW BOARD:

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HENRY W. MCCOY
Administrative Appeals Judge

June 8, 2012
DATE

[14] *Corrigan v. Georgetown University*, CRB No. 06-094, AHD No. 06-256, OWC No. 604612 (September 14, 2007).

[15] See *Jones v. D.C. Dept. of Employment Services*, No. 10-AA-628 (D.C. April 26, 2012).