GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services
Labor Standards Bureau

Office of Hearings and Adjudication
COMPENSATION REVIEW BOARD

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CRB (Dir. Dkt.) No. 03-159

GERALD A. WORMACK,

Claimant–Petitioner

v.

FISCHBACH & MOORE ELECTRIC, INC., AND LIBERTY MUTUAL INSURANCE GROUP,

Employer/Carrier–Respondent

Appeal from a Compensation Order of
Administrative Law Judge David L. Boddie
OHA/AHD No. 03-151, OWC No. 564205

Matthew Peffer, Esquire, for the Petitioner

Anthony D. Dwyer, Esquire, for the Respondent

Before JEFFREY P. RUSSELL, SHARMAN MONROE, *Administrative Appeals Judges*, and FLOYD LEWIS, *Acting Administrative Appeals Judge*.

JEFFREY P. RUSSELL, *Administrative Appeals Judge,* for the Compensation Review Panel:

DECISION AND ORDER

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board pursuant to D.C. Official Code §§ 32-1521.01 and 32-1522 (2004), 7 DCMR § 230, and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005). [1]

[1] Pursuant to Administrative Policy Issuance No. 05-01, dated February 5, 2005, the Director of the Department of Employment Services realigned the Office of Hearings and Adjudication to include, *inter alia*, establishment of the Compensation Review Board (CRB) in implementation of the District of Columbia Fiscal Year 2005 Budget Support Act of 2004, Title J, the District of Columbia Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, *codified at* D.C. Official Code § 32-1521.01. In accordance with the Director's Directive, the CRB replaces the Office of the Director in providing administrative appellate review and disposition of workers' and disability compensation claims arising under the District of Columbia Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §§ 32-1501 to 32-1545 (2005), and the District of Columbia Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Code Ann. §§ 1-623.1 to 1-643.7 (2005), including responsibility for

BACKGROUND

This appeal follows the issuance of a Compensation Order from the Administrative Hearings Division (AHD) of the Office of Hearings and Adjudication (OHA) in the District of Columbia Department of Employment Services (DOES). In that Compensation Order, which was filed on September 8, 2003, the Administrative Law Judge (ALJ) granted Petitioner's claim for causally related medical expenses and denied Petitioner's claim for permanent partial disability under the schedule in the amount of 22% to the right arm and 56% to the left arm. Petitioner seeks review of that portion of the Compensation Order which denied the schedule awards.

As grounds for this appeal, Petitioner alleges as error that the ALJ's Compensation Order impermissibly failed to make legally necessary findings of fact concerning the nature and extent of impairment in connection with the schedule claims. Further, Petitioner asserts that he provided substantial evidence entitling him to schedule awards in the amount claimed. Further, Petitioner argues that the ALJ erred in accepting the opinion of the treating physician and rejecting the opinion of an independent medical evaluator (IME) retained by Petitioner.

Respondent opposes the appeal, and asserts that the ALJ properly accepted the medical opinion of the treating physician and rejected the IME opinion, and that the denial of any permanency award was proper, because Petitioner did not "plead in the alternative" in making a claim for relief consistent with the rating of the treating physician's opinion.

ANALYSIS

As an initial matter, the scope of review by the Compensation Review Board (CRB) and this Review Panel, as established by the Act and as contained in the governing regulations, 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. *See* D.C. Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §32-1501 to 32-1545 (2005), at §32-1521.01(d)(2)(A). "Substantial evidence," as defined by the District of Columbia Court of Appeals, is such evidence as a reasonable person might accept to support a particular conclusion. *Marriott Int'l. v. Dist. of Columbia Dep't. of Employment Servs.*, 834 A.2d 882 (D.C. 2003). Consistent with this standard of review, the CRB and this Review Panel are constrained to uphold 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, and even where the reviewing authority might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

In the Compensation Order, the ALJ made numerous findings of fact which are not disputed concerning the injury to Petitioner's right and left wrists, which occurred when he fell from a ladder. He found, and it is undisputed on appeal, that Petitioner's treating physician was Dr. Labropoulos, that he treated petitioner for over a year, during which time he performed two surgical

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administrative appeals filed prior to October 1, 2004, the effective date of the District of Columbia Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004.

procedures on Petitioner's right wrist, and oversaw the convalescence. The ALJ considered and rejected the IME physician opinions presented by Petitioner and by Respondent. In so doing, the ALJ not only properly cited the "general rule" in this jurisdiction favoring the opinions of treating or "attending" physicians in preference to IME physician opinion (*Stewart v. District of Columbia Dep't. of Employment Serv's.*, 606 A.2d 1350 (D.C. 1992)), but went even further, giving numerous reasons why the treating physician's opinion was deemed more reliable.

We detect no error in the ALJ's choosing to accept the treating physician's opinions regarding the nature and extent of Petitioner's permanent partial impairment, and we reject Petitioner's argument that such choice was in error.

The difficulty in this case, however, is that Dr. Labropoulos expressed a clear and unambiguous opinion that Petitioner had, indeed, suffered a ratable medical impairment to each arm as a result of the wrist injuries, and he gave a specific rating for each impairment: 10% to the right, and 15% to the left. Yet, the ALJ made no such award.

It is also clear from the Compensation Order that the ALJ felt constrained to limit consideration of the claim for relief to a single medical impairment rating, that he had no discretion to make an award for any disability percentage that was not identical to some medical impairment rating espoused by a physician in the record, and that he had no discretion to award anything at all in the absence of some specific percentage request which comports exactly with what he, the ALJ, found to be the true amount of permanent partial disability under the schedule. In support of these supposed constraints on his ability to make an award on this record, the ALJ cites *Deguzman v. Bell* Atlantic, Dir. Dkt. 99-73, OHA No. 99-231, OWC No. 016376 (Director's Decision May 31, 2002), *Amaya v. Frt. Myers Construction Co.*, Dir. Dkt. No. 03-15, OHA No. 01-080B, OWC No. 544746 (Director's Decision April 29, 2003), and *Transportation Leasing Co. v. District od Columbia Dep't. of Employment Serv's.*, 690 A.2d 487 (D.C. 1997). It is in this area that we detect error.

In *Deguzman*, the Director issued a decision in which the assessment by the ALJ of a disability under the Act for loss of industrial use which was greater than *medical impairment* of employer's IME physician, yet less than assessed *medical impairment* assigned by claimant's rating (but non-treating) physician amounted to an "unauthorized" "adjusting" of the "disability percentages". See, *Deguzman v. Bell Atlantic-Washington, D.C.*, Dir. Dkt. 99-73, OHA No. 99-231, OWC No 016376 (May 31, 2002), at page 3.

This constraint on what was termed "adjusting" the percentages is problematic, because the Act does not concern itself with *medical* impairment, except to the extent that it allows that the degree of such impairment, as assessed by the *AMA Guidelines to the Evaluation of Permanent* (the AMA Guides), "*may*", (but notably, not that it "must" or "shall") be considered in determining what is an appropriate award for disability to a schedule member. Further, it is well established that awards under the schedule are for presumed wage loss, not for the injury itself. *Smith, supra. Deguzman* only makes sense if the object of the inquiry was inherently medical, because "adjusting the percentages" means nothing outside the context of medical impairment ratings.

"Disability under the Act" it has been said, "is an economic, not medical, concept". A LEXIS® search of cases interpreting the Act reveals in excess of 30 instances in which either the Office of

Hearings and Adjudication (OHA), the Office of the Director (OD), or the District of Columbia Court of Appeals has used this phrase, or a variant thereof (sometimes adding "just" prior to "medical"). See, e.g., *Upchurch v. D.C. Department of Employment Services,* 783 A.2d 623 (D.C. 2001). Thus, it is apparent that this is the law.

However, on May 29, 2003, the Director the issued a "Decision of the Director" in *Amaya, supra*. In that case, the ALJ had conducted a Formal Hearing at which he heard testimony from the claimant concerning how an injury to claimant's third finger on his left hand effected the use of the finger and hand while at work and elsewhere. The ALJ also received medical reports from claimant's treating physician and an evaluating physician also employed by claimant for the purpose of obtaining medical impairment ratings for the finger. After reviewing those reports, the ALJ decided to accept the opinion of the treating physician with respect to the degree of medical impairment to the finger, which was 34%. In addition, the ALJ considered the effect of the loss of use of the finger as it related to that specific claimant, a non-English speaking construction laborer with no apparent work-related skills, beyond his ability to perform unskilled or semi-skilled manual labor. Part of that evidence was the credible and uncontradicted testimony of the claimant that due to the injury, he was rendered incapable of operating a jackhammer, an activity which prior to the injury had been a significant portion of his marketable work skill set. Lastly, claimant exhibited the injured finger to the ALJ, demonstrating the rubber-like consistency of the finger. Based upon this evidence, the ALJ awarded claimant an amount in excess of the medical impairment as found by the treating physician, in that the evidence demonstrated that the medical impairment to the finger had an impact on claimant's ability to earn wages beyond the percentage of the ratable anatomic limitation, in light of claimant's age, education, experience, and training.

Employer appealed to the Director, who reversed the ALJ, and reduced the award to the 34% medical impairment as found by the treating physician. The basis of that reversal was that Director interpreted the Act to prohibit an ALJ from awarding anything other than the medical impairment that the ALJ has found to be applicable in a given case. That is, nothing matters in a schedule award, other than the degree of medical impairment. Hence, in the case of schedule loss awards under the Act, Director carved out an exception to the "economic concept of disability", and in its' place, has substituted the application of a strict "medical impairment" standard. In the case of schedule awards, under *Amaya*, it is the medical injury, and not the economic impact of that injury, for which compensation is awarded. Further, the Director explicitly ruled for the first time that the Act does not concern itself with the "loss of industrial use" of a schedule member.

From the outset, how this decision squared with the longstanding and oft-cited case of *Smith v. District of Columbia Department of Employment Services*, 548 A.2d 95 (D.C. 1988) (awards under the Act are for disability, not the injury itself), or the language in the introductory chapter to the *AMA Guidelines to the Evaluation of Permanent* (disability is a concept separate and distinct from medical impairment: the Guides address only the latter, but not the former) was not explained, and it has not been in the interim.

Further, amendments to the Act in 1998 raise additional problems with the "pick a rating" approach to the schedule. While impairment ratings are significant, arriving at the medical impairment does not end the inquiry. Because the Act was amended in 1998 to reflect the intent of the Council of the District of Columbia with regard to assessment of permanent partial disability for *loss of industrial*

use, (note, the "loss of endurance" and "loss of function" in the amendments, discussed below) and *not* medical impairment alone, a somewhat detailed discussion is required to formulate the role of the Administrative Law Judge in this determination.

The 1998 amendments became effective as of April 16, 1999. Section 9 of the amendments amended § 32-1508 (c), adding a new paragraph (21A), which now provides that "In determining disability pursuant to [the schedule of permanent partial disabilities] the most recent edition of the [AMA Guides] may be utilized, along with the following 5 factors: (A) Pain; (B) Weakness; (C) Atrophy; (D) Loss of Endurance; and (E) Loss of function." See, "Workers' Compensation Act of 1998", Bill 12-192 (referred to hereafter as the 1998 Amendments).

Among the purposes of the 1998 Amendments are "to contain workers' compensation costs to make the District more competitive with the *surrounding jurisdictions* as a place to do business" by "aligning the compensation period for scheduled permanent partial disability injuries with *Maryland and Virginia* limits... [...]." Council of the District of Columbia Legislative Report, October 29, 1998, Bill 12-192, "Purpose and Effect", page 1 (emphasis added). Further, the Legislative Report, in its section by section analysis, states that while the original version of the 1998 Amendments would have sanctioned the application of the AMA Guides by themselves, the 1998 Amendments were changed in committee to "adopt [...] the Maryland approach to determine disability, which includes the use of multiple factors." *Id.*, page 8.

Thus, a notable feature of the 1998 Amendments is the inclusion of the factors enumerated in addition to the AMA Guides. These factors (commonly referred to as "the Maryland factors") are derived from the law and practice in place in the State of Maryland. See, Anno. Code of Maryland, Labor and Employment Article § 9-721.

While we do not purport to adopt Maryland law *per se* in connection with the assessment of permanent partial schedule disabilities, a discussion of the Maryland approach, and the discretion that it affords the fact finder in assessing the degree of *disability* in light of differing ratings by physicians of *medical impairment*, is illuminating and instructive for how our Act is to be similarly utilized.

In applying the AMA Guides and the Maryland factors, the Maryland Workers' Compensation Commission (hereinafter the W.C.C.) and the Maryland courts of general jurisdiction to which a *de novo* appeal lies from the W.C.C. (see generally, Anno. Code of Maryland, Maryland Rules of Civil Procedure 7-201, *et seq.*; Labor and Employment Article § 9-737 *supra*; *Smith v. State Roads Comm.*, 240 Md. 525, 214 A.2d 792 (1965)) have broad discretion to consider the competing opinions of physicians retained for evaluative purposes by claimants on the one hand and employers on the other. *Gly Constr. Co. v. Davis*, 60 Md. App. 602, 607, 483 A.2d 1330, 1333 (1984), *cert. denied* 302 Md. 288 (1985).

Under the approach employed in Maryland, the fact finder, whether it is the Commissioner, the Circuit Court Judge, or the Circuit Court jury, weighs the competing opinions of the evaluating physicians, or even in the absence of a competing opinion, the substance of the medical evidence, and reaches an independent judgment on the issue of scheduled losses, either accepting one or another opinion, or reaching a different conclusion altogether. *Gly Constr. Co., supra.*

Although reference to the AMA Guides is mandated by the Maryland Act and W.C.C. Regulations[2], and although the law further commands that consideration be given to the factors of pain, weakness, atrophy, loss of endurance, and loss of function, the fact finder is not bound by the opinions of the evaluating physicians:

> Although physicians' evaluations of a claimant's disability are an important factor for the Commission, or a circuit court on appeal, to consider when deciding the appropriate level of permanency benefits, the reports are not dispositive of the issue. That is because compensation benefits are payable for disability which results from an injury; they are not payment for the injury itself. The function of an evaluating physician is to provide an opinion with respect to medical or psychiatric impairment. It is for the finder of fact alone to decide the amount of compensable disability, if any, that a claimant has sustained as the result of an injury.

Maryland Workers' Compensation Handbook, 2nd Ed., 1993, Richard P. Gilbert and Robert L. Humphries, Jr., § 7.2, page 135 (citing *Gly, supra*).

This is a particularly appropriate approach where the statutory disability scheme employs by its explicit terms factors which are in large part subjective to the patient and the examiner, where the additional factors are not assigned any relative weight as compared to the objective medical rating that is presumed to result from application of the AMA Guides alone, and where the subjective factors at times duplicate themselves or the factors already included in the AMA Guides. For example, "loss of function" and "loss of endurance" can commonly overlap; "loss of function" and the loss of range of motion (an AMA Guide factor) may also duplicate each other in whole or in part; "loss of endurance" and "loss of strength" can overlap; "loss of strength" can be captured under both the Maryland factors and the AMA Guides; "pain" can be the sole cause of "loss of function", "loss of endurance", or "loss of strength" under the Maryland factors or loss of motion under the AMA Guides; "loss of strength" and "atrophy" can be two sides of the same coin.

In summary, therefore, and consistent with the expressed direct will of the Council of the District of Columbia and with the "Maryland approach" to 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-

[2] Anno. Code of Md., Labor and Employment Article, § 9-721 states that "(a) A physician shall evaluate a permanent impairment and report the evaluation to the Commission in accordance with the regulations of the Commission. (b) A medical evaluation of a permanent impairment shall include information about (1) atrophy; (2) pain; (3) weakness; and (4) loss of endurance, function, and range of motion." Code of Maryland Regulations (COMAR), Title 14, "Independent Agencies", Subtitle 09, "Workers' Compensation Commission", Chapter 04, "Guide for Evaluation of Permanent Impairment", section .02, "General Guidelines", B states that "When preparing an evaluation of permanent impairment, a physician shall (1) Generally conform the evaluation with the format set forth in §2.2 ("Reports") of the American Medical Association's "Guides to the Evaluation of Permanent Impairment". The Regulations go on to command, at .02 B(4) that the report also shall "Include information on items required by Labor and Employment Article, § 9-721, Annotated Code of Maryland, which include: (a) Loss of function, endurance, and range of motion, and (b) Pain, weakness, and atrophy." The Regulation then directs, in §.02 C that "A physician preparing an evaluation of permanent impairment may include numerical ratings not set forth in the [AMA Guides] for the items listed in §B(4) of this regulation. If the physician does so, the physician shall include in the evaluation the detailed findings that support those numerical ratings."

medical question of the 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 the degree of disability under the Act.

Such discretion is not consistent with the constraints perceived by the ALJ in this case, either in connection with arriving at a percentage figure in connection with a schedule disability, or in connection with matching that award to a specific claimed disability sought in a stated claim for relief. That is, where a claimant seeks a schedule award under the Act, and an employer is aware of and has legally sufficient notice that the claim is for such a schedule award, is able to perform such discovery in connection with that claim as is appropriate, including IMEs, and is afforded the opportunity to become acquainted (through interrogatories, depositions, or other common pretrial methods) with the various functional, occupational and medical limitations claimed to result from a particular injury, there is no due process impediment to an ALJ making an award that is different in degree than the specific figure urged by the claimant or argued by the employer. Unlike *Transportation Leasing, supra.*, allowing the ALJ to make an award higher or lower than the specific award requested does not place any due process burden upon the employer, so long as the employer was in a position to do all that it could within the bounds of the Act and the procedures promulgated to defend the claim.

Accordingly, we have determined that the matter should be reversed and remanded to the ALJ for further consideration, in light of the aforegoing principals according broad discretion to the ALJ as the fact finder, to consider the medical impairment, the Maryland Factors, and the effect of the work injury on Petitioner's industrial capacity, in arriving at a percentage of disability under the Act. In so doing, the ALJ shall identify the record evidence upon which he relied in exercising said discretion to arrive at the percentage of disability to award.

CONCLUSION

The failure of the ALJ to make a determination as to the nature and extent of schedule disability under the Act is not in accordance with the law.

ORDER

The Compensation Order of September 8, 2003 is hereby REVERSED and REMANDED with instructions that, on remand, the ALJ shall give further consideration to the claim for permanent partial disability under the schedule, consistent with the foregoing Decision and Order.

FOR THE COMPENSATION REVIEW BOARD:

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JEFFREY. P. RUSSELL
Administrative Appeals Judge

July 22, 2005
DATE