

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 15-142

ROBERT JOHNSON, JR.,
Claimant-Petitioner,

v.

Washington Metropolitan Area Transit Authority,
Employer-Respondent.

Appeal from a July 30, 2015 Compensation Order by
Administrative Law Judge Gregory P. Lambert
AHD No. 13-167A, OWC No. 695223

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2016 FEB 19 AM 9 26

(Decided February 19, 2016)

David J. Kapson for Claimant¹
Mark H. Dho for Employer

Before JEFFREY P. RUSSELL, LINDA F. JORY, *Administrative Appeals Judges* and LAWRENCE D. TARR, *Chief Administrative Appeals Judge*.

JEFFREY P. RUSSELL for the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

Robert Johnson, Jr. (Claimant) sustained accidental injuries to his neck and back in January 2007 while working for the Washington Metropolitan Area Transit Authority (Employer). In a Compensation Order issued in October 2009, Claimant's claim for schedule awards for permanent partial disability to his legs was granted. The awards included a 12% permanent partial disability to the left leg.

¹ Petitioner was represented by Michael Kitzman at the formal hearing.

On August 6, 2012, Claimant sustained another work-related injury while riding as a passenger on one of Employer's buses. He sustained injuries to his right shoulder, neck, sternum, right elbow, and lower back.

At a formal hearing conducted by an administrative law judge (ALJ) in the Administrative Hearings Division (AHD) of the Department of Employment Services (DOES,) Claimant sought an award 21% permanent partial disability under the schedule (PPD) to the right arm, and 29% PPD. to the left leg. Following that hearing, the ALJ issued a Compensation Order on July 30, 2015 (the CO).

In the CO, the ALJ denied both claims.

Claimant appealed the CO to the Compensation Review Board (CRB) by filing Claimant's Application for Review and memorandum of points and authorities in support thereof (Claimant's Brief). In his appeal Claimant requests that the CO "be reversed, vacated and remanded for further findings consistent the CRB's Decision and in accordance with the law." Claimant's Brief at 9. In the body of Claimant's Brief he posits that he "has demonstrated by a preponderance of the evidence an entitlement to an award of 21% permanent partial disability benefits to the right upper extremity and 29% permanent partial disability to the left lower extremity." *Id.*

Employer opposed the appeal by filing Employer's Opposition to Claimant's Application for Review and memorandum of points and authorities in support thereof (Employer's Brief). In its opposition, Employer argues that the CO ought to be affirmed because it is supported by substantial evidence.

Because the findings that Claimant has sustained no PPD as a result of the stipulated work-related injuries are supported by substantial evidence, we affirm the CO.

ANALYSIS

The scope of review by the CRB as established by the District of Columbia Workers' Compensation Act (the Act) and as contained in the governing regulations is limited to making a determination as to whether the factual findings of a Compensation Order on appeal are based upon substantial evidence in the record, and whether the legal conclusions drawn from those facts flow rationally from those facts and are otherwise in accordance with applicable law. D.C. Code § 32-1521.01(d)(2)(A). "Substantial evidence", as defined by the District of Columbia Court of Appeals (DCCA), is such evidence as a reasonable person might accept to support a particular conclusion. *Marriott Int'l. v. DOES* 834 A.2d 882 (D.C. 2003) (*Marriott*). Consistent with this scope of review, the CRB is bound 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 members of the CRB review panel considering the appeal might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

We begin by noting that the ALJ's decision in this case was highly dependent upon a finding that Claimant lacked credibility. Although in the final substantive paragraph of Claimant's Brief Claimant "maintains that he testified credibly" (CO at 9), the brief contains no other discussion of this issue, does not argue that the lack of credibility findings are unsupported by record evidence or

that the specific bases identified by the ALJ in the CO as being indicative of a lack of credibility do not rationally support the conclusion that Claimant lacks credibility. Without repeating the contents of the CO, we have reviewed the ALJ's credibility findings, and conclude that they are supported by the record. Accordingly they are affirmed.

Claimant's first argument is framed as follows:

THE ALJ'S FINDING THAT MR. JOHNSON HAS NOT DEMONSTRATED ENTITLEMENT TO AN AWARD OF PERMANENT PARTIAL DISABILITY TO THE RIGHT UPPER EXTREMITY AND THE LEFT LOWER EXTREMITY IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

Claimant's Brief at 5.

In support of this thesis, Claimant first argues that "substantial evidence in the record supports a finding that Mr. Johnson has demonstrated, by a preponderance of the evidence" that he is entitled to his claimed award. *Id.*

To this argument we respond that even if true the point is irrelevant. As stated above, the question is not whether there is substantial evidence in the record supporting Claimant's losing position; rather the issue is whether there is substantial evidence supporting the ALJ's CO. *See Marriott, supra.*

The brief then proceeds to put forth many paragraphs discussing a variety of legal topics of no relevance to this appeal, such as questions of permanency, the compensation rate at which PPD benefits are to be paid, the "economic nature" of the concept of "disability",² and the factors that are

² Claimant's Brief contains reference to *Corrigan v. Georgetown University*, CRB No. 06-094 (September 14, 2007). Although not germane to any issue before us in this appeal, we repeat an admonition made several times in the past, as recently as the case of *El Masaoudi v. UNO Chicago Grill*, CRB No. 15-093 (October 15, 2015):

On page 6, Claimant asserts "Whether or not Claimant has suffered a wage loss is irrelevant to determining the Claimant's eligibility to received [sic] scheduled benefits, because of a conclusive presumption that Claimant will have his or her working life end earlier due to the injury", citing *Corrigan v. Georgetown University*, CRB No. 06-094, AHD No. 06-256, OWC No. 604612 (September 14, 2007). This is apparently a complaint about the ALJ's finding that Claimant only missed a week of work and has suffered no additional time off work since then.

There are several problems with this argument.

Third, *Corrigan* no longer represents the applicable law, and hasn't since the CRB issued *Al-Robaie v. Fort Myer Construction Company*, CRB No. 10-014, AHD No. 09-383, OWC No. 642015 (June 6, 2012), where it was held that the effect of a work injury upon a claimant's actual earnings are relevant and can be considered "to the extent that such wage loss correlates with or is indicative of loss of wage earning capacity or economic impairment." The move away from *Corrigan* was in response to the District of Columbia Court of Appeals' (DCCA) decision in *Jones v. DOES*, 41 A.3d 1219 (April 26, 2012), wherein the DCCA explicitly referenced the percentage of wage loss that the claimant in that case had suffered subsequent to the injury.

El Masaoudi, supra at 4.

generally considered in connection with determining the nature and extent of wage-based disability claims, and other subjects. Claimant's Brief at 5, 6. We will not address these irrelevant matters.

Claimant's next argument is focused on the ALJ's rejection of Dr. Fechter's opinion regarding the degree of medical impairment Claimant sustained to the right arm. Claimant argues that Dr. Fechter's opinion consists of a 5% "objective" rating per the American Medical Association Guides to the Evaluation of Permanent Impairment (the AMA Guides) plus an additional 24% based upon the "subjective" 5 factors of pain, weakness, atrophy, loss of endurance and loss of function.

The ALJ rejected Dr. Fechter's opinion based upon his conclusion that the opinion was essentially unreliable because 24% of the 29% was premised upon undependable descriptions and complaints from the incredible Claimant. It is Claimant's position that the ALJ was bound by the treating physician preference doctrine to favor Dr. Fechter's 5% opinion over Employer's independent medical evaluation (IME) physician, Dr. Levitt. That is, Claimant argues or implies that the ALJ is obliged to dissect the constituent parts of an impairment rating and accord treating physician preference status to some but not all of the subparts.

Claimant cites no authority for this proposition, and while an ALJ might possibly employ that sort of analysis, there is no obligation to do so. An ALJ must give reasons for rejecting a treating physician's opinion. In this case the ALJ did so, and Claimant makes no specific argument that the lack of credibility findings are not supported by substantial evidence.³ The acceptance of Dr. Levitt's opinion over Dr. Fechter's is adequately explained, and is affirmed.

Claimant's final argument is that the ALJ has also run afoul of the treating physician doctrine in connection with the claim for the left leg, and that in denying an award the ALJ applied principles of "apportionment", a concept that he maintains is not the law in this jurisdiction.

The uncited underpinning of Claimant's argument that "there is no apportionment under the Act" is the "aggravation rule", which the DCCA has described as follows:

It is well settled that "an aggravation of a preexisting condition may constitute a compensable accidental injury under the Act." *Ferreira [v. DOES]*, 531 A.2d at 660 (quoting *Wheatley [v. Adler]*, 132 U.S. App. D.C. at 182, 407 F.2d at 312). "The fact that other, nonemployment related factors may also have contributed to, or additionally aggravated [claimant's] malady, does not affect his right to compensation under the 'aggravation rule.'" *Hensley v. Washington Metro. Area Transit Auth.*, 210 U.S. App. D.C. 151, 155, 655 F.2d 264, 268 (1981), *cert. denied*, 456 U.S. 904, 72 L. Ed. 2d 160, 102 S. Ct. 1749 (1982). "The cases almost invariably decide that the fact that the injury would not have resulted but for the pre-existing disease, or might just

While we understand the value in not reinventing the wheel, we also point out it is a good practice when reusing a wheel, one should be certain that it fits, and still holds air. We urge counsel to follow our prior requests that *Corrigan* no longer be cited as if it were good law.

³ As noted above, Claimant makes a passing, non-specific assertion that his testimony was credible in the closing sentence of Claimant's Brief. He provides no reasons why the ALJ's assessment that Claimant is not a credible witness is faulty or should be rejected. We are not persuaded by his mere assertion, and defer to the ALJ's finding on this issue.

as well have been caused by a similar strain at home or at recreation, are both immaterial." Id. (quoting *Wheatley*, 132 U.S. App. D.C. at 182 n. 11, 407 F.2d at 312 n. 11). The aggravation rule is embodied in D.C. Code § 36-308 (6)(A) [now §32-1508], which provides that "if an employee receives an injury, which combined with a previous occupational or nonoccupational disability or physical impairment causes substantially greater disability or death, the liability of the employer shall be as if the subsequent injury alone caused the subsequent amount of disability . . ."; see also *Washington Metro. Area Transit Auth. v. District of Columbia Dep't of Employment Servs.*, 704 A.2d 295, 297-99 (D.C. 1997) (discussing the policies underlying § 36-308 (6)); *Daniel v. District of Columbia Dep't of Employment Servs.*, 673 A.2d 205, 207-08 (D.C. 1996).

King v. DOES, 742 A.2d 460, 468 (D.C. 1999).

The statutory provision cited by the DCCA above is now found at D.C. Code § 32-1508(6)(A). While it is often asserted and generally accepted that there is "no apportionment" under the Act, the statute actually provides that an employer is liable for the entire, unapportioned disability where the work-related injury combines with a pre-existing condition resulting in a "*substantially greater disability*" than that which pre-existed (emphasis added).

In this case, Claimant argues that by comparing Dr. Fechter's opinion concerning the earlier injury for which Claimant previously received a schedule award to the leg to his present opinion concerning the instant claim, and premising the denial of an award upon the fact that Dr. Fechter's AMA Guides assessment (2%) was the same then as his AMA Guides assessment in the instant case, the ALJ has somehow "apportioned" the prior award from the present claim.

We reject that argument. What the ALJ has done in this case is discredit Claimant's subjective complaints completely, and then considered the fact that even Dr. Fechter finds no greater impairment under the AMA Guides now than already existed. Although he did not find as a fact that Claimant does indeed have a 2% AMA Guide impairment, the ALJ assumed as much for the purpose of concluding that in the absence of credible evidence for additional disability from the "subjective" factors, the instant injury has caused no additional impairment, be it "substantial" or otherwise. Claimant's argument that he has "demonstrated an entitlement to at least 2%" PPD is unconvincing, in that if one accepts its logic, the result would be a second award for the first injury previously awarded and paid.

We find no error in the ALJ's analysis, and affirm the decision.

CONCLUSION AND ORDER

The finding that Claimant lacks credibility and the rejection of the treating physician's opinions concerning the degree of medical impairment are supported by substantial evidence and are in accordance with the law. The Compensation Order is affirmed.

So ordered.