

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY  
MAYOR



F. THOMAS LUPARELLO  
ACTING DIRECTOR

COMPENSATION REVIEW BOARD

CRB 13-068

RENEE L. JACKSON,  
Claimant-Petitioner,

v.

WASHINGTON HOSPITAL CENTER  
and GALLAGHER BASSETT SERVICES, INC.,  
Self-Insured Employer and Third Party Administrator-Respondent.

Appeal from a May 2, 2013 Compensation Order  
By Administrative Law Judge Gerald D. Roberson  
AHD No. 12-520, OWC No. 525040

David J. Kapson for the Petitioner  
William S. Hopkins for the Respondent  
Allen J. Lowe and Benjamin E. Douglas, as *Amicus Curiae*

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

LAWRENCE D. TARR for the Compensation Review Board; JEFFREY P. RUSSELL, *concurring in part and dissenting in part*.

DECISION AND ORDER

This case is before the Compensation Review Board (CRB) on the appeal filed by Renee L. Jackson (Claimant) challenging the May 2, 2013, Compensation Order (CO) issued by an Administrative Law Judge (ALJ) in the Hearings and Adjudication Section of the District of Columbia Department of Employment Services (DOES).

In the CO, the ALJ determined that Claimant's back and right leg problems are causally related to a February 1, 1998 work injury, denied Claimant's requests for authorization of medical treatment and for reimbursement of out-of-pocket medical expenses, and held that Claimant proved a 9% permanent partial disability to her right leg. We AFFIRM.<sup>1</sup>

<sup>1</sup> This case initially was selected for en banc determination. The parties and amicus curie were notified on March 31, 2014 that the case would be decided by panel.

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## BACKGROUND AND FACTS OF RECORD

Claimant has worked for Employer, the Washington Hospital Center, since 1972. In February 1998, Claimant was working as a patient and guest service representative. Her duties, as found by the ALJ, were:

Claimant assisted patients from their cars lifting them in and out cars, transported them in wheelchairs. Claimant would also walk along with the patients and assisted them to their appointments. Claimant's job required a lot of lifting.

CO at 2.

On February 11, 1998, Claimant went to Employer's Occupational Health Department and reported she was experiencing severe pain down her right side and leg. Six days later, on February 17, 1998, Claimant was examined by Dr. Robert Collins, an orthopedic surgeon. The history taken by Dr. Collins stated Claimant was injured while attempting to push a patient in a wheelchair through a door that was broken. Dr. Collins diagnosed acute lumbar strain with muscle spasm.

The medical treatment received by Claimant thereafter is fully described in the CO. In brief, Dr. Collins continued to treat Claimant, primarily for back, right side and leg pain. After an April 1998 MRI showed a small central and right sided disc herniation, Dr. Collins referred Claimant to a neurosurgeon, Dr. James Tozzi, who determined Claimant did not need surgery. Dr. Tozzi recommended Claimant receive epidural steroid injections, which were done. Dr. Collins released Claimant to light duty, with no lifting more than 25 pounds, on June 23, 1999. Despite the light duty release, the claimant continued to perform her regular duties for Employer.

Since 1999, Claimant has been treated by, or received consultation from, several doctors: Dr. Jeff Jacobson, Dr. John Toerge, Dr. Michael Kuo, and Dr. Malady Kodgi. Employer had Claimant examined for IMEs, twice by Dr. Marc Danziger and once by Dr. Phillip Marion. Claimant also was examined for an IME at her request by Dr. Joel Fechter. Claimant testified that since July 2012 she has received pain management treatment from Dr. Asaaf Gordon. No reports, bills, or records were introduced into evidence from Dr. Gordon.

Two IME doctors, Dr. Danziger and Dr. Fechter, opined on the claimant's permanent impairment. Dr. Fechter reported that Claimant has a 21% impairment of her right leg, of which 9% was due to pain, loss of endurance, and loss of function. Dr. Danziger reported that the claimant did not have any impairment caused by the work accident.

At the formal hearing Claimant testified that although she has been able to do her regular work since the accident, she continues to have problems:

Claimant testified she currently works for Employer in the same job with the same duties, and she is on her feet all day during the workday, which causes leg discomfort.

\* \* \*

Claimant contends she has problems with prolonged sitting, standing and walking, and she has difficulty with pain in the low back and increased symptoms radiating into her lower extremities, primarily the right side with repetitive bending, stooping and lifting as well as pushing, pulling, and twisting activities involving the trunk. HT pp. 72-73. Claimant maintains she has difficulty with lifting, walking and sleeping due to pain. HT p. 73.

CO at 7, 11-12.

Claimant sought an award for the 21% permanent partial disability to her right leg, authorization for continued medical treatment with Dr. Gordon, payment of his medical bills, and reimbursement for her out-of-pocket pain medication that were paid either through Claimant's health insurance or were paid directly by Claimant.

In the May 2, 2013 CO, the ALJ held there is a medical causal relationship between Claimant's current back and right leg symptoms and the February 11, 1998, work incident. Employer has not appealed that determination.

The ALJ also determined Claimant has a 9% schedule permanent partial disability, denied authorization for Dr. Gordon's medical treatment and denied reimbursement of out-of-pocket expenses related to Dr. Gordon's treatment. Claimant has appealed these determinations.

## **DISCUSSION AND ANALYSIS**

### **Treatment with Dr. Gordon and Reimbursement of Medical Expenses**

Claimant testified she began treating with Dr. Gordon in 2012 and that Dr. Gordon has given her three injections and prescribed medication that she continues to need. Claimant did not introduce any medical records, bills or reports from Dr. Gordon at the hearing and testified she has not submitted for payment any of his bills to Employer or its third party administrator.

In denying the requests, the ALJ held:

Claimant's request for reimbursement did not contain any documentation to establish the expenses incurred and the medication expenses were related to the work injury. Additionally, Claimant has not offered any documentation to establish she incurred an out of pocket expense. In term [sic] of authorization for treatment, Claimant testified she never submitted any of Dr. Gordon's bills to Gallagher Bassett. HT p. 54. Claimant remarked she did not tell Dr. Gordon about

the insurance company, and he has not sent any of his reports to the insurance company. HT p. 55. Claimant indicated she began her treatment with Dr. Gordon in December 2012. HT p. 42 Claimant readily admitted she does not have any medical records from Dr. Gordon. HT p. 75. Given the fact the record does not contain any medical records from Dr. Gordon, this Office cannot make a determination whether the treatment is medically related to the work incident in order to authorize his treatment and find Employer obligated to pay for the treatment. As such Claimant's request for authorization of medical treatment and reimbursement of out of pocket expenses is denied.

CO at 14, 15.

The D. C. Workers' Compensation Act of 1979, as amended, D.C. Code §32-1501, *et seq.*, (Act) provides that an employer is liable to pay for all reasonable and necessary medical treatment and expenses that are causally related to the work injury. (D.C. Code § 32-1507 (a)).<sup>2</sup> However, the burden is on Claimant to prove entitlement to payment for such treatment.

Claimant failed to produce any evidence that the medical treatment and other expenses were incurred for a compensable injury. "In some cases, rather, the weakness of the proponent's proof -- the lack of evidence -- may be enough to defeat (his) claim." *Lyles (Deceased) v. D.C. Dept. of Public Works*, CRB No. 08-211, AHD No. PBL XX-258B, DCP No. LT5-DPW000497 (November 10, 2009) citing *Golding-Alleyne v. DOES*, 980 A.2d 1209 at 1216-1217 (D.C. 2009).

In light of the lack of documentary evidence that Dr. Gordon's treatment, or the expenses related to his treatment, were incurred to treat a compensable injury, the ALJ's decision not to award medical benefits is supported by substantial evidence and in accordance with the law.

#### **SCHEDULE PERMANENT PARTIAL DISABILITY CLAIM**

Claimant also has appealed the ALJ's determination regarding her claim for permanent partial disability benefits. Claimant argues that the ALJ erred in finding she has a 9% permanent partial disability of her right leg and contends her disability is 21% in accordance with Dr. Fechter's IME.

In a claim seeking a schedule permanent partial disability award, a determination must be made of the nature and extent of a claimant's disability. With such claims, the burden is on a claimant

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<sup>2</sup> The pertinent part of this Code section states:

The employer shall furnish such medical, surgical, vocational rehabilitation services, including necessary travel expenses and other attendance or treatment, nurse and hospital service, medicine, crutches, false teeth or the repair thereof, eye glasses or the repair thereof, artificial or any prosthetic appliance for such period as the nature of the injury or the process of recovery may require.

to prove the extent of disability by a preponderance of the evidence without the assistance of any presumption. *Davis-Dodson v. DOES.*, 697 A.2d 1214 (D.C. 1997); *Dunston v. DOES*, 509 A.2d 109 (D.C. 1986). *Burge v. DOES*, 842 A.2d 661, 666 (D.C. 2004); *Upchurch v. DOES*, 783 A.2d 623, 628 (D.C. 2001).

The Act has three principal parts that address schedule disability. The first, D.C. Code § 32-1508 (3), identifies the periods of compensation payable for permanent disability to the listed body parts. The second, placed in § D.C. Code 32-1508(V) (iii), provides for a 25% reduction in these periods of compensation for injuries occurring after April 16, 1999.

The third, and the one primarily brought into focus by the present appeal, is D.C. Code § 32-1508 (U-i). This section identifies several factors that can be considered in assessing a claim for permanent partial disability. This Code section provides:

In determining disability pursuant to subparagraphs (A) through (S) of this subsection, the most recent edition of the American Medical Association's *Guides to the Evaluation of Permanent Impairment* may be utilized, along with the following 5 factors:

- (i) Pain;
- (ii) Weakness
- (iii) Atrophy;
- (iv) Loss of endurance and
- (v) Loss of function.

Although the statute requires a determination of “disability,” a review of the case law shows that there are times when administrative judges have used “disability” and “impairment” interchangeably. However, the two terms are not synonymous.

The Code contains separate definitions for each term. Disability is defined as the “physical or mental incapacity because of injury which results in the loss of wages.” Physical impairment is defined as “any physical or mental condition which is or is likely to be a hindrance or obstacle to obtaining employment” D.C. Code §§ 32-1501 (8), (17).

In the decision below, the ALJ used a sequential analysis in determining Claimant’s degree of disability—he first assessed medical impairment by analyzing the two IME reports that provided a rating of impairment, decided which rating was persuasive, and then increased this rating by his assessment of the 5 factors to determine Claimant’s disability.

With respect to the medical impairment component the only doctors who opined on the issue of medical impairment were the IME doctors, Dr. Danziger and Dr. Fechter. The ALJ correctly afforded neither IME opinion an evidentiary preference.

The ALJ accepted Dr. Danziger's 0% rating and rejected Dr. Fechter's rating and held "In this case, Claimant has not provided sufficient evidence to establish a medical impairment for the right lower extremity."

The ALJ stated the reasons why he accepted Dr. Danziger's opinion and rejected Dr. Fechter's opinion. The ALJ accepted Dr. Danziger's rating because

there are no radicular symptoms, no weakness, no atrophy in the legs and no signs of any objective complaints to the legs, and straight leg raising [being] negative for any type of nerve root symptoms.

The ALJ rejected Dr. Fechter's rating because that doctor

has not offered sufficient medical rationale to establish entitlement to a medical impairment. Dr. Fechter does not refer to any tables in the AMA guides [the American Medical Association Guides for the Evaluation of Permanent Impairment, 6<sup>th</sup> Edition] to support his impairment rating and he does not expressly state how he arrived at the impairment rating of 12% for the right lower extremity. Therefore, Claimant has not provided sufficient medical rationale to support an impairment rating of 12% for the right lower extremity."<sup>3</sup>

CO at 13.

The ALJ next analyzed the claim with respect to the 5 factors. The ALJ noted Dr. Fechter reported additional impairment of 9% for the 5 factors- 3% each for pain, loss of endurance and loss of function while Dr. Danziger had not found any additional impairment based on the 5 factors.

The ALJ reviewed the medical record and the claimant's testimony and explained why he accepted Dr. Fechter's 9% impairment:

The treating physicians and Dr. Fechter have documented Claimant's complaints with respect to pain, loss of function and loss of endurance. Dr. Kodgi examined Claimant on October 20, 2010, and her complaints included low back pain with dull aching right leg, calf and to the toe. CE 2, p. 46. On October 5, 2011, Claimant complained of back pain, muscle cramps and muscle weakness. CE 2, p. 25. She had positive straight leg raising on the right. Dr. Kodgi diagnosed right lumbar radiculopathy, chronic low back pain, and Dr. Kodgi recommended lumbar epidural steroid injection for radicular pain. CE 2, p. 27. Dr. Fechter documented similar subjective complaints in his IME report. Dr. Fechter noted

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<sup>3</sup> The ALJ correctly stated Dr. Fechter reported a 12% medical impairment, since 9% of his 21% impairment rating was attributed to the five factors.

Claimant also had increased radicular symptoms with repetitive bending, stooping or lifting as well as with pushing, pulling and twisting activities of the trunk. Dr. Fechter remarked Claimant cannot lift as much as she used to be able to do because she has low back pain and radicular symptoms. Dr. Fechter stated Claimant has stiffness and weakness here and notes increased pain and aching discomfort about the low back with cold and damp weather changes. CE 1, p. 1. Based on the medical evidence and the testimony, Claimant has established an entitlement to an impairment rating of 3% for pain, 3% for loss of function and 3% for loss of endurance for a total impairment rating of 9% for the right lower extremity due to the injury of February 11, 1998

CO at 14.

On review we find no error in these determinations. Each is supported by substantial evidence in the record and is in accordance with the law. Moreover, the ALJ explained the basis for his determination with sufficient specificity to satisfy the standard set forth in *Jones v. DOES*, 41 A. 3d 1219 (D.C.2012).

Our dissenting colleague raises the issue of whether the ALJ erred by awarding schedule permanent partial disability benefits even though he found no medical impairment. Although the CRB usually does not discuss issues not raised or briefed by the parties, in light of the dissent we feel a response is necessary.

There is nothing in D.C. Code § 32-1508(U-i) which states or implies that evidence of medical impairment is required. To the contrary, to the extent that this code section says anything about medical impairment, it says that in determining disability, the AMA guides for evaluating impairment along with the 5 factors “may” be used.

Additionally, making a medical impairment a prerequisite for a schedule award is contrary to the principle that disability is a legal not a medical concept. As the District of Columbia Court of Appeals stated in *Negussie v. DOES*, 915 A.2d 391 (2007), when discussing the legislative history of D.C. Code § 32-1508:

There is nothing in the plain words of these statutory provisions stating explicitly, or even implicitly, that the determination of disability is the sole 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.

*Id.* at 396.

The *Negussie* Court cited with approval the following from a Maryland Court of Appeals decision:

The *AMA Guides* themselves warn that the impairment ratings derived from the *AMA Guides* are not substitutes for the legal determination of disability. "As used in the *Guides*, 'impairment' means an alteration of an individual's health status that is *assessed by medical means*, 'disability,' which is *assessed by nonmedical means*, means an alteration of an individual's capacity to meet personal, social, or occupational demands, or to meet statutory or regulatory requirements." . . . The Commission must do more than merely adopt medical evaluations of anatomical impairment; the Commission must assess the extent of the loss of use by considering how the injury has affected the employee's ability to do his or her job. An evaluating physician provides the Commission with an assessment of medical impairment; the finder of fact, however, must determine the degree of disability. (Emphases in original).

*Id.* at 397.

Similarly, the CRB held in *Wormack v. Fischback & Moore Electric Inc.*, CRB No. 03-159, AHD No. 03-151, OWC No. 456205 (July 22, 2005) that an ALJ may reject all medical opinions in determining disability, thereby implying that a medical determination of impairment is not a requirement for a schedule award.

In *Wormack*, the CRB held:

[T]he ALJ needs broad discretion to consider the medical and non-medical evidence in reaching a decision as to the non-medical question of the loss of industrial use, and in so doing, needs broad discretion to accept either or neither of the medical opinions in reaching a conclusion as to the fact of the degree of disability under the Act.

Requiring evidence of medical impairment is not consistent with statutory language and is inconsistent with the liberal construction with which we are to construe the Act.

We also do not believe a remand is necessary for the ALJ to consider the non-medical vocational facts in his decision, as suggested by the dissent. We find the ALJ did consider those factors.

The ALJ held:

Regarding the five factors under D.C. Official Code § 32-1508(3)(A)-(U-i), Dr. Fechter provided an additional impairment rating of 3% each for pain, loss of endurance and loss of function for a total impairment of 9% based on the subjective five factors. CE 1, p. 2. Conversely, Dr. Danziger found no additional

impairment based on the five factors of pain, weakness atrophy, loss of function and loss of endurance, stating there is no evidence of subjective complaints that would warrant a rating. At the hearing, Claimant testified she is on her feet all day during the workday, and she uses the rub on cream on her legs after a long day. HT pp. 46-47. Claimant remarked she has problems sleeping due to pain. HT p. 46. Claimant testified she continues to perform pre-injury employment, and she has difficulty pushing patients. HT p. 46. Claimant testified her back feels tired after a long day, and her leg feels terrible. HT p. 47.

The treating physicians and Dr. Fechter have documented Claimant's complaints with respect to pain, loss of function and loss of endurance. Dr. Kodgi examined Claimant on October 20, 2010, and her complaints included low back pain with dull aching right leg, calf and to the toe. CE 2, p. 46. On October 5, 2011, Claimant complained of back pain, muscle cramps and muscle weakness. CE 2, p. 25. She had positive straight leg raising on the right. Dr. Kodgi diagnosed right lumbar radiculopathy, chronic low back pain, and Dr. Kodgi recommended lumbar epidural steroid injection for radicular pain. CE 2, p. 27. Dr. Fechter documented similar subjective complaints in his IME report. Dr. Fechter noted Claimant also had increased radicular symptoms with repetitive bending, stooping or lifting as well as with pushing, pulling and twisting activities of the trunk. Dr. Fechter remarked Claimant cannot lift as much as she used to be able to do because she has low back pain and radicular symptoms. Dr. Fechter stated Claimant has stiffness and weakness here and notes increased pain and aching discomfort about the low back with cold and damp weather changes. CE 1, p. 1. Based on the medical evidence and the testimony, Claimant has established an entitlement to an impairment rating of 3% for pain, 3% for loss of function and 3% for loss of endurance for a total impairment rating of 9% for the right lower extremity due to the injury of February 11, 1998.

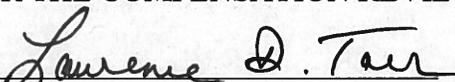
CO at 13-14.

We find this passage from the CO shows that the ALJ considered the evidence of non-medical vocational facts in his decision. Indeed those matters—Claimant's testimony as to how her pain, loss of function, and loss of endurance impairs her ability to work, in conjunction with the medical evidence regarding those matters—were the reason the ALJ accepted Dr. Fechter's opinion and found the impairment that he did which, in turn, formed the basis of the ALJ's decision to award benefits.

## CONCLUSION AND ORDER

The ALJ's decision not to award medical benefits and his decision that Claimant sustained a 9% permanent partial disability to her right leg are supported by substantial evidence and are in accordance with the law and are therefore AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

  
LAWRENCE D. TARR  
Chief Administrative Appeals Judge

May 30, 2014  
DATE

Jeffrey P. Russell, *concurring in part and dissenting in part*:

I concur with the portion of the Decision and Order regarding the payment of medical bills. I respectfully dissent and would find that the ALJ erred as a matter of law when he awarded permanent partial disability benefits after finding Claimant had a 0% medical impairment.<sup>4</sup>

The ALJ held

Claimant has not provided evidence to establish a medical impairment for the right lower extremity.

Although it has now become firmly entrenched in our workers' compensation law that medical impairment and disability are not the same thing, and that a given numerical medical impairment rating does not necessarily translate to an identical numerical disability award under the schedule, it is equally true that *some* degree of medical impairment is required for a claimant to have a disability, which as is defined as "physical or mental incapacity because of injury which result in loss of wages". D.C. Code § 32-1501(8). "Impairment" and "incapacity" are in this context synonymous.

As we have stated numerous times, some degree of medical impairment is a prerequisite for an award under the schedule. See *Stocks v. Washington Hospital Center*, CRB No. 12-053, AHD No. 09-394A, OWC No. 639622, (August 15, 2013), at 5-6; *Thompson v. WMATA*, CRB No. 11-111, AHD No. 05-056B, (January 19, 2012) at 9, footnote 2; and *Evans v. WMATA*, CRB No. 09-012, AHD No. 08-203, OWC No. 615875, (December 23, 2008), at 8.

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<sup>4</sup> I acknowledge that Employer did not appeal this issue. However, the CRB is mandated to affirm Compensation Orders that are in accordance with the law. D.C. Code § 32-1521.01 (d) (A), 7 DCMR § 266.2(a) (b).

Thus, a medical impairment is a prerequisite to awarding permanent partial disability benefits which can serve as a baseline for an award. As the CRB held in *Nickens v. Fort Myer Construction Co.*, AHD No. 12-455, OWC No. 687767 (August 6, 2013):

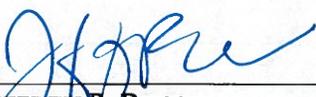
It would not be error for an ALJ to make a finding as to the degree of medical impairment if the finding is supported by substantial evidence, and it would not be error to accept the degree of medical impairment as fairly representing the extent of disability under the schedule if the record fails to 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.

Further, the ALJ made several findings or references to non-medical, vocational facts: "Claimant has continued to perform her regular duties, and has continued to have back and right leg problems associated with performing those duties", Compensation Order, page 4; "Claimant indicated her symptoms were starting to feel worse due to pushing patients in the wheelchairs, and bending over to lift legs to put on the leg rest. She is working full duty despite the discomfort", *id*, page 10; "At the hearing, Claimant testified she is on her feet all day during the workday, and she uses a rub on cream on her legs after a long day. HT pp. 46-47. ... Claimant testified she continues to perform her pre-injury employment, and she has difficulty pushing patients. HT p. 46. Claimant testified her back feels tired after a long day, and her leg feels terrible. HT p. 47", *id*, page 13; and Dr. Fechter noted Claimant also has increased radicular symptoms with repetitive bending, stooping or lifting as well as with pushing, pulling and twisting activities of the trunk [and] she cannot lift as much as she used to be able to do because she has low back pain and radicular symptoms", *id*, page 14; "On page 3 of his July 29, 2008 report, Dr. Danziger stated 'she has been able to maintain a full duty work status over the last 10 years minus six weeks she was out'. He further remarked 'To her credit, she has continued to work and there is no symptom of symptom magnification or any evidence of secondary gain as she complained she developed left side pain and limping due to pushing patients up the ramp", *id*, page 6; "Claimant testified that she currently works for the same employer with the same job and duties, and she is on her feet all day during the workday, which causes her leg discomfort. HT pp. 45-47", *id*, page 7; "Dr. Fechter remarked Claimant cannot lift as much as she used to be able to do ... ." *id*, page 8.

Despite these references, however, the ALJ makes no comment concerning how these noted vocational issues impact the award; one can't tell whether for example he felt that they enhance, diminish, or have no impact upon his assessment of Ms. Jackson's disability.

Accordingly and for these reasons, I would vacate the schedule award and remand the matter for further consideration. I would remand the matter to the ALJ for clarification: if he finds in fact that there is no medical impairment, the schedule award should be denied. If, however, he finds that there is a medical impairment, he may make finding as to that impairment, and then proceed

to consider the non-medical, vocational matters, as well as the “five factors” in conjunction with the vocational factors, and arrive at a disability award rationally based thereon.



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JEFFREY P. RUSSELL  
*Administrative Appeals Judge*