

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

Department of Employment Services

MURIEL BOWSER  
MAYOR



DEBORAH A. CARROLL  
DIRECTOR

DEPT. OF EMPLOYMENT  
SERVICES  
COMPENSATION REVIEW  
BOARD

2015 SEP 18 AM 9 55

**CRB No. 15-085**

**WILLIAM MOSBY,**

**Claimant-Respondent,**

**v.**

**DISTRICT OF COLUMBIA DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS,**

**Employer-Petitioner.**

Appeal from a April 17, 2015 Compensation Order by  
Administrative Law Judge Fred D. Carney, Jr.

AHD PBL No. 12-046A, DCP No. 30090448718-0001 & 0468-WC-09-0500537

(Decided September 18, 2015)

Frank McDougald for the Employer  
Richard J. Link for the Claimant

Before HEATHER C. LESLIE, JEFFREY P. RUSSELL, *Administrative Appeals Judges*, and  
LAWRENCE D. TARR, *Chief Administrative Appeals Judge*.

HEATHER C. LESLIE, for the Compensation Review Board.

**DECISION AND REMAND ORDER**

**FACTS OF RECORD AND PROCEDURAL HISTORY**

Claimant was employed as an inspector with Employer. On March 27, 2007, while removing weights from a vehicle, Claimant injured his right shoulder. Claimant came under the care of Dr. Masoud Pour. After an MRI revealed a partial tear of the rotator cuff, Claimant underwent surgery on his right shoulder on June 18, 2009, performed by Dr. Pour. Claimant continued further courses of conservative treatment after surgery with Dr. Pour.

On October 3, 2012, Dr. Pour opined the following:

Using guides to the evaluation of permanent impairment, Sixth edition of American Medical Association, Page 475, table 15-34, Grade Modifier II, shoulder range of motion is given 27% of upper extremity impairment. For pain, weakness, and atrophy of shoulder muscles, given 9% for total of 36% of right upper extremity impairment.

Claimant's exhibit 3 at 7.

On January 13, 2013, Claimant underwent an additional medical evaluation (AME) with Dr. David C. Johnson at the request of the Employer. Dr. Johnson took a history of Claimant's injury, summarized Claimant's medical treatment including surgery, and performed a physical examination. Dr. Johnson opined Claimant had a 15% impairment rating with 5% attributable to pre-existing conditions and 10% attributable to the work injury.

A Notice of Determination (NOD) was issued on August 28, 2014 which denied Claimant's claim for permanent partial disability pursuant to Dr. Pour's medical report. The NOD determined Claimant's request for permanent partial disability benefits was to the right shoulder, a body part not covered under D.C. Official Code § 1-623.07.

A full evidentiary hearing occurred on January 29, 2015. Claimant sought an award of 36% permanent partial disability to the right arm with the issue to be adjudicated the nature and extent of Claimant's disability to the right arm. A Compensation Order (CO) was issued on April 7, 2015 which awarded Claimant 36% permanent partial disability to the right arm.

Employer timely appealed. Employer argues the ALJ erred in awarding permanent partial disability to the arm when the injury was to the shoulder, relying upon *Fowler v. Howard University*, CRB No. 12-150 AHD No. 12-212 (December 5, 2012)(hereinafter *Fowler*). Employer also argues that the ALJ's reliance on *Buchholz v. DC Office of the Attorney General*, CRB No. 07-082, AHD PBL No. 04-027(A) (June 7, 2007)(hereinafter *Buchholz*) and *Barron v. DOES*, CRB No. 06-54, AHD No. PBL 05-010, (2006)(hereinafter *Barron*) is in error as the Act does allow for apportionment under D.C. Code § 1-623.07(d).

Claimant opposes, arguing the CO is supported by the substantial evidence in the record and in accordance with the law.

#### STANDARD OF REVIEW

The scope of review by the CRB is limited to making a determination as to whether the factual findings of the Order are based upon substantial evidence in the record and whether the legal conclusions drawn from those facts are in accordance with the applicable law. Section 1-623.28(a) of the District of Columbia Government Merit Personnel Act of 1978, as amended, D.C. Official Code § 1-623.1 *et seq.* ("Act"). 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. *Marriott*, 834 A.2d at 885.

## ANALYSIS

Employer first argues the CO is not supported by the substantial evidence in the record as the evidence submitted shows any disability is limited to the right shoulder, a non-schedule body part. Employer directs our attention to the report of Dr. Pour, arguing that the basis for Dr. Pour's rating is the shoulder and no reference to the right arm is made. We reject this argument.

In *Barron*, the CRB quoted with approval this passage from Professor Larson's treatise:

It has been stressed repeatedly that the distinctive feature of the compensation system, by contrast with tort liability, is that its awards, apart from medical benefits, and apart from certain permanent partial awards in four or five states, [footnote omitted] are made not for physical injury as such, but for "disability" produced by such injury [footnote omitted]. The central problem, then, becomes that of analyzing the unique and rather complex legal concept which, by years of compensation legislation, decision, and practice, has been built up around the term "compensable disability."

The key to the understanding of this problem is the recognition, at the outset, that the disability concept is a blend of two ingredients, whose recurrence in different proportions gives rise to most controversial disability questions: The first ingredient is disability in the medical or physical sense, [footnote omitted] as evidenced by obvious loss of members or by medical testimony that the claimant simply cannot make the necessary muscular movements and exertions; the second ingredient is *de facto* inability to earn wages, as evidenced by proof that claimant has not in fact earned anything.

The two ingredients usually occur together; but each may be found without the other: A claimant may be, in a medical sense, utterly shattered and ruined, but may by sheer determination and ingenuity contrive to make a living. Conversely, a claimant may be able to work, in both the claimant's and the doctor's opinion, but awareness of the injury may lead employers to refuse employment. These two illustrations will expose at once the error that results from an uncompromising preoccupation with either the medical or the actual wage-loss aspect of disability. An absolute insistence on medical disability in the abstract would produce a denial of compensation in the latter case, although the wage loss is as real and as directly traceable to the injury as in any other instance. At the other extreme, an insistence on wage loss as the test would deprive the claimant in the former illustration of an award, thus not only penalizing his or her laudable efforts to make the best of misfortune but also fostering the absurdity of pronouncing a person nondisabled in spite of the unanimous contrary evidence of medical experts and of common observation. The proper balancing of the medical and the wage-loss factors is, then, the essence of the "disability" problem in worker's compensation.

4-80 *Larson's Workers' Compensation Law* § 80.02, *Larson's Workers'*

Compensation Law, Copyright 2005, Matthew Bender & Company, Inc., Part 9 DISABILITY AND PERSONAL INJURY BENEFITS, Chapter 80 KINDS AND ELEMENTS OF DISABILITY, "The Two Components of Disability: Medical Disability and Earning Impairment".

*Baron*, at 7.

As enunciated in *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 the end, this determination can result in accepting one physician's medical rating over another or in reaching a different conclusion altogether because the fact-finder is not bound by the opinions of the evaluating physicians. While Employer may take issue with the basis of Dr. Pours impairment rating, the ALJ is not bound by his rating alone when determine the amount of disability Claimant may be entitled. To assist in making that determination, an ALJ may consider actual wage loss insofar as that loss is indicative of an effect upon future wage earning capacity. *Ulloa v. Hotel Harrington*, CRB No. 12-006, AHD No. 10-556A, OWC No. 669607 (August 7, 2012). The ALJ credited Claimant's testimony, specifically:

At the formal hearing, Claimant testified that he was 58 years old at the time. He has retired from working for Employer as a weights and measures inspector from 1989 to 2009. The duties of his employment included inspecting truck scales, school scales, clinic scales, grocery store scales, gas station scales, pharmaceutical scales, etc., (HT 16). His duties also included inspecting the gas pumps at area gas stations for fuel grade and appropriate quantification. (HT 35-36) To execute his duties Claimant testified he had to stand, walk, reach over head and lift/carry up to 50lbs without assistance. (HT 16 & 27-28).

On March 27, 2009, Claimant was working as an Inspection Enforcement Officer for the DCRA. While removing weights from a truck Claimant suffered injury to his right shoulder. (HT 16) Claimant testified that he had a prior injury to his shoulder in the 1990s. He could not remember which year or month. (HT 18) Claimant testified that in the 1990s he sustained that injury when he was working on a truck that carries approximately 180 gallons of oil. (HT 18) He was treated with a cortisone injection and released from the hospital. He does not remember missing any time from work because of his prior injury. After that incident he had no subsequent injuries to his right arm or his right shoulder until March 27, 2009.

Subsequent to the March 27, 2009, injury Claimant reported to Dr. Pour for treatment of his right shoulder. Dr. Pour conducted an MRI study and based thereon, he diagnosed Claimant with right shoulder tear and recommended Claimant undergo surgery to repair the tear. Claimant was treated with surgery, medication and home exercise. (HT 21) Claimant has not returned to work for Employer. Claimant testified that since the surgery he experiences tingling in his right hand. (HT 24) He experienced sensations in his right arm that he described as like pins and needles. Claimant suggested that the court take note that he was shaking his hand to regain normal sensation. (HT 25) Claimant testified he is right

hand dominant and he cannot do things with his right hand and arm that he did before the March 27, 2009 work injury, such as lawn work, washing his car, performing tasks that require him to reach overhead and lift and/or carry weights up to 50lbs. (HT 28) Claimant testified he cannot lift his right hand as high as the left and he has trouble sleeping at night due to the discomfort he experiences from his right shoulder. (HT 32-33) When he attempts to lift his right arm over his head he gets pain in his right arm as well as his shoulder. (HT 36)

CO at 7-8.

In addition to the above discussion, the ALJ specifically found that the “Claimant retired because of his work related disability.” CO at 3. Pursuant to *Negussie*, the ALJ took into consideration not only Dr. Pour’s rating, but also Claimant’s testimony including his complaints about his right arm resulting from his shoulder injury, and found claimant entitled to an award of disability, using Dr. Pour’s rating as a guide. We conclude there is no error in the ALJ’s analysis.

We cannot agree, as Employer urges, that *Fowler* is controlling. As the Claimant correctly points out in argument, Fowler was remanded as the ALJ had awarded permanent partial disability to the shoulder, a non-scheduled member when the Claimant had argued for an award to the arm. As the ALJ notes:

Employer’s reliance on FOWLER here is misplaced. In FOWLER, the ALJ erred when she misstated the claim as a right shoulder claim when it was actually a claim for PPD to the arm as a result of a shoulder injury. In this instance, Claimant seeks a schedule award for her right upper extremity, *i.e.*, her arm and the Act recognizes an arm as a scheduled member of the human body.

CO at 7.

However, we do find merit in Employer’s second argument, that the ALJ’s reliance on *Buchholz* and *Barron* is in error. On this point the ALJ stated:

In response to Employer’s contention that the apportioned rating is appropriate in this matter, the CRB held in the decision of BUCCHOLZ V. DC OFFICE OF THE ATTORNEY GEN’L., CRB No. 07-082, AHD PBL No. 04-027A, DCP No. 761037-0001-20002-0001(June 7, 2007) that there is no apportionment in the Act. *See also* BARRON v. DOES, CRB No. 06-54, AHD No. PBL 05-010, DCP No. MDMPED-0004151 (2006).

Considering that apportionment is not appropriate under the Act according to the CRB in BUCCHOLZ, the report of Dr. Johnson is rejected. The only remaining report is that of Dr. Pour. Dr. Pour’s report indicates that he has been treating Claimant since the work injury. Dr. Pour noted Claimant’s consistent complaints of right arm pain, his lack of function in his right arm based on the limitation of Claimant’s range of motion since the injury to his shoulder and subsequent surgery. Claimant’s personal life has been affected by his not being able to use his

right upper extremity for exercise, recreation and to perform basic domestic tasks. Therefore, I conclude that Dr. Pour's opinion that Claimant continues with 27% impairment for his diminished range of motion, 9% for pain in his right upper extremity for a total of 36% permanent partial impairment the right upper extremity.

CO at 9.

As Employer correctly points out, D.C. Code § 1-623.07(d) states,

If medical records or other objective evidence substantiate a pre-existing impairment or other impairments or conditions unrelated to the work-related injury, the Mayor shall apportion the pre-existing or unrelated medical impairment from that of the current work-related injury or occupational disease in accordance with American Medical Association Guides to the Evaluation of Permanent Impairment ("AMA Guides"). In making this determination, the Mayor shall consider medical reports by physicians with specific training and experience in the use of the AMA Guides.

D.C. Code § 1-623.07(d) allows for apportionment, a section that was added October 1, 2010 by the city council, after *Buchholz* and *Barron* were decided. Thus, *Buchholz's* conclusion that apportionment is not a part of the statute is no longer valid in light of the amendments by the Council. The ALJ's reliance on *Buchholz* and *Barron* as a basis to reject Dr. Johnson's opinion is in error.

As the sole reason for rejecting Dr. Johnson's opinion is not in accordance with the law, we must remand the case for further analysis to determine what permanent partial disability benefits Claimant may be entitled. If the ALJ rejects the opinion of one physician over another, record based reasons must be identified.

#### CONCLUSION AND ORDER

The April 17, 2015 is VACATED and REMANDED consistent with the above discussion.

*So ordered.*