

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
Department of Employment Services

VINCENT C. GRAY  
MAYOR



LISA M. MALLORY  
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 12-152

WILLIAM TILGHMAN,  
Claimant–Petitioner,

v.

WMATA and SEDGWICK CMS,  
Employer/Carrier-Respondent.

Appeal from a Compensation Order by  
The Honorable Linda F. Jory  
AHD No. 12-227, OWC No. 648567

Krista N. DeSmyter, Esquire, for the Petitioner  
Mark H. Dho, Esquire, for the Respondent

Before MELISSA LIN JONES, HEATHER C. LESLIE,<sup>1</sup> *Administrative Appeals Judges* and LAWRENCE D. TARR, *Chief Administrative Appeals Judge*.

MELISSA LIN JONES, *Administrative Appeals Judge*, for the Compensation Review Board.<sup>2</sup>

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

On April 8, 2008, Mr. William Tilghman was working for the Washington Metropolitan Area Transit Authority (“WMATA”) as a bus operator. On that day, a taxicab hit Mr. Tilghman’s bus, and he hit both of his knees against the fare box.

Mr. Tilghman received conservative treatment, and on July 10, 2008, he was released to return to his regular occupation with no restrictions. Mr. Tilghman was terminated in December 2009 for absenteeism.

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<sup>1</sup> Judge Leslie has been appointed by the Director of the Department of Employment Services (“DOES”) as a temporary Compensation Review Board (“CRB”) member pursuant to DOES Administrative Policy Issuance No. 12-02 (June 20, 2012).

<sup>2</sup> Jurisdiction is conferred upon the CRB pursuant to §§32-1521.01 and 32-1522 of the District of Columbia Workers’ Compensation Act of 1979, D.C. Code, as amended, §32-1501 *et seq.*, (“Act”), 7 DCMR §250, *et seq.*, and the Department of Employment Services’ Director’s Administrative Policy Issuance 05-01 (February 5, 2005).

A dispute arose over Mr. Tilghman’s entitlement to permanent partial disability benefits for his right and left legs. Mr. Tilghman contended he was entitled to 10% permanent partial disability to his left leg and 15% permanent partial disability for his right leg. In a Compensation Order dated August 24, 2012, an administrative law judge (“ALJ”) granted Mr. Tilghman an award of 1% permanent disability to his left leg only.<sup>3</sup>

On appeal, Mr. Tilghman contends that when assessing entitlement to permanent partial disability, the ALJ failed to consider the five, subjective factors authorized by §32-1508(3)(U-i) of the Act.<sup>4</sup> Mr. Tilghman also contends the ALJ failed to consider his industrial history and work experience. For these reasons, Mr. Tilghman requests the CRB vacate the August 24, 2012 Compensation Order and award him the benefits he sought in his application for formal hearing.

In response, WMATA asserts the ALJ did consider the five factors and Mr. Tilghman’s industrial loss. WMATA requests the CRB affirm the Compensation Order because it is supported by substantial evidence and is in accordance with the law.

#### ISSUE ON APPEAL

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

#### ANALYSIS<sup>5</sup>

There is no requirement that an ALJ state what portion of the percentage of permanent partial disability is attributable to the D.C. five factors.<sup>6</sup> Nonetheless, Mr. Tilghman complains that the ALJ did not consider those five, subjective factors.

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<sup>3</sup> *Tilghman v. WMATA*, AHD No. 12-227, OWC No. 648567 (August 24, 2012).

<sup>4</sup> Section 32-1508(3)(U-i) of the Act states

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.

<sup>5</sup> 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. Section 32-1521.01(d)(2)(A) of the Act. 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).

<sup>6</sup> See *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

Careful review of the Compensation Order reveals the ALJ found as fact

As arranged by counsel for claimant, claimant underwent an Independent Medical Evaluation performed by Dr. Allan H. Macht on September 13, 2010. Dr. Macht ordered x-rays of both knees and claimant's lumbo-sacral spine. Dr. Branda reported that all of the x-rays were negative. Dr. Macht concluded and reported on September 21, 2010 claimant has a 1 percent permanent partial impairment of his left leg and a 2 percent permanent partial impairment of his right leg based on the sixth edition of the AMA guides and a total of 10 percent permanent partial impairment of his left leg and a total of 15 percent permanent partial impairment of his right leg. Dr. Macht explained that the increase is based on the significance of the pain and effect on the activities of daily living.<sup>[7]</sup>

When weighing the evidence to reach a conclusion, the ALJ was

inclined to add that the impairment should also be of a permanent nature. In so concluding, less weight has been afforded the IME opinion of Dr. Macht who, despite obtaining completely negative x-rays of claimant's knees, on September 13, 2010, provided excessive ratings based on claimant's subjective complaints of pain providing only a diagnosis of traumatic injury to both knees. Dr. Macht failed to state what the injury actually was. Claimant was asked by the undersigned at the hearing what he believed was the injury to his knees and claimant responded that he really did not know. HT at 49, 50.<sup>[8]</sup>

In addition, Dr. Johnson's opinion was favored because

There is little in the way of any objective abnormality that would substantiate the severity of his subjective complaints as far as the right knee is concerned nor the lumbar spine. The only abnormality identified for the left knee is an occasional click beneath the patella, which could, in fact, be related to a contusion of the left knee at the time of the original injury of 04/08/2008. No other objective abnormality is apparent. Comparing my examination today with the one Dr. Robert Macht performed on 09/21/2010, the patient seems to have objectively improved. As there is no tenderness about the knees, there is no limp nor any pain with motion or with resistance. . . .

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requiring that the analysis of schedule award claims include specific reference to the AMA Guides and/or the five factors.")

<sup>7</sup> *Tilghman, supra* , pp. 2-3.

<sup>8</sup> *Id.* at p. 5.

I also make note of the fact that x-rays of the lumbar spine and both knees were unremarkable on 09/21/2010 when Dr. Macht evaluated the patient. I believe the patient is capable of driving a Metro transit bus without restrictions at this time.

According to the Sixth Edition of the Guides to the Evaluation of Permanent Impairment published by the American Medical Association, the patient would warrant no more than a 1 percent lower extremity impairment rating to the left knee due to the click present on motion and 0 percent impairment rating to the right knee according to table 16-3, page 509. I note that the “grade 2 modifier” that Dr. Macht had noted from table 16-6, page 516 no longer applies as the patient has no antalgic limp with no asymmetric shortened stance phase, etc. that would increase this impairment rating to either knee. Also table [sic] 16-7 page 517 would direct a grade modifier 0. Therefore, the total impairment rating to the left knee from the injury of 04/08/2008, according to the Sixth Edition of the AMA Guides would be 1 percent and a 0 percent impairment rating due to the right knee. These impairment ratings take into account such factors as pain, loss of function, loss of endurance, atrophy and weakness.

EE 1 at 2,3.<sup>[9]</sup>

Both the findings of fact and the analysis demonstrate the ALJ did consider the five, subjective factors authorized by §32-1508(3)(U-i) of the Act.

Similarly, Mr. Tilghman’s argument that the ALJ failed to consider his industrial history and work experience also is misplaced. As the ALJ stated, without a permanent physical impairment, there is no legal justification for determining an effect on Mr. Tilghman’s alleged industrial loss:

Claimant was asked a series of questions about occupations that pre-existed his bus operator position with employer, most likely because claimant was in fact terminated from his employment as a bus operator. As there exists, in the undersigned’s opinion no evidence to support a finding of permanent physical impairment to either leg other than the left knee clicking, there is no need to determine if the existence of an injury-based effect upon claimants [sic] earnings or upon his future earnings as a result of the work injury.<sup>[10]</sup>

The true essence of Mr. Tilghman’s argument is that the ALJ failed to weigh the evidence in his favor and award his claim for relief. Reweighing the evidence is beyond the scope of our authority.<sup>11</sup>

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<sup>9</sup> *Id.* at p. 6.

<sup>10</sup> *Id.*

<sup>11</sup> *Marriott, supra.*

CONCLUSION AND ORDER

The ALJ properly analyzed the evidence to determine Mr. Tilghman's entitlement to permanent partial disability and was not required to state what portion of the percentage of disability is attributable to the five, subjective factors. The August 24, 2012 Compensation Order is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

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MELISSA LIN JONES  
Administrative Appeals Judge

December 20, 2012 \_\_\_\_\_  
DATE