

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**  
**Department of Employment Services**

**VINCENT C. GRAY**  
**MAYOR**



**LISA M. MALLORY**  
**DIRECTOR**

**COMPENSATION REVIEW BOARD**

**CRB No. 12-165**

**LYNETTE WEST,**  
**Claimant–Petitioner,**

**v.**

**WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY and XCHANGING,**  
**Employer/Carrier-Respondent.**

Appeal from a Compensation Order by  
The Honorable Karen R. Calmeise  
AHD No. 12-245, OWC No. 642412

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

Before MELISSA LIN JONES, HEATHER C. LESLIE,<sup>1</sup> and JEFFREY P. RUSSELL,<sup>2</sup> *Administrative Appeals Judges.*

MELISSA LIN JONES, *Administrative Appeals Judge*, for the Compensation Review Board.<sup>3</sup>

**DECISION AND ORDER**

**FACTS OF RECORD AND PROCEDURAL HISTORY**

On September 7, 2007, Ms. Lynette West, a bus driver for the Washington Metropolitan Area Transit Authority (“WMATA”), sprained her right knee when exiting a bus. A dispute arose over her entitlement to permanent partial disability benefits, and the parties proceeded to a formal hearing.

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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> Judge Russell has been appointed by the Director of the DOES as a temporary Compensation Review Board (“CRB”) member pursuant to DOES Administrative Policy Issuance No. 12-01 (June 20, 2012).

<sup>3</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).

In a Compensation Order dated September 14, 2012, an administrative law judge (“ALJ”) denied Ms. West’s request for an award of 21% permanent partial disability to the right knee.<sup>4</sup> In doing so, the ALJ relied upon the opinions of Ms. West’s treating physician (Dr. Mark J. Sheer) who asserted that when considering Ms. West’s “[h]istory, subjective complaints, physical findings, diagnostic studies, and review of systems,”<sup>5</sup> Ms. West was at maximum medical improvement but had not sustained any impairment to her right leg as a result of her work-related injury.

On appeal, Ms. West does not dispute the ALJ’s ruling that her disability is causally related to her right knee injury; she 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. Ms. West requests the CRB vacate the September 14, 2012 Compensation Order and award her the benefits she sought in her application for formal hearing.

In response, WMATA asserts the ALJ properly afforded Dr. Sheer’s opinion greater weight because he is Ms. West’s treating physician. 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 Ms. West’s entitlement to permanent partial disability benefits?

#### ANALYSIS<sup>6</sup>

Ms. West’s complains that the ALJ did not consider the five subjective factors. The ALJ specifically acknowledged those very factors and recognized Ms. West’s testimony that “she has suffered pain and functional limitations in her right knee”<sup>7</sup> and that “she continues to have pain and swelling and an occasional limp when she walks.”<sup>8</sup> When assessing the totality of the evidence, however, the ALJ did not determine Ms. West’s disability warranted any enhancement for these factors, and she was

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<sup>4</sup> The right knee is not a schedule member, and Ms. West did not seek permanent partial disability benefits based upon wage loss despite the ALJ’s cursory statement in the Compensation Order to the contrary. *West v. Washington Metropolitan Area Transit Authority*, AHD No. 12-245, OWC No. 642412 (September 14, 2012), p. 5. Given the outcome reached and the analysis applied to reach that outcome, both of these errors are harmless in this case.

<sup>5</sup> Employer’s Exhibit 1.

<sup>6</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>7</sup> *West*, *supra*, p. 4.

<sup>8</sup> *Id.* These two examples are meant to be illustrative of the many references to Ms. West’s purported subjective complaints; they are by no means exclusive.

not required to do so. There is no requirement that the ALJ state what portion of the percentage of disability is attributable to the D.C. five factors,<sup>9</sup> even when the portion is zero.

The true essence of Ms. West's argument is that the ALJ failed to weigh the evidence in Ms. West's favor and award her claim for relief. Reweighing the evidence is beyond the scope of our authority.<sup>10</sup>

Finally, we have not ignored the ALJ's statements that

[t]he Act does not provide the Claimant with a presumption regarding the nature and extent of his disability. *See Dunston v. District of Columbia Department of Employment Services*, 509 A.2d 109 (D.C. 1986). Thus, the claimant has the burden of producing substantial credible evidence that he is entitled to the level of benefits requested."<sup>11</sup>

and that

It is well settled that in determining an injured employee's entitlement to the requested level of benefits, the claimant must present sufficient credible, supporting evidence. *Dunston, supra*.<sup>12</sup>

Ordinarily, we cannot affirm a Compensation Order that "reflects a misconception of the relevant law or a faulty application of the law,"<sup>13</sup> but because Ms. West was unable to satisfy even the lower standard of proof (as opposed to the more demanding preponderance of the evidence standard), the ALJ's error in reciting the wrong burden is harmless.

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<sup>9</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.

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.")

<sup>10</sup> *Marriott, supra*.

<sup>11</sup> *West, supra*, p. 6.

<sup>12</sup> *Id.*

<sup>13</sup> *D.C. Department of Mental Health v. DOES*, 15 A.3d 692 (D.C. 2011) (Internal citations omitted.)

CONCLUSION AND ORDER

The ALJ properly analyzed the evidence to determine Ms. West'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 September 14, 2012 Compensation Order is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

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MELISSA LIN JONES  
Administrative Appeals Judge

December 10, 2012  
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DATE