

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

Department of Employment Services

VINCENT C. GRAY  
MAYOR



F. THOMAS LUPARELLO  
ACTING DIRECTOR

**COMPENSATION REVIEW BOARD**

**CRB No. 13-154**

**VILMA PADILLA,**  
**Claimant-Petitioner,**

v.

**M & N CONTRACTORS and BROADSPIRE,**  
**Employer/Insurer-Respondent.**

Appeal from a November 8, 2013 Compensation Order By  
Administrative Law Judge Leslie A. Meek  
AHD No. 10-600A, OWC No. 660339

Carlos A. Espinosa for Petitioner  
Zachary L. Irwin for the Respondent

Before: JEFFREY P. RUSSELL, MELISSA LIN JONES and HEATHER C. LESLIE, *Administrative Appeals Judges.*

JEFFREY P. RUSSELL for the Compensation Review Board.

**DECISION AND REMAND ORDER**

**BACKGROUND FACTS AND PROCEDURAL OVERVIEW**

Petitioner Vilma Padilla injured her left leg when she slipped and fell while employed as an office cleaner for Respondent M & N Contractors. Petitioner underwent two surgical procedures on her left knee, and ultimately returned to her job with Respondent. However, she has not returned to a second job as a restaurant cook.

Petitioner was evaluated by her treating physician for a medical impairment rating, and he opined that she had sustained a 22% permanent partial impairment to the left leg as a result of the knee injury and the subsequent surgeries. Respondent had Petitioner's leg evaluated by an independent medical evaluator (IME), who opined that she had sustained a 3% permanent partial medical impairment to the left leg.

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On June 11, 2013, Petitioner presented her claim for an award of 22% permanent partial disability under the schedule, D.C. Code § 32-1508(3) to the left leg at a formal hearing before an Administrative Law Judge (ALJ) in the Administrative Hearings Division (AHD) of the Office of Hearings and Adjudication (OHA) in the Department of Employment Services (DOES).

On November 8, 2013, the ALJ issued a Compensation Order awarding Petitioner 10% permanent partial disability under the schedule. Petitioner filed a timely appeal of the award to the Compensation Review Board (CRB), to which appeal Respondent filed a timely opposition.

We vacate the award and remand for further consideration.

#### DISCUSSION AND ANALYSIS<sup>1</sup>

Petitioner's first and most detailed argument is that the ALJ "ignored the opinion of the treating physician" or, alternatively, "rejected the opinion of the treating physician" without adequate basis or explanation.

We must respectfully disagree that Petitioner accurately describes what the ALJ did in this Compensation Order. As Petitioner notes, the ALJ explicitly rejected the opinion of Respondent's IME physician, Dr. Draper. *See* Compensation Order, page 3. Throughout the discussion of the opinion of the treating physician, Dr. Siekanowicz, it is apparent that the ALJ gave it credence. However, what the ALJ did not do was make the error that Petitioner appears to be making in her first argument, *i.e.*, using the term "medical impairment" and "disability" synonymously. *See* for example, Petitioner's "Memorandum of Points and Authorities in Support of Claimant's Application for Review", page 7, where Petitioner writes "More importantly, the evidence presented at the hearing did not support the ALJ's decision to completely ignore the *disability rating* of 22% to the left lower extremity provided by the treating physician" (emphasis added).

As the ALJ points out (and Petitioner acknowledges elsewhere in her Memorandum), disability is an economic concept, not solely a medical one. What Dr. Siekanowicz offered was an opinion as to Petitioner's *medical impairment rating*. But, disability and impairment are related but different concepts.

Thus, we find no merit in Petitioner's contention that the ALJ "ignored" the opinion of the treating physician, and are satisfied that, as between Dr. Draper's opinion and Dr. Siekanowicz's opinion, she found that of Dr. Siekanowicz more convincing. What she did not do was make a disability award on the theory that disability and medical impairment are the same thing, and in that regard she was not in error. *See Negussie v. DOES*, 95 A2d 31, 396 (D.C. 2007).

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<sup>1</sup> The CRB reviews a Compensation Order to determine whether the factual findings are based upon substantial evidence in the record, and whether the legal conclusions drawn from those facts are in accordance with applicable law. The CRB will 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. A Compensation Order will be deemed unsupported by substantial evidence where it cannot be determined whether the decision was arbitrary and capricious. *Jones, supra*.

Rather, the ALJ made clear that she was aware of the fairly recent District of Columbia Court of Appeals (DCCA) pronouncement on the matter. Citing and quoting from *Jones v. DOES*, 41 A.3d 1219, 1224 (D.C. 2012), the ALJ wrote:

The Court of Appeals has recently recognized “the determination of disability for workers’ compensation purposes is not an exact science, and it necessarily involves a certain amount of ‘prediction’ in making a schedule award for partial loss (or loss of use) of a member.” The Court asserts “... the ALJ comes to a conclusion based on a complex of factors, taking into account physical impairment and potential for wage loss, and the application of judgment based on logic, experience and even ‘predication.’”

However, the ALJ also noted that:

In making determinations of the nature and extent of permanent partial disability under the schedule of the Act, the fact finder is not bound by the opinions of evaluative physicians. “[I]n determining the nature and extent of permanent partial disability for loss of industrial use under the schedule award paradigm, the ALJ needs broad discretion to consider the medical and non-medical evidence in reaching a decision as to the non-medical question of loss of industrial use, and in so doing, needs broad discretion to accept either or neither of the medical opinions in reaching a conclusion as to the fact of [sic] degree of disability under the Act.” *Wormack v. Fischbach & Moore*, Dir. Dkt No. 03-159, AHD No. 03-151, OWC No. 564205 (July 22, 2005).

Compensation Order, page 5 – 6.

This passage, quoted with apparent approval by the ALJ, predates *Jones*, which had this to say about the discretion of an ALJ, and its limits:

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. But whether or not the measure for such a disability award, expressed by the statute in terms of weeks of pay, see D.C. Code § 32-1508 (3), may be described as "arbitrary," it cannot be countenanced that the ALJ's decision-making itself can be arbitrary [footnote 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 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 were a talisman under which any agency decision is by definition unimpeachable.'" *International 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)).

*Jones, supra*, at 1224.

In light of this pronouncement, we now consider the portion of the Compensation Order in which the ALJ determines the amount of the disability award:

Claimant's medical evidence shows, regarding her left knee, she continues to have residual symptomatology as a result of the work injury. Claimant continues to have decreased stability, strength, endurance and motion. She testified that she is not capable of performing physical activities as she did before the work incident and she is no longer able to perform in her [second job] as a restaurant cook.

Based upon the evidence of record, the pain, loss of endurance, weakness and loss of function that Claimant experiences warrant a schedule award of 10% of Claimant's left leg.

Two percent of this schedule award is attributed to Claimant's pain, two percent to weakness, three percent to Claimant's loss of endurance and three percent to Claimant's loss of function.

Compensation Order, page 6.

In *Jones*, the DCCA wrote:

In this case, we know that the ALJ resolved the conflict between the two doctors and found that petitioner had suffered a physical 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.*, 675 A.2d 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<sup>7</sup>. Petitioner claims that her impairment has restricted her to sedentary work, resulting in economic disability in excess of 20% [footnote 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 on [c]laimant's earning capacity*, [c]laimant qualifies for a 7% permanent partial disability award for her left leg disability." (emphasis added). How the ALJ determined that the disability award should be 7% — and not, for example, 1%, 10% or 30% — is a complete mystery, however.

7. 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 that there are documents in the record (one from employer's counsel) that petitioner's wages from her part-time work comprised approximately 20% of her overall earnings.

*Id.*, at 1226 (emphasis and parentheticals in original, bracketed notations added, footnote numbering in original).

Putting aside that the ALJ in *Jones* did not, in fact, find that the claimant had sustained a 6% medical impairment to the leg, the court was nonetheless clear that its view of the discretion accorded the ALJ is not as broad as the CRB had previously supposed. While the court was less than exhaustive in suggesting exactly how a specific numerical figure is to be derived, several points are apparent. One is that the court assumed that, with adequate explanation, the ultimate award *could be* a figure greater than, equal to, or less than whatever the ALJ determines to be the amount of medical impairment, as is evident from the final sentence of the main text. A second is that the court assumes that it is at least proper, if not required, for the ALJ to take into consideration the actual effect that the impairment has had on a claimant's actual earnings when arriving at a disability figure where the record includes specific evidence on the issue. This is evident from the court's own reference in the body and footnote 7 to the claimant having sustained a 20% diminution in earnings as a result the impairment's precluding the claimant from working in a second job.

Although it is apparent from the Compensation Order that the ALJ was aware of the competing medical impairment opinions, that she assumed the existence of a significant impairment to the left leg, and that she was persuaded that the impairment precluded Petitioner from performing the duties of her second job as a cook, the Compensation Order does not spell out how or even if these facts were taken into consideration in reaching a disability figure. And, while we are convinced that the ALJ accepted that Petitioner sustained a significant medical impairment to her left leg, we are puzzled that the entire award of 10% was broken down in the Compensation Order to be derived from the "five factors". While we recognize the "five factors" are in some ways duplicative of the same considerations that go into arriving at an AMA impairment rating, we nonetheless cannot discern how the award was derived. For example, it would appear that the non-medical factors alluded to by the ALJ in her findings would lead to an enhancement rather than a diminishment of any award, yet the award is for less than half the medical impairment rating that the ALJ appears to have accepted as most convincing.

By making this observation we by no means wish to suggest that the ALJ is compelled on this record to make any such "enhancement". We merely point out the anomaly to illustrate the lack of explanation which we view *Jones* as requiring.

As the court noted was the case in *Jones*, the Compensation Order and record before us may contain substantial evidence to support the ALJ's conclusion and award, but also like *Jones*, it does not contain an explanation as to how the award was determined. While prior to *Jones* we would in all likelihood have deferred to the ALJ's exercise of "broad discretion", we cannot ignore that what we previously viewed as the exercise thereof has now been deemed by the DCCA to be arbitrary and capricious.

**CONCLUSION AND ORDER**

The lack of explanation for the underlying award of 10% permanent partial disability to the left leg renders the award unsupported by substantial evidence, and it is therefore vacated. The matter is remanded for further consideration and the making of a new award accompanied by an explanation of how the award was determined.

FOR THE COMPENSATION REVIEW BOARD:



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JEFFREY P. RUSSELL  
*Administrative Appeals Judge*

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May 13, 2014  
DATE