GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR

DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 16-001

RICHARD A. MANN,
Claimant–Petitioner,

v.

KNIGHT NETWORKING & WEB DESIGN and
MONTGOMERY INSURANCE COMPANY,
Employer-Respondent.

DEPT. OF EMPLOYMENT SERVICES
COMPENSATION REVIEW BOARD
2016 JUL 26 AM 11 50

Appeal from a December 25, 2015 Compensation Order
by Administrative Law Judge Lilian Shepherd
AHD No. 15-307, OWC Nos. 548557 and 601718

(Decided July 26, 2016)

Jonathan Marlin for the Employer
Richard A. Mann, *pro se* Claimant[1]

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

JEFFREY P. RUSSELL, for the Compensation Review Board.

DECISION AND REMAND ORDER

PROCEDURAL HISTORY

This appeal follows a formal hearing conducted before an administrative law judge (ALJ) in the Administrative Hearings Division (AHD) within the Office of Hearings and Adjudication (OHA)

[1] As is discussed in two prior orders from the Compensation Review Board (CRB), Claimant was represented at the formal hearing by Benjamin T. Boscolo, who has been deemed to have withdrawn his appearance by failing to respond to an Order to Show Cause (OSC) which included, in part, a direction that Mr. Boscolo clarify his status as counsel for Claimant in light of Claimant's having filed a separate Application for Review *pro se*, in which he asserted that Claimant had been "abandoned" by his attorney. We nonetheless have decided to continue to include Mr. Boscolo as a person being served as if he were still counsel, at least until this matter is resolved at the administrative level by the issuance of this Decision and Remand Order, in order to assure that if there have been unexplained circumstances which have thus far prevented anyone from advising the CRB as to Mr. Boscolo's status, no prejudice will inure to Claimant as a result of his counsel not being kept apprised of the actions of the CRB.

of the District of Columbia Department of Employment Services (DOES). Richard A. Mann (Claimant) was represented at that hearing by Benjamin T. Boscolo (Claimant's Counsel). That formal hearing occurred November 3, 2015.

The ALJ issued a Compensation Order on December 9, 2015 (the CO), awarding Claimant 2% permanent partial "impairment" to the right hand, for which Claimant had sought a 28% permanent partial disability (PPD) award under the schedule, and 0% "impairment" to the left, for which Claimant had sought a PPD award of 27%.[2]

In addition, the ALJ denied a motion to reopen the record[3] filed by Claimant's counsel, stating in a footnote that:

> Claimant submitted a motion on November 16, 2015, to reopen the record. The basis was to show why the Claimant did not change his treating physician. The motion was denied because the record did not close until November 18, 2015 and the information in the motion was not pertinent to the decision.

CO at 2, n. 1.[4]

On January 7, 2016, Claimant filed a *pro se* "Application for Review" and a memorandum in support thereof (Claimant's AFR 1), appealing the CO to the Compensation Review Board (CRB) within OHA. No mention was made in Claimant's AFR 1 explaining why he, and not his counsel, had filed the AFR.

On January 8, 2016, Claimant's Counsel filed "Claimant's Application for Review" and a memorandum in support thereof (AFR 2) with the CRB on behalf of Claimant.

On January 20, 2016, Knight Networking & Web Design and Montgomery Insurance Company (Employer) filed with the CRB "Employer/Insurer's Opposition to Application for Review" and memorandum in support thereof (Employer's Brief).

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[2] We assume for this appeal that the ALJ meant "disability" rather than "impairment". Care should be taken, particularly in schedule loss cases, that these two terms be used accurately, inasmuch as they are closely related yet different in legal significance that in some cases, using one term where the other is appropriate could result in a reversal because the CRB may not be able to clearly assess from the context which was intended.

[3] The motion sought to introduce documents from prior proceedings before the Office of Workers' Compensation (OWC) in which Claimant's request for authorization to change his attending physician was denied. The re-opening request was premised upon Employer having argued in closing argument that the treating physician's opinion on the degree of medical impairment should be accorded great weight, and that Claimant should have obtained care from another physician if, as Claimant testified, the treating physician was ignoring his complaints and failed to assess them properly. The motion was denied, and that denial was not appealed in AFR 2. Because the ALJ didn't base any part of her decision upon this issue, we decline to find that the denial of the request to re-open the record constitutes prejudicial error.

[4] We cannot tell whether the footnote itself was the ALJ's ruling, or if it described a ruling contained in a separate order. No such separate order was provided to the CRB when AHD transmitted the record upon filing of the Applications for Review.

On January 21, 2016, Claimant filed an additional pleading, with a cover letter referring to the document as an "addendum" to the original AFR.

On February 8, 2016, Claimant opposed Employer's opposition by filing "Plaintiff's Response to Employer/Insurer's Opposition to Plaintiff's Application for Review".

Although Employer's Brief acknowledges that multiple AFRs have been filed with the CRB (Employer's Brief at unnumbered page 4), Employer raises no substantive or procedural objection to having the CRB consider both AFRs.

Such facts as are necessary for our review of the CO will be set forth as stated in the CO.

ANALYSIS

We begin with an observation that the CO, which concerns claims of injuries to both hands arising out of two separate incidents, suffers from a fatal inconsistency between the awards and the findings of fact which requires that the awards be vacated and the matter remanded for further consideration.

The awards made were 0% to the left hand and 2% to the right hand. Yet the CO, in the "Findings of Fact", contains the following:

> [Claimant's] job duties included taking computers out of big racks and pulling a lot of heavy drawers, installing components, [sic] installing software. *His job duties were* 60% software installation and *40 % hardware installations*. On July 30, 2002, Claimant was walking through a door when the handle hit the back of his right hand, causing injury to the middle and index finger from the knuckles to the back of the hand. Claimant sought medical treatment from Dr. McClinton and was treated with heat and physical therapy. He continued to work but used the left hand more to compensate for the injured right hand.
>
> On December 3, 2003, Claimant was reaching into a computer and felt a snap/pop sound in the left wrist. Claimant experienced pain but he continued to work, switching back to using the right hand. Claimant began experiencing pain in his right wrist. Claimant could *no longer use his hands to do hardware installation* and only worked on software installation. Claimant continued to work full time with his injuries and only *took a few months off work* and *did not use his hands during that time*.

CO at 2, 3 (emphasis added).

The CO does not assert that this is merely a recital of Claimant's version of events; rather, these findings are clearly set forth as being "Findings of Fact". It is inconceivable to this panel that two injuries that combined to cause Claimant to (1) miss "a few months" from work, (2) completely avoid using either hand during the time off, and (3) eliminate from his work 40% of the activities that the pre-injury job entails, could rationally be found to have caused so minor a disability under the schedule.

We recognize that the ALJ made a finding (set forth in the "Discussion" portion of the CO) that the ALJ didn't "find the Claimant credible" when he testified that "he is able to play the piano for only 30 minutes before he has to stop due to pain, yet he works on a keyboard all day, every day as part of his continued employment. Logic dictates that the range of motion for the piano is the same or similar to the range of motion on the computer keyboard and Claimant has been able to maintain his employment without any restrictions from any doctors." CO at 6, 7.

Regardless of whether the ALJ's conclusion that Claimant lacks credibility flows rationally from the piano/computer keyboard comparison, that lack of credibility did not prevent the ALJ from finding that Claimant had sustained an injury that kept him out of work for several months and continues to requires him, at least according to the CO, to avoid performing functions comprising nearly half of his pre-injury duties.[5]

This leads to one of the arguments raised in AFR 2, that the ALJ erred in making this credibility determination:

> The Compensation Order's credibility determination is not based upon the appearance and demeanor of [Claimant] at the formal hearing, but based upon assumptions regarding a comparison between a piano and a computer keyboard which are not based upon evidence in the record.

AFR 2 at 9, citing *WMATA v. DOES,* 683 A.2d 470 (D.C. 1996) at 477. The cited passage from that case is as follows:

> It is well-settled that "'substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Dell* [*v. DOES*,] 499 A.2d [102] at 108 (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229, 83 L. Ed. 126, 59 S. Ct. 206 (1938)). The trier of fact -- in this case the hearing examiner -- "is entitled to draw reasonable inferences from the evidence presented." *Id.*; *see George Hyman Constr. v. District of Columbia Dep't of Employment Servs.*, 498 A.2d 563, 566 (D.C. 1985). Where credibility questions are involved "the fact finding of hearing officer is entitled to great weight," *In re Dwyer*, 399 A.2d 1, 12 (D.C. 1979), since the hearing examiner is in the best position to observe the demeanor of witnesses.

While Claimant argues in AFR 1 that his credibility has been unfairly judged by the ALJ due to what he characterizes as explainable facts about his demeanor, as AFR 2 notes, it is not upon Claimant's demeanor that this finding was based.

We agree with AFR 2: there is nothing in the record establishing any comparability between playing a piano and typing, and it is not a subject about which an ALJ may take administrative notice.

We also note that the ALJ's consideration of any non-occupational limitations is now deemed irrelevant to consideration of the degree of disability under the schedule unless the ALJ can show a "nexus" between the non-occupational limitations and specific requirements of the pre-injury

[5] There is no finding that this limitation was limited in time and does not persist to this day.

job. Under the recent case of *M.C. Dean, Inc., v. DOES and Anthony Lawson, Intervenor*, DCCA No. 14-AA-1141 (Slip Op. July 7, 2016) (*Lawson*) the District of Columbia Court of Appeals determined:

> 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 not increase based on functional impairment of personal and social activities because those are beyond the economic scope of the Act.**[9] 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.
>
> [9] *Smith v. DOES*, 548 A.2d 95, 100 (D.C. 1988), explains that "compensation under the Act is predicated upon the loss of wage earning capacity, or economic impairment, and not upon functional disability or physical impairment." *See also Upchurch v. DOES,* , 783 A.2d 623, 627 (D.C. 2001) (stating "[d]isability is an economic and not a medical concept" based on the "loss of wage-earning capacity").

Lawson, at 22, 23. (bold added, footnote in original).

While the CRB had assumed that the ALJ's CO consideration of two of the "Five Factors", specifically, loss of function and loss of endurance, would render non-occupational considerations relevant, the court determined otherwise.[6]

Lawson sheds additional light upon the court's thinking with regard to the process by which an ALJ is to arrive at a disability award, and implies that a medical impairment rating is something of a "baseline" from which the disability award is to be assessed by determining how occupational impacts plus subjective factors that have a "nexus" to earning capacity would support a deviation from the medical impairment determination to arrive at a disability figure. Quoting from *Lawson*:

> We agree that determining "occupational capacity is precisely what an ALJ is tasked to do," but it is not clear that occupational capacity should be an independent factor in a vacuum. Limitations of occupational activities are assessed under the statutory structure (with the Maryland factors of pain, weakness, atrophy, loss of endurance, and loss of function), and our recent decisions have emphasized that **variance from the physical impairment rating to the economic disability rating should be specifically explained.** *See Bowles*

[6] See *Lawson v. M.C. Dean, Inc.,* CRB No.14-056, (September 17, 2014). Prior to *Lawson*, Claimant's testimony, if credited, would have apparent relevance because he testified that his current hand problems have limited his ability to play piano for more than 30 minutes at a sitting and only a few days a week, while before he could play for hours at a time, and on a daily basis.

> [*v. DOES,* 121 A3rd 1264 (D.C. 2015)] *supra*, at 1269–70 (remanding where disability award could not be derived from summation of the possible evidence: "No combination of 7%, 8%, and 5% add[s] up to just 10%"); *Jones*, [*v. DOES*, 41 A.3d 1219 (D.C. 2012)] *supra*, 41 A. 3d at 1226 (remanding for further findings where the basis of a 7% disability award "and not, for example, 1%, 10% or 30% -- is a complete mystery.")

Lawson, at 24, 25 (bold added).

The usage "variance from the physical impairment" suggests that the court views medical impairment as a baseline from which disability is to be assessed, and is consistent with a framework for analysis that has been applied in CRB decisions since *Jones*.

The earliest formation of medical impairment being viewed as a proxy or baseline for disability under the schedule appears in a concurrence in *Ulloa v. Hotel Harrington*, CRB No. 12-006 (August 7, 2012) *(Ulloa)*:

> In my estimation, the court has stated that schedule awards must be explained fully, which, given their numerical nature, means that the method of arriving at the number must be (1) explained, and (2) rationally related to the goal of reaching a "prediction" concerning the future impact of the injurious impairment upon earnings.
>
> I can see only one possible way that this type of specificity can be achieved.
>
> Given that the legislature specifically countenances the use of the AMA Guides "in determining disability", it is rational to at least start with the proposition that the legislature intends for medical impairment to be viewed as a proxy or a baseline for disability. Thus, it is incumbent upon an ALJ, as the first step in considering a claim under the schedule, to make a clear, record based determination as to the degree of medical impairment to the schedule body part.
>
> In the absence of further convincing evidence of the existence of or the lack of an injury-based effect upon the claimant's actual earnings, or upon future earning capacity (such as, for example, the testimony of a qualified occupational economist concerning the likely future impact of the injury upon earnings), a disability award in the amount of the established medical impairment would be deemed to be supported by substantial evidence.
>
> Where the evidence establishes an effect upon actual earnings, or a likely future impact upon future earnings, the ALJ would assess that evidence and determine whether the "proxy" fairly encompasses, overstates, or understates the likely earnings impact. This would require the ALJ to calculate the dollar value of the impairment-based rating, compare that to the amount that the earnings-based evidence demonstrates is likely to cause, and increase or decrease the schedule award to a schedule percentage that comes the closest to the actual expected effect of the injury upon future earnings, up to a maximum 100% award to the member under schedule.

> This approach runs counter to my own long held views concerning how schedule awards should be considered. I have been an adherent to the proposition that in this perhaps unique area of workers' compensation law, the considered discretion of the ALJ should be accorded the maximum deference on appellate review, and that a decision that falls within the parameters of rational possible outcomes ought to be affirmed. It is, after all, prediction. Under *Jones*, however, the ALJ's discretion appears to be more circumscribed than I had supposed.
>
> As stated above, these are my thoughts on how one can comply with this newly enunciated requirement for specificity in this area. If on remand the ALJ arrives at a different approach, I welcome it.

Ulloa, concurrence of AAJ Jeffrey P. Russell at 8, 9.

The approach, minus the actual calculations of the "dollar value of the impairment–based rating" by the ALJ, has since been more explicitly applied in *Green v. DOES*, CRB No. 12-156 (November 15, 2012) (*Green*):

> We must disagree with the Employer's argument that the ALJ was in error by not specifying how the ALJ concluded the Claimant was entitled to additional percentages for loss of use, pain, and loss of endurance. As the DCCA acknowledged, "we can agree with the basic premise expressed by the CRB that the determination of disability is not an exact science, and that it necessarily involves a certain amount of 'prediction,' in making a scheduled award for partial loss (or loss of use of a member)." *Jones*, *supra* at 1224. The ALJ adopted as a baseline the medical impairment of the treating physician and Dr. Johnson, and then added additional percentages based on the Claimant's loss of use, pain and loss of endurance to the right lower extremity, and referenced the fact that Claimant's injury has had an adverse impact upon his ability to work and perform his activities of daily living. We believe the ALJ's conclusion and explanation on how he came about 46% is enough to satisfy the requirement to now be specific, while still acknowledging the underlying predictive nature of permanent partial disability awards.[7]

Green at 5, 6.

The CRB was more specific in *Nickens v. Fort Myer Construction*, CRB No. 13-057 (August 6, 2013) (*Nickens I*):

> 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

[7] We now recognize that the court would not agree with our including the "activities of daily living" in the mix, without a showing of some "nexus" between a specific activity and a claimant's wage earning capacity.

> 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.

Nickens I at 8, 9,

Further, the approach has been used in public sector workers' compensation cases such as *Prescott v. Friendship Public Charter School*, CRB No. 13-072 (August 22, 2013) (*Prescott*):

> It is clear that although the ALJ did not accord Dr. Phillips the treating physician preference, he did utilize Dr. Phillips opinion when determining if the Claimant is entitled to any disability award. The ALJ did not, as the Claimant asserts, substitute his own medical opinion in lieu of Dr. Phillips. As we have said, "the schedule in the statute impliedly permits the use of the degree of medical impairment as a baseline for the extent of disability." *Nickens*, *supra*. Such is the case here, where the ALJ used as a baseline, Dr. Phillips' opinion on the Claimant's loss of function and loss of endurance when awarding 3% to the right lower extremity and 4% to the right upper extremity. We affirm the award.
>
> We find the above analysis to be sufficient enough to satisfy the DCCA's rationale outlined in *Jones v. DOES*, 41 A.3d 1219 (D.C. 2012), where the Court indicated that any award of disability must be explained with specificity. The ALJ, while finding that Dr. Phillips' medical impairment rating overstated the Claimant's disability, did ultimately rely upon Dr. Phillips analysis of the Claimant's loss of endurance and loss of function when awarding 3% permanent partial disability to the right lower extremity and 4% permanent partial disability to the right upper extremity.

Prescott at 6, (footnotes omitted).

Solidifying the CRB's application of this concept is this, from *Hawkins v. Washington Hospital Center*, CRB No. 13-063 (August 27, 2013) (*Hawkins*):

> SPECIFICITY OF AWARD
>
> The ALJ was fully aware of her responsibilities under *Jones*. She started her analysis with the proposition that the Act intends for medical impairment to be viewed as a baseline for determining permanent impairment before assessing the likelihood (or lack thereof) of an effect upon future earnings as the Court of Appeals in *Jones* suggests.
>
> In addition to the medical impairment, the ALJ evaluated Ms. Hawkins' subjective complaints (bearing in mind that Ms. Hawkins' testimony had been found not credible in this regard):
>
> While the undersigned does not find Dr. Franchetti's excessive rating of 20% lower leg impairment considering the objective evidence to be reasonable, the undersigned also does not find Dr. Danziger's rating of 0% impairment to the left lower extremity to be a fair estimation of claimant's subjective complaints of pain. Accordingly, the undersigned concludes that due to her consistent complaints of pain in the lower extremity, claimant is entitled to a 5% permanent impairment rating of the left lower extremity.
>
> Finally, the ALJ assessed Ms. Hawkins' industrial loss as set forth previously. Given the thorough nature of the ALJ's consideration and the level of attention to the *Jones* requirements, we find no basis for disturbing the ALJ's findings or conclusions.

Hawkins, at 6, (footnotes omitted).

In a later appeal of a decision involving the same claimant in *Nickens* I, *Nickens v. Fort Myer,* CRB No. 14-045 (August 19, 2014), (*Nickens* II) the CRB stated:

> In the COR, the ALJ first undertook a thorough review of the medical evidence, including the opinions of both independent medical examiners, one of which (proffered by claimant) opined that claimant had sustained a 10% permanent partial impairment to the right leg under the Guides, and an additional 8% for "loss of function and endurance", for a total impairment rating of 18%, and the other of which (proffered by employer) opined that claimant had sustained a 17 to 17 1/2 % impairment to the right leg. The ALJ concluded that these medical opinions were not in significant conflict, and she found that the claimant has been left with an 18% permanent partial impairment to the right leg.
>
> The ALJ then proceeded to consider whether there was anything "in the instant record which would warrant deviation from 18% as a baseline" before "assessing the likelihood (or lack thereof) of an effect upon future earnings as the Court of Appeals in *Jones* suggests." COR, pp. 5 - 6.

> The ALJ considered the arguments asserted by claimant for an upward deviation from the 18% baseline, being: (1) the claimant's average weekly wage at the time of the accident is not a true representation of her likely future earnings in the construction field, because the injury occurred in March, and if it had occurred in the summer months she would have earned significantly more in overtime; (2) at the time of the injury, claimant was in training to become a journeyman, which pays more than her laborer position; (3) claimant is unable to return to the "heavy work" of her former position or tolerate the amount of standing and walking required in her waitress position; (4) her current wages in the grocery store are less than her pre-injury wage and less than they would have been had she achieved journeyman status; and (5) it is too speculative to postulate that claimant will recoup her lost earnings by opening a restaurant.
>
> The ALJ also considered employer's argument that claimant has voluntarily chosen to pursue a new career path by seeking a degree in business management, and there is nothing in the record to justify any additional ppd award, beyond the 18% medical impairment figure.
>
> * * *
>
> Claimant argues before us that her testimony concerning her own view as to whether or not she can return to work as an apprentice laborer compels the ALJ to reach that same conclusion. However, a reasonable person relying upon the medical records before the ALJ and the testimony cited by the ALJ concerning claimant's reasons for returning to school could conclude otherwise. While the claimant's testimony could be read as claimant argues, it could also be read as the ALJ interpreted it. Such a determination is the province of the fact-finder, and we will not substitute our judgment for that of the ALJ. This particularly true where, as here, the claimant bears the burden of proof. *See Dunston v. DOES*, 509 A.2d 109 (D.C. 1986).

Nickens II at 4-6.

The CRB reiterated this view in *Allen v. Corrections Corporation of America,* CRB No. 15-090 (October 5, 2015) (*Allen*):

> The Administrative Hearing Division ALJ's are tasked with determining the effect of a schedule injury on future wage loss which the District of Columbia Court of Appeals (DCCA) has acknowledged requires the exercise of discretion and prediction. *See Jones v. DOES*, 41 A.3d 1219 (D.C. 2012) (*Jones*); *Negussie v. DOES*, 915 A.2d 391 (D.C. 2007) (*Negussie*); *Bowles v. DOES*, [121 A.3d. 1264 (D.C. 2015)].
>
> Specifically, the Court in *Negussie* stated "Hence, we hold 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, and that in this case the ALJ erred by following decisions of the Director of DOES that require ALJs to choose

> a disability percentage rating provided either by the claimant's or the employer's medical examiner. *Negussie*, *supra* at 392.
>
> Thereafter in *Jones*, the DCCA issued a decision that while not limiting the ALJ's discretion has cautioned that in making a legal determination of disability, the ALJ should not arrive at an arbitrary amount but should come to a conclusion based on a complex of factors, taking into account physical impairment and potential for wage loss. *Jones*, *supra*.
>
> The Panel agrees that there will be situations where merely choosing a physician's rating over another physician could be supported by the evidence of record if the physician adequately explains the rating and there is no evidence of further wage loss. However, that is not the case here. Dr. Fechter provided no explanation for his conclusion that Claimant's left knee sprain has resulted in a 26% PPD rating. Moreover, the ALJ clearly based her decision to award Claimant PPD benefits on her unsupported determination that Claimant experienced a change in job duties. There is no evidence that the change in job duties would result in future wage loss.
>
> As the DCCA offered in *Jones* "It is clear that, by utilizing the permissive 'may' as opposed to the mandatory 'shall', the legislature was authorizing but not requiring that the analysis of schedule award claims include specific reference to the AMA Guides and/or the five factors." Given that the Act specifically approves the use of the American Medical Association Guides to the Evaluation of Permanent Impairment (AMA Guides) and the "Maryland five factors" in determining disability, it is rational to start with the proposition that the Act intends for medical impairment to be viewed as a baseline for determining permanent impairment before assessing the likelihood (or lack thereof) of an effect upon future earnings as the Court of Appeals in *Jones* suggests.
>
> However, absent further explanation by the ALJ, we cannot conclude the award of 26% PPD of the left leg is supported by substantial evidence or in accordance with the law and the award is vacated. The matter is remanded for further discussion and analysis consistent with *Negussie*, and *Jones*, *supra*.

Allen at 6. *But see Jackson v. Washington Hospital Center*, 13-068 (May 30, 2014), (*AAJ Russell dissenting*), (affirming an ALJ's scheduled award despite finding a 0% medical impairment).

It is clear is that a medical impairment is an appropriate baseline or starting point from which an ultimate determination of disability is to be made. It is also apparent from *Lawson* that any deviation from this baseline, if based upon the Maryland factors or otherwise, must be (1) fully explained by reference to how the amount attributed to each such factor was determined individually, and (2) can only be considered if that factor is either directly related to a claimant's job, or that there is a "nexus" between the factor being evidenced in purely personal or social settings and the physical requirements of the claimant's employment. We add that the extent of actual wage loss is also a factor that may be considered, despite AFR 2's erroneous assertion to

the contrary, relying upon the no-longer applicable rule enunciated in *Corrigan v. Georgetown Univ.*, CRB No. 06-094 (September 14, 2007). [8]

In our view, the *Lawson* case, which was decided while this appeal was pending, makes new law in the area of which of the Maryland factors (or other social or personal impairments) are properly considered in assessing disability under the schedule, by requiring an ALJ to employ only such factors if there is a demonstrable "nexus" between the factor and a claimant's earning capacity. We direct that upon further consideration of this claim, the ALJ take into account *Lawson.*

In the introductory letter to AFR 1, Claimant states that "it is Claimant's belief that this decision hinges directly on the credibility of plaintiff", explaining that "It is the goal of [the document] to establish plaintiff's credibility and to explain why plaintiff is able to type on a keyboard substantially longer than he is able to play piano." The bulk (if not the entirety) of the remaining content of AFR 1 consists of arguments about why additional records should be considered to repair his damaged credibility as found by the ALJ. These matters were dealt with through the show cause process, which is already a matter of record, and the discussion of which will not be repeated.

However, as was discussed above, while the request to admit the additional documents was denied, we agree that the ALJ's consideration of the keyboard/piano analogy was erroneous. No additional substantive matters not related to the evidence whose submission has been denied is included in AFR 1, and thus our consideration of that document is concluded.

In AFR 2, Claimant argues (through counsel) similarly that the ALJ's determination that Claimant lacked credibility was based at least in part upon "an out of record assumption of how piano playing compares to typing", an issue already addressed herein.

Further, AFR 2 argues that the ALJ failed to "perform any analysis when determining the degree of disability to [Claimant's] right hand and left wrist, but instead relied upon a permanency report [Employer's IME by Dr. Barth] that was lacking important analytical details", that the report doesn't adequately explain which of the "five factors" received the 1% rating assigned to them, that the CO failed to "describe the interplay between physical impairment and potential for wage loss", and arguing that the CO needs to be remanded "to explain which of the five factors should receive compensation [sic]." AFR 2 at 9. AFR 2 relies upon *Jones, supra.*

Employer responds "simply that there isn't much explanation required for a 2% permanency rating", but does not dispute that neither the CO nor the IME report delineate out how the five-factors result in a 2% rating. Employer's Brief, at (unnumbered) 10. In *Jones*, the court felt that a deviation of 1%, from 6% to 7%, was significant enough to require an explanation. Thus we assume that a 2% rating requires an explanation as well.

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[8] As we have repeatedly pointed out in connection with this, or nearly identical assertions, the central holding in *Corrigan* 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).

Employer raises additional points in argument concerning the treating physicians in this case never having placed Claimant under any specific functional restrictions or limitations nor does the record disclose any medical treatment at all to the left wrist (Employer's Brief at 12). However, as noted above, the ALJ found as facts that Claimant's impairment significantly restricted Claimant's ability to perform the functions of his pre-injury job. A physician's restriction is not a legal requirement for such a finding.

We agree with AFR 2 that the CO does not comport with the specificity requirements mandated by the court in *Jones*, as re-affirmed and expanded upon in *Lawson*, *supra*. The CO lacks any discussion regarding how the apparently significant limitations on Claimant's functioning at work constitute 0% and 2% disabilities.

Finally, we note that in making her assessment that Claimant sustained 0% impairment to the left hand, the ALJ stated that she was relying upon Dr. Barth, and that Dr. Bath opined that Claimant's left wrist injuries are not causally related to employment.

Although the ALJ did not specifically state whether the 0% award was based upon the lack of medical impairment, or was based at least in part upon a determination that there is no causal relationship between any existent impairment and Claimant's employment, we are not certain of the basis of her decision.

Given that the matter must be returned, we vacate both awards so that upon further consideration the ALJ can make clear that her determination is not based upon causal relationship, in that that issue was not before the ALJ.

CONCLUSION AND ORDER

The finding that Claimant sustained a *de minimis* a disability does not flow rationally from the facts as found by the ALJ concerning the occupational impact Claimant's hand injuries have caused, and thus the awards are not supported by substantial evidence and are vacated. The matter is remanded to AHD for further consideration of the claims taking into account the findings concerning the effect the injuries have had upon Claimant's earning capacity, and in a manner consistent with *Lawson*..

So ordered.