

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

Department of Employment Services

VINCENT C. GRAY  
MAYOR



F. THOMAS LUPARELLO  
ACTING DIRECTOR

**COMPENSATION REVIEW BOARD**

**CRB No. 14-051**

**RONALD A. ARMSTEAD JR.,  
Claimant-Petitioner,**

v.

**GREYHOUND LINES, INC.  
and SEDGWICK CLAIMS MANAGEMENT SERVICES,**

**Self-Insured Employer/Third-Party Administrator-Respondents.**

Appeal from an April 1, 2014 Compensation Order By  
Administrative Law Judge Linda F. Jory  
AHD No. 13-126A, OWC No. 695654

David M. Snyder for the Petitioner  
Barry Bernstein for the Respondent

Before HEATHER C. LESLIE, HENRY W. MCCOY, and JEFFREY P. RUSSELL, *Administrative Appeals Judges.*

HEATHER C. LESLIE for the Compensation Review Board.

**DECISION AND ORDER**

**OVERVIEW**

This case is before the Compensation Review Board (CRB) on the request for review filed by the Claimant-Petitioner (Claimant) of the April 1, 2014, 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 that CO, the ALJ denied Claimant's request for permanent partial disability benefits to his left arm. We AFFIRM.

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## BACKGROUND AND FACTS OF RECORD

Claimant was a motor coach operator for the Employer. On August 8, 2012 the Claimant injured his back when unloading luggage from a bus. The Claimant sought medical care the next day from Concentra Medical Center, with complaints of an injury to his back. Physical therapy was recommended. Subsequently, Claimant came under the treatment of Dr. Joel Fechter. Dr. Fechter recommended Claimant continue physical therapy.

On July 17, 2013, Dr. Fechter opined that pursuant to the Fifth Edition of the AMA Guides to the Evaluation of Permanent Impairment, Claimant was "entitled to 0% impairment of the left upper extremity. Taking into account the patient's additional subjective factors of pain, weakness, loss of endurance and loss of function entitle the patient to an additional 4% impairment for each of these for a total impairment of 16% to the left upper extremity." Claimant's exhibit 1 at 2.

Dr. Fechter released Claimant to light duty work and then to full duty with no restrictions. Claimant received voluntary payments of compensation from Employer from August 8, 2012 to December 26, 2012.

On November 27, 2012, the Claimant underwent an independent medical evaluation (IME) by Dr. Robert O. Gordon. Dr. Gordon took a history of the Claimant's injury and performed a physical examination. Dr. Gordon opined the Claimant suffered a muscular strain in the work accident and that Claimant was at maximum medical improvement and needed no further treatment. In an addendum dated February 13, 2013, Dr. Gordon reiterated his earlier opinions.

A full evidentiary hearing proceeded on March 6, 2014. The issues to be adjudicated were whether or not the Claimant's left arm impairment was casually related to the work injury of August 8, 2012 and the nature and extent of the Claimant's left arm. A CO issued on April 1, 2014 denying the Claimant's claim for relief. The CO found that Claimant's neck symptoms were medically casually related to the work injury, but found Claimant had failed to prove, by a preponderance of the evidence, any permanent partial disability to the left arm.<sup>1</sup>

The Claimant timely appealed. Claimant argues the CO did not give proper weight to the opinion of the treating physician. Claimant also argues that the CO erroneously states and considers the applicable law as to the presumption of future wage loss in a case involving permanent partial disability to a scheduled member.

Employer counters, stating the CO is supported by the facts of the record and taking into consideration the credibility finding, is in accordance with the law.<sup>2</sup>

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<sup>1</sup> We are aware of the discrepancy between the issue of whether Claimant's left arm impairment was causally related to the work injury as listed in the CO, and the conclusion that Claimant's neck symptoms were casually related to the injury. We assume that the omission of a determination of the relatedness of the left arm was an administrative error as the ALJ did address the nature and extent of the left arm, a step that would be unnecessary if the CO determined the left arm symptoms were not medically casually related to the work injury. Any error is harmless as ultimately, the CO denied Claimant's request for permanent partial disability in its entirety.

<sup>2</sup> Employer did not appeal the CO's conclusion that the neck and left arm symptoms are medically casually related to the work injury.

## STANDARD OF REVIEW

The scope of review by the CRB, as established by the Act and as contained in the governing regulations, is generally limited to making a determination as to whether the factual findings of the Compensation Order are based upon substantial evidence in the record, and whether the legal conclusions drawn from those facts are in accordance with applicable law. *See*, D.C. Workers' Compensation Act of 1979, as amended, D.C. Code § 32-1501, *et seq.*, (the Act) at § 32-1521.01 (d)(2)(A), and *Marriott International v. DOES*, 834 A.2d 882 (D.C. 2003). Consistent with this standard of review, the CRB must affirm a Compensation Order that is supported by substantial evidence, even if there is also contained within the record under review substantial evidence to support a contrary conclusion, and even where this panel might have reached a contrary conclusion. *Id.*, at 885.

## DISCUSSION AND ANALYSIS

Claimant first argues that the CO failed to consider the evidence in the record as to Claimant's impairment pursuant to the five factors and failed to accord Dr. Fechter the treating physician preference. As to the failure of the CO to consider the five factors, Claimant refers us to *Wormack v. Fischback & Moore*, CRB No. 03-159, AHD No. 03-151 (July 22, 2005), for the proposition that the ALJ must consider the Maryland factors. We note our discussion in *Ulloa v. Hotel Harrington*, CRB No. 12-006, AHD No. 10-556A, OWC No. 669607 (August 7, 2012). Specifically,

*Wormack* does not mandate specific findings be made with regard to the factors listed in D.C. Official Code § 32-1508(U-i), commonly referred to as the "Maryland five factors." In *Kane v. WMATA*, [CRB No. 10-071, AHD No. 09-483 (November 8, 2011)] when addressing virtually the same argument, the CRB stated,

Nothing in the APA or Agency precedent requires that an ALJ make specific findings on every potential factual scenario or criteria that might have had a potential effect on a determination. They require that the record be considered as a whole, and that findings of fact be made based thereon. If there is substantial evidence in that record upon which the ALJ relies and which a reasonable mind might accept to support the factual findings, and if the legal conclusion reached by the ALJ flows rationally from those facts, the decision must be affirmed.

*Kane, supra* at 3.

Moreover, nothing in the Act requires the ALJ to consider the "Maryland five factors," or even the AMA Guides. D.C. Official Code § 32-1508(U-i) states, in pertinent part,

In determining disability . . . [under the schedule], the most recent edition of the American Medical Association 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." (Emphasis added.)

The statute clearly utilizes the term "may" to allow the ALJ the discretion to determine what factors, if any, ultimately to use in coming to a conclusion on what permanent partial disability the Claimant may, or may not be, entitled too. The ALJ is free to consider what Maryland factors are deemed to be appropriate, or not, depending on the case.

*Ulloa, supra at 3-4, [citation added]*

We reject Claimant's first argument.

Claimant also argues that the ALJ erred by rejecting Dr. Fechter's opinion because Dr. Fechter was unambiguous in his opinion regarding the percentages assigned to each of the Maryland factors, and because Claimant's testimony buttressed this opinion. Claimant points out the CO failed to even acknowledge the treating physician preference and failed to apply the preference.

While we agree that the CO does not reference the treating physician preference when discussing the nature and extent of Claimant's disability, we hold any such omission harmless. Dr. Fechter's opinion is the only opinion discussed when the ALJ is analyzing whether Claimant proved by a preponderance of the evidence the nature and extent of her disability. Dr. Gordon's opinion is not referenced at all. While not expressly stated, as Dr. Fechter is the only physician's opinion discussed, we find the application of the preference implicit in the ALJ's analysis.

Moreover, contrary to Claimant's argument, the ALJ gave legitimate and specific reasons why she was disregarding Dr. Fechter's opinion. The ALJ, in discussion, noted that the only time Dr. Fechter mentioned arm complaints from Claimant was in the first and last report. Specifically,

A thorough review of the reports of Dr. Fechter do not, however, reveal any complaints made by claimant to Dr. Fechter with regard to his left hand and/or his grip problems. To the contrary, the only time claimant's left extremity is mentioned by Dr. Fechter is in his first report of August 22, 2012 and his last report of July 17, 2013 wherein he comes up with a permanent rating to the left extremity. But on July 17, 2013, Dr. Fechter referred only to the left shoulder and never mentioned claimant's hand or his grip.

CO at 7.

After quoting testimony from Claimant about the lack of arm complaints in the report, the ALJ stated,

Claimant's inconsistent testimony notwithstanding, Dr. Fechter's decision to provide claimant with a 16% PPD rating to the left arm causes concerns as to the

motive of this provision given the total lack of complaints regarding the left arm through his course of treatment until the day of the PPD evaluation. The lack of consistency with the treatment rendered is substantial enough to warrant disregard of the treating physician's permanent impairment rating to conclude that claimant has not met his burden of establishing by a preponderance of evidence that he is entitled to an award of 16% permanent impairment to the left arm.

CO at 9.

The ALJ rejected the treating physician's opinion questioning his motive for giving an impairment rating in light of the lack of any complaints, and noting the lack of consistency in treatment. We find these reasons to be specific and legitimate reasons to reject the opinion of Dr. Fechter's opinion.

In arguing that the medical records, Dr. Fechter's impairment rating, and Claimant's testimony support a finding of 16% permanent partial disability to Claimant's left arm, Counsel is asking the CRB to reweigh the evidence in favor of Claimant, a task we cannot do. The ALJ took into consideration what Claimant points to and weighed the evidence accordingly. As we stated above, the CRB must affirm a Compensation Order that is supported by substantial evidence, even if there is also contained within the record under review substantial evidence to support a contrary conclusion, and even where this panel might have reached a contrary conclusion. *Marriot, supra* at 885.

Claimant second argument is that the CO "erroneously cites and applies the law regarding permanent partial disability to a scheduled member." Claimant's argument at 9. Claimant asserts it was legal error for the CO to deny Claimant's request for permanent partial disability benefits, because future wage loss is presumed. We reject Claimant's argument.

Claimant takes umbrage with the ALJ's statement,

Inasmuch as the record contains no evidence that claimant's left upper extremity impairment due to the injury results in the potential for wage loss as a motor coach operator, no additional impairment is warranted under *Jones, supra*.

CO at 9.

Claimant refers us to *Jones v. DOES*, 41 A.3d 1219 (D.C. 2012) and *Smith v. DOES*, 548 A.2d 95 (D.C. 1988) in support of his position. However, as the CRB held in *Dent v. Providence Hospital*, CRB No. 13-101, AHD No. 12-381 (March 7, 2014):

Ms. Dent's argument that the ALJ was bound to make a disability award under *Smith v. DOES*, 548 A.2d 95 (D.C. 1988) is unavailing. The language she points to in *Smith* is where the court wrote "Although impaired earning capacity need not be proved to receive schedule benefits, this is not ... to be interpreted as an erratic deviation from the underlying principle of compensation law--that benefits relate to loss of earning capacity and not to physical injury as such. The basic theory remains the same; the only difference is that the effect on earning capacity is a

conclusively presumed one, instead of a specifically proved one based upon the individual's actual wage loss experience." Petitioner's Memorandum, page 6.

What Ms. Dent is missing in this argument is the fact that the court in *Smith* was talking about the lack of a need for a proven actual wage loss experience to recover under the schedule, and that awards are predictive in nature, with such a prediction being subject the possibility of error when, in hindsight, an award may turn out to be "overly generous in some cases, and grievously inadequate in others". What is "conclusively presumed" under *Smith* is that whatever the award is that is made is correct, assuming that it is based upon substantial evidence. The discussion in *Smith* is a discussion of the theoretical underpinnings of schedule awards and how once such an award is made, what actually happens in the future is irrelevant to whether a claimant has been over or undercompensated by the award that was made, because it is "conclusively presumed" that the statutory schedule represents the industrial effect of the injury. *Smith* does not say that a claimant's actual wage loss experience *prior* to receiving an award under the schedule is irrelevant to the making of the prediction regarding *future* wage loss.

As the CRB has held, the absolute prohibition upon consideration of the existence and amount of a specific, identifiable loss of wages in a particular case is no longer the law in this jurisdiction, and hasn't been since the District of Columbia Court of Appeals (DCCA) held that such a prohibition is not consistent with the law with regard to schedule awards, in *Jones v. DOES*, 41 A.3d 1219, 1224 to 1226 and footnote 7 (D.C. 2012); See also, *Hill v. Howard University*, CRB No. 12-016, AHD No. 117A, OWC No. 657973 (September 5, 2012), AAJ Jones dissenting in part; see also, *Al-Robaie v. Fort Myer Construction Co.*, CRB No. 10-014, AHD No. 09-383, OWC No. 642015 (June 6, 2012), AAJ Jones, Chair, in which the following language appears:

Furthermore, the ALJ's ruling that Mr. Al-Robaie is not entitled to permanent partial disability benefits because he "has not returned to any type of gainful employment" also constitutes error. Upon remand, the ALJ is directed to reconsider the Claimant's request for permanent partial disability benefits without any consideration of wage loss *except to the extent that such wage loss correlates with or is indicative of loss of wage earning capacity or economic impairment.*

*Al-Robaie, supra*, page 5 (emphasis added).

The *Jones* court's footnote 7 reads as follows:

Although neither the ALJ nor the parties have referred to the relative amounts petitioner received from her full-time and part-time employment, we note there are documents in the record (one

from employer's counsel) that petitioner's part time work comprised approximately 20% of her overall earnings.

*Jones, supra*, at 1222.

Thus, consistent with the court's writing in *Jones* and the CRB holding in *Al Robaie*, "to the extent that such wage loss correlates with or is indicative of loss of wage earning capacity or economic impairment", actual wage loss history (its presence or absence) may be considered as a factor by an ALJ in making a prediction about the future impact a schedule injury will cause.

*Dent, supra* at 4-5

It was not in error for the ALJ to consider the absence of actual wage loss in denying the Claimant's request for permanent partial disability to the left arm. We affirm.

#### CONCLUSION AND ORDER

The April 1, 2014 Compensation Order is supported by the substantial evidence in the record and in accordance with the law. It is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:



HEATHER C. LESLIE

*Administrative Appeals Judge*

July 22, 2014

DATE