GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR

LISA M. MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 12-006

ROSA ULLOA,

Claimant- Petitioner,

v.

HOTEL HARRINGTON and CHARTIS INSURANCE,

Employer/Carrier - Respondent.

Appeal from a Compensation Order of
Administrative Law Amelia G. Govan
AHD No. 10-556A, OWC No. 669607

Michael Kitzman, Esquire, for the Claimant
James Maloney, Esquire, for the Employer

Before HEATHER C. LESLIE,[1] HENRY MCCOY, and JEFFREY P. RUSSELL,[2] *Administrative Appeals Judges*.

HEATHER C. LESLIE, *Administrative Appeals Judge*, for the Compensation Review Board; JEFFREY P. RUSSELL, concurring.

DECISION AND REMAND ORDER

OVERVIEW

This case is before the Compensation Review Board (CRB) on the request for review filed by the Claimant - Petitioner (Claimant) of the December 21, 2011, 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 granted, in part, the Claimant's request for permanent partial disability benefits to the Claimant's left upper extremity. We REVERSE and REMAND.

BACKGROUND AND FACTS OF RECORD

[1] Judge Heather C. Leslie is appointed by the Director of DOES as an Interim Board Member pursuant to DOES Administrative Policy Issuance No. 12-02 (June 20, 2012).

[2] Judge Russell has been appointed by the Director of the DOES as a Interim CRB Member pursuant to DOES Administrative Policy Issuance No. 12-01 (June 20, 2012).

On April 3, 2010 the Claimant, a laundry attendant for the Employer, injured her left arm while removing sheets from the dryer. The Claimant sought treatment with the medical providers at Kaiser Permanente for her left arm complaints. The Claimant was diagnosed as having impingement syndrome of the shoulder and medial epicondylitis and underwent conservative care which included injections and medication. The Claimant was found temporarily and totally disabled from April 30, 2010 to and including July 20, 2010.[3]

On March 2, 2011, the Claimant underwent an Independent Medical Evaluation (IME) with Dr. Joel Fechter. Dr. Fecthter took a history of the injury and performed a physical exam. Dr. Fecther opined the Claimant suffered from an 18% permanent partial disability to his left upper extremity. Dr. Fecther based his rating on the AMA Guides to the Evaluation of Permanent Impairment.

The Employer sent the Claimant for an IME with Dr. Robert O. Gordon on July 20, 2012. Dr. Gordon also took a history of the injury and performed a physical examination. Dr. Gordon opined the Claimant did not require any further treatment and had recovered fully from any injuries suffered on April 3, 2010. In an addendum dated August 25, 2010, Dr. Gordon opined the Claimant did not suffer from any permanent impairment from her work related injury.

A full evidentiary proceeded on November 10, 2011 with the nature and extent of disability the sole issue to be adjudicated. The Claimant sought an award of permanent partial disability in the amount of 18% to her right upper arm. The Claimant relied upon the opinion of Dr. Fecther while the Employer relied upon the opinion of Dr. Gordon. A CO was issued on December 21, 2011 which granted, in part, the Claimant request for permanent partial disability to her left arm. The CO awarded the Claimant 2% permanent partial disability to the left arm.

The Claimant timely appealed. On appeal, the Claimant argues that the ALJ was in error in not considering the requirements enunciated in *Wormack v. Fishback & Moore Electric, Inc.*[4] Specifically, (1) the Compensation Order failed to make findings regarding the physical nature of the Claimant's injury, (2) the ALJ was in error by not considering the five factors enunciated under D.C. Official Code § 32-1508(U-i) (the "Maryland factors") when determining permanent partial disability; and (3) the CO fails to make clear findings regarding industrial loss in failing to articulate how the determination was made in coming to the ultimate conclusion that the Claimant suffered from 2% permanent partial disability to her left arm.

The Employer responds by arguing that the evidence in the record supports that ALJ's conclusions and that as a matter of law, there is no basis to reverse the CO.

[3] *Ulloa v. Hotel Harrington*, AHD No. 10-556, OWC No. 669607 (April 29, 2011).

[4] CRB No. 03-159, AHD No. 03-151 (July 22, 2005).

THE STANDARD OF REVIEW

The scope of review by the CRB is 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. S*ee* District of Columbia Workers' Compensation Act of 1979, D.C. Code, as amended, §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 uphold a Compensation Order that is supported by substantial evidence, even if there is substantial evidence in the record to support a contrary conclusion, and even where the CRB might have reached a contrary conclusion. *Id*. at 885.

DISCUSSION AND ANALYSIS

The Claimant argues mainly that the CO is not supported by the substantial evidence in the record as the CO failed to consider the *Wormack* requirements. We first address the Claimant's argument that the CO failed to address the five factors enunciated in D.C. Official Code § 32-1508(U-i), pursuant to *Wormack.* Specifically, the Claimant argues, "the Compensation Order failed to articulate the impact that each of these factors played, if any, in the ultimate finding that was reached." Claimant's argument unnumbered at 5. We disagree.

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,*[5] 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.

[5] CRB No. 10-071, AHD No. 09-483 (November 8, 2011).

The Claimant's final arguments are that the CO was in error in not explaining fully what medical opinion was relied upon, if any, and that the ALJ did not fully explain how the 2% permanent partial disability was arrived at, stating the CO does not make any clear findings regarding industrial loss. We reluctantly agree.

Since the issuance of the CO, the District of Columbia Court of Appeals (DCCA) has issued *Jones v. DOES*.[6] In *Jones,* the DCCA, while acknowledging the predictive nature of permanent partial disability determinations, also indicated that any disability award amount must be explained and reasons for the award must be outlined. Without any explanation from the ALJ, the DCCA found that it would be impossible to determine whether or not the ALJ's conclusion flowed rationally from the factual findings and whether or not the ALJ applied the law correctly, taking into account the entirety of the record. *Id.*

With the above precedent in mind, we note that when assessing the competing opinions of Dr. Fecther and Dr. Gordon, the ALJ states,

> It is the considered opinion of the undersigned that the appropriate permanency rating is in between those of Dr. Fechter and Dr. Gordon. Neither Dr. Fechter's rating nor that of Dr. Gordon, of course, encompass the discretionary element of the effect of Moody's (sic) left upper extremity impairment on her consequential industrial capacity.

CO at 5.

The ALJ goes on further to conclude,

> After considering the medical reports and testimony of record, as well as Ulloa's testimony at formal hearing, it was appropriate to increase Dr. Gordon's rating. However, the record evidence does not support the eighteen percent (18%) rating provided by Dr. Fechter. Taking the entirety of the medical records and Ulloa's testimony into consideration, it was determined that a rating of two percent (2%) for the left upper extremity is most appropriate.

CO at 5-6.

Prior to the issuance of *Jones,* we may have affirmed the decision in the case at bar. However, *Jones* now requires more specificity and reasoning be enunciated when awarding permanent partial disability. In other words, the CO in order to pass muster or review under *Jones*, must not only assign the percentage of disability to be awarded to a scheduled member, but now also must explain *why* that particular amount was awarded based on the evidence in the record.

We do note each particular workers compensation case is unique. Some scheduled award injuries are severe requiring significant medical treatment, while others only require a short rehabilitation period and a few visits to a physician. Some claimants are restricted to a light duty status for a long period of time, sometimes years, while other claimant's return to work full duty without any restrictions. Some employer's are able to accommodate light duty restrictions, some are not.[7] ALJ's are tasked with analyzing the medical evidence, often times in the form of

[6] 41 A.3d 1219 (April 26, 2012).

[7] We have found that often it is the occupation of the claimant and the industry of the employer that often dictates whether or not light duty can be accommodated.

competing IME's, as well as the duties of the claimants' jobs, the affect of the injury on the ability of the claimant to do his or her job, and come up with what the ALJ believes is the best approximation of the claimant's disability.

This is what makes the DCCA's decision in *Jones* difficult to reconcile with the predictive nature of permanent partial disability cases. 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. ALJ's are now tasked with the difficulty of explaining with specificity what is essentially a prediction; what the ALJ feels is the best percentage that would compensate the Claimant for his or her injury.

We are thus forced to remand the case back to the ALJ to explain the rationale and basis behind the 2% award as the CO is silent on the "reasoning in arriving at a disability award."[8] Upon remand, the ALJ must state what specific evidence in the record was relied upon and any inferences draw from that evidence to justify how the number arrived at is appropriate.

Stated another way and somewhat simply, why 2%?

CONCLUSION AND ORDER

The CO of December 21, 2011 is **REVERSED** and **REMANDED.** 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 DCCA in *Jones, supra*.

FOR THE COMPENSATION REVIEW BOARD:

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HEATHER C. LESLIE
Administrative Appeals Judge

August 7, 2012
DATE

[8] *Id* at 1225.

JEFFREY P. RUSSELL, *concurring.*

I agree that the *Jones* decision has created a much more difficult task in the area of schedule awards. However, and with all due respect for the majority and the District of Columbia Court of Appeals (DCCA), I am troubled by merely lamenting the difficulties created by the *Jones* decision, and remanding with instructions to, in essence, try again. Recognizing that this concurrence expresses only my own views as to an approach that I feel comports with the court's ruling, I offer the following.

The DCCA in *Jones* wrote:

> 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 schedule award […]. But whether or not the measure for such a disability award, expressed by the statute in terms of weeks of pay […] may be described as "arbitrary," it cannot be countenanced that the ALJ's decision-making itself can be arbitrary [font. 4 omitted]. There is a qualitative difference between recognizing that in making a legal determination of disability, the ALJ comes to a conclusion based on a complex of factors, taking into account physical impairment and potential for future wage loss, and the application of judgment based on logic, experience and even "prediction," and considering that any disability determination by the ALJ, once made, is impermeable to review. We cannot accept "the predictive nature of the judgment 'as though it was a talisman under which any agency decision is by definition unimpeachable'". *Int'l. Ladies Garment Workers' Union v. Donovan, 722 F.2d 795, 821, 232 U.S. App. D.C. 309 (D.C. Cir. 1983)* (quoting *Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 50, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983)).*
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> …
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> In this case, we know that the ALJ resolved the conflict between the two doctors and found that petitioner had suffered a permanent impairment to her left leg of 6%. We also know that the ALJ was properly aware that the disability determination was not the same as physical impairment, and required a determination of economic wage loss. *Washington Post Co.[v. DOES], 675 A.2d [37] at 40* (quoting *American Mut. Ins. Co. v. Jones, 426 F.2d 1263, 1265, 138 U.S. App. D.C. 269 (D.C. Cir. 1970)).* There is evidence in the record that petitioner established such a loss because she could not perform her part-time work.[ftnt. 7omitted]. Petitioner claims that her impairment restricted her to sedentary work, resulting in an economic impairment in excess of 20% [ftnt. 8 omitted]. The ALJ stated in conclusory terms, with apparent contradiction, that, "In consideration of the evidence in the record as detailed above, and *setting aside any consideration of wage loss but presuming an effect an [c]laimant's wage earning capacity*,[c]laimant qualifies for a 7% permanent partial disability award

> for her left leg disability." How the ALJ determined that the disability award should be 7%-- and not, for example, 1%, 10% or 30%-- is a complete mystery, however.
>
> On this record, therefore, we are unable to affirm the CRB's conclusions that the ALJ's determination flowed rationally from the factual findings, and that the ALJ in fact applied the law taking into account the entirety of the record. We remand this case so that the agency can, in further proceedings, make such additional findings of fact and reasoned conclusions of law, as will support the determination of the disability award.

Id., 1224 and 1226 (emphasis in original).

While the court stated that "we know that the ALJ resolved the conflict between the two doctors and found that petitioner had suffered a permanent impairment to her left leg of 6%" in my reading of her decision, that is not entirely accurate. The ALJ in *Jones* expressed her clear preference for the opinion of the IME physician as opposed to the treating physician, yet she in fact made no specific factual finding concerning the degree of medical impairment. The medical evidence on the question of medical impairment was that the IME physician opined that Ms. Jones had sustained a 6% permanent impairment to her left leg, while the treating physician opined that Ms. Jones had sustained 20% impairment to her left leg.[9]

This failure to make a specific finding would not, under pre-*Jones* law, have been harmful to the overall assessment of permanent partial disability, because, as the ALJ noted, disability and impairment are not the same thing. Impairment informs but does not determine disability.

However, the court in *Jones* has insisted on a high degree of evidentiary and analytic specificity, expressed as it must be under the Act in a numerical, percentage term, as to how a specific number has been reached. In the words of the court, "How the ALJ determined that the disability award should be 7%-- and not, for example, 1%, 10% or 30%-- is a complete mystery".

There are only two areas of evidentiary inquiry in cases of permanent partial disability that can be reduced to numerical values: medical impairment, and impact upon earnings, expressible as a percentage differential between pre- and post-injury earnings. The court assumed that the ALJ had made a finding on the first, and the court itself made its own calculation as to the second (determining that Ms. Jones was suffering a 20% wage loss as a result of being unable to perform the duties of her part time job as an usher).

The shortcomings that the court detected in *Jones* were two: ignoring the second factor (actual impact on earnings) and not explaining why the ALJ awarded "7%-- and not for example, 1%,

[9] The DCCA in its opinion in *Jones* stated that Dr. Magee's opinion was that Ms. Jones had sustained 20% impairment to her left *knee*. I note that, in fact, the ALJ found that Dr. Magee was of the opinion that Ms. Jones's 20% impairment was to the leg. In any event, the court surmised that the Disability Compensation Program's 13% award, which was what was appealed to the ALJ, represented a "splitting the difference" between the two impairment ratings. While that may have been the case, the knee is not a schedule member under the Act. It is a subpart of the leg. "Splitting the difference" between a 20% knee rating and a 6% leg rating would yield a figure that is lower than 13% to the leg.

10% or 30%". Again, with all due respect to the court, awarding a number that is 1% higher than what the court thought was the ALJ's medical impairment rating determination does not seem, on its face and at least to the undersigned, a complete mystery. She made an award that was very close to the medical impairment that she found, and increased it a small amount.[10] The court deemed this small variation from what it thought of as the ALJ's determination as to Ms. Jones's medical impairment rating to be impermissibly arbitrary.

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

[10] And how much was the increase? Interestingly, a 1% incremental additional award on top of 6% represents a little more than a 15% increase of the award. Although the ALJ didn't perform the arithmetic (erroneously assuming that she was prohibited from considering the specific actual post-injury earnings), the amount that she awarded represents the combined percentage of the medical impairment as opined by the IME physician, increased by the round figure, 1%, that most closely represents an additional 20% of the impairment rating. Twenty percent, it will be recalled, is the amount that the court determined Ms. Jones was losing from her lost part time employment. Whether the court would have approved the CRB's affirmance of the ALJ if the ALJ had expressed her decision in these terms is itself a mystery.

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.

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Jeffrey P. Russell
Administrative Appeals Judge