

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA M. MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 12-036

MICHAEL SMITH,
Claimant–Petitioner,

v.

FACCHINA CONSTRUCTION and LIBERTY MUTUAL INSURANCE CO.,
Employer/Carrier-Respondent.

Appeal from a Compensation Order by
The Honorable Leslie A. Meek
AHD No. 06-015B, OWC No. 604142

Krista N. DeSmyter, Esquire, for the Petitioner
Curtis B. Hane, Esquire, for the Respondent

Before MELISSA LIN JONES, LAWRENCE D. TARR, and HENRY W. MCCOY, *Administrative Appeals Judges*.

MELISSA LIN JONES, *Administrative Appeals Judge*, for the Compensation Review Board.

DECISION AND REMAND ORDER

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board (“CRB”) pursuant to D.C. Code §§32-1521.01 and 32-1522 (2004), 7 DCMR §250, *et seq.*, and the Department of Employment Services Director’s Directive, Administrative Policy Issuance 05-01 (February 5, 2005).

FACTS OF RECORD AND PROCEDURAL HISTORY

In September 2004, Mr. Michael Smith injured his left knee when a pipe fell on it. At a formal hearing, Mr. Smith sought an award of permanent partial disability for 44% impairment to his left leg. In an Errata Compensation Order dated February 10, 2012, an administrative law judge (“ALJ”) awarded Mr. Smith permanent partial disability for 10% of his left leg.¹

¹ The ALJ actually determined Mr. Smith’s impairment warranted an award of 17% permanent partial disability for his left leg; however, she credited 7.5% as a result of a prior award of permanent partial disability to Mr. Smith’s left leg. Neither party has appealed the issues of credit or apportionment.

On appeal, Mr. Smith requests the Errata Compensation Order be reversed or vacated because “the ALJ’s ultimate conclusion regarding the percentage of disability Mr. Smith suffers due to his left knee injury is unclear, lacks reasoning, and is not supported by substantial evidence in the record.”² Facchina Construction asserts the Errata Compensation Order should be affirmed because it is supported by substantial evidence.

ISSUE ON APPEAL

1. Did the ALJ properly analyze the evidence to determine Mr. Smith’s permanent partial disability?

ANALYSIS³

When reviewing a Compensation Order that awards permanent partial disability benefits for a schedule member, we are mindful that

unlike other questions that ALJs are called upon to decide in connection with contested compensation claims, there is no dichotomous answer in schedule award cases. That is, there is no “a” or “b” choice in schedule disability awards, as there is in cases where the ALJ must make a choice between compensable or non-compensable, causally related or not causally related, employment relationship or no employment relationship, timely notice or untimely notice, etc. Those questions present scenarios in which there is presumably a right answer and a wrong answer. However, schedule loss cases present the problem of prediction: the goal is to make the best approximation of the effect of a scheduled injury on future wage loss, and then to express that approximation in percentage terms of the member in question, which in the words of the Court of Appeals result in an award based upon an “arbitrary” number of weeks of benefits. See, *Smith v. District of Columbia Department of Employment Services*, 548 A.2d 95 (1988), at 101. Only time will determine whether, in any given case, the approximation arrived at through the hearing process is close to “the right answer”, or is wildly under reality, or wildly over it. That may be unfortunate, for either the employer or the worker, but as the Court of Appeals has recognized, that is the nature of the system.^[4]

² Memorandum of Points and Authorities in Support of Claimant’s Application for Review at unnumbered p. 4.

³ The scope of review by the CRB is limited to making a determination as to whether the factual findings of the appealed 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. D.C. Code §32-1521.01(d)(2)(A). Consistent with this standard of review, the CRB is constrained to uphold a Compensation Order that is supported by substantial evidence, even if there also is contained within the record under review substantial evidence to support a contrary conclusion and even if the CRB might have reached a contrary conclusion. *Marriott International v. DOES*, 834 A.2d 882, 885 (D.C. 2003).

⁴ *Majano v. Linens of the Week*, CRB No. 07-066, AHD No. 06-285, OWC No. 578369 (April 24, 2007). See also *Negussie v. DOES*, 915 A.2d 391 (D.C. 2007) (When determining permanent partial disability, the role of the ALJ is to weigh competing medical opinions of impairment together with other relevant evidence and to arrive at a determination on the issue of the nature and extent of any disability.)

In this case, the ALJ considered the opinion of Ms. Smith's orthopedic surgeon (Dr. Edward Rabbitt (27%) as well as the opinions of two independent medical examination physicians (Dr. Joel Fechter (44%) and Dr. Robert Gordon (10%)) and determined "[t]he pain and atrophy and weakness reported by Claimant and his treating physician warrant a schedule award of seventeen percent (17%) for his left lower extremity."⁵ It is clear from this portion of the Errata Compensation Order that the ALJ considered the five, subjective factors, and this tribunal has held there is no requirement to state what portion of the permanent partial disability awarded is attributable to those five factors;⁶ however, it seems the rules have changed.

On April 26, 2012, the D.C. Court of Appeals issued *Jones v. D.C. Department of Employment Services*,⁷ and despite *Negussie*'s recognition of the predictive and subjective nature of an award of permanent partial disability and despite the subjective nature of the five factors, the Court has demanded precision when an ALJ explains the "reasoning in arriving at a disability award"⁸ in order to determine if there is substantial evidence in the record that could support the ALJ's ruling as to the actual percentage of permanent partial disability. The ALJ did not explain her evaluation of the medical opinions or other evidence or record when reaching the conclusion that

[b]ased upon a review of the record evidence as a whole, I find and conclude the nature of Claimant's on-the-job injury to his lower left extremity is permanent and the extent of Claimant's disability is seventeen percent. Employer is entitled to a credit of 71/2 percent pursuant to the March 14, 2006 *Stevens, Supra* order.^[9]

Consequently, because the Court would be "unable to review the agency's order on the record presented,"¹⁰ we are constrained to remand this matter for further explanation consistent with the dictates of *Jones*.

⁵ *Smith v. Facchina Construction*, AHD No. 06-015B, OWC No. 604142 (February 10, 2012), p. 5. The ALJ note

Claimant testified that as a result of the work accident of September 24, 2004, he still experiences pain in his left knee; that his left knee will "give out" with certain movements; that his knee gets stiff and causes him to limp; and he experiences numbness in said knee. (TR pp. 49-52).

Id. at p. 4. There, however, is no indication regarding what impact, if any, this testimony had on the ALJ's ultimate conclusion.

⁶ See §32-1508(3)(U-1) of the Act, *supra*. See also *Jones v. Howard University*, CRB No. 11-095, AHD No. 10-494, OWC No. 649331 (November 1, 2011) ("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.")

⁷ 41 A.3d. 1219 (D.C. 2012).

⁸ *Id.* at 1225.

⁹ *Smith, supra*, at p. 5.

¹⁰ *Jones, supra*, at 1221.

CONCLUSION AND ORDER

The February 10, 2012 Errata Compensation Order is VACATED. This matter is remanded for further explanation of the reasoning applied to arrive at the permanent partial disability award pursuant to the precedent set by the D.C. Court of Appeals in *Jones, supra*.

FOR THE COMPENSATION REVIEW BOARD:

MELISSA LIN JONES
Administrative Appeals Judge

September 19, 2012
DATE