GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR

ODIE DONALD II
ACTING DIRECTOR

CRB No. 17-009

WILLIAM MOSBY,
Claimant–Respondent,

v.

DISTRICT OF COLUMBIA DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS,
Employer–Petitioner.

Appeal from a January 17, 2017 Compensation Order on Remand
by Administrative Law Judge Fred D. Carney, Jr.
AHD PBL No. 12-046A, DCP No. 30090448718-0001 & 0468-WC-09-0500537

(Decided April 11, 2017)

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

Before JEFFREY P. RUSSELL, LINDA F. JORY and HEATHER C. LESLIE, *Administrative Appeals Judges*.

JEFFREY P. RUSSELL, for the Compensation Review Board.

DECISION AND ORDER

PRELIMINARY MATTERS

MOTION TO STAY COMPENSATION ORDER ON REMAND

Accompanying the Application for Review filed in this matter by the District of Columbia Department of Consumer and Regulatory Affairs ("Employer") was a Motion to Stay Compensation Order on Remand ("Motion").

The basis of the Motion is that "Employer believes that the [Compensation Order on Remand] is not supported by substantial evidence and that the ALJ failed to comply with the September 18, 2015 Decision and Remand Order of the Board. If the lump-sum payment [to which Mr. Mosby is entitled under the Compensation Order on Remand] is made and the appeal successful, Employer does not believe it will be able to recover the money paid to Claimant, thus resulting in

significant loss to District of Columbia taxpayers. Accordingly, Employer will suffer irreparable injury if the COR is not stayed." Motion at 2.

Employer acknowledges that it has raised this same argument multiple times before, and that we have rejected it, where Employer states that it "respectfully takes exception with this Board's prior holdings concerning stays within the public sector context." Motion at 3.

Employer points to some recent instances in which a stay was granted, specifically *Harrison v. D.C. Department of Corrections*, CRB No. 16-084 (July 15, 2017) and *Green v. D.C. Department of Corrections*, CRB 16-155 (December 7, 2016). In arguing for a stay premised upon these cases, Employer quotes from *Harrison*:

> The CRB finds irreparable injury is present in this case based on the facts and issues presented by this appeal appear to be of first impression or are issues that have not previously been directly decided by the CRB, that the amount in controversy is extremely large, and because of the difficulty, if not impossibility, of recovery in the event that the award is paid and the Amended Compensation Order is overturned (emphasis added).

Motion at 3 (bold in original).

Employer's allegations and arguments in this case are no different than those of any employer in a similar position as Employer. That is, employers in all public and private sector cases are required to pay awards made in compensation orders while an appeal is pending, in the absence of a stay. Both statutory schemes, public and private, contemplate that stays would be granted in exceptional cases, not routinely. Nothing presented in this case supports a determination that this case is exceptional in any unique way beyond it being a schedule award which Employer has declined to pay. There are no unusual or novel issues presented.

Lastly, with the issuance of this decision, the motion is moot.

Accordingly, the Motion is DENIED.

FACTS OF RECORD AND PROCEDURAL HISTORY

The following background information is taken from the Decision and Remand Order issued September 18, 2015 ("DRO") by the Compensation Review Board ("CRB"), which preceded the issuance of the Compensation Order on Remand issued January 17, 2017 ("COR") by an administrative law judge ("ALJ") in the Administrative Hearings Division ("AHD") of the Office of Hearings and Adjudications in the District of Columbia Department of Employment Services ("DOES"). It is the COR which is before us on appeal.

> 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.

DRO at 1 – 2.

The CRB rejected Employer's first argument, but accepted the second, stating:

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.

DRO at 5 – 6.

The CRB remanded the matter to AHD for further consideration and issuance of a compensation order consistent with the DRO.

On January 17, 2017, the COR was issued, and the ALJ reached the same conclusion as was reached in the CO, rejecting Employer's AME physician's opinion that Claimant's complained-of upper extremity impairment was not subject to apportionment because "Dr. Johnson's opinion by his own admission was not 'within a reasonable degree of medical certainty' and appears speculative." COR at 6.

On February 7, 2017, Employer filed Petitioner's Application for Review and Memorandum of Points and Authorities in Support of Petitioner's Application for Review ("Employer's Brief") with the CRB, arguing that the COR's award was not supported by substantial evidence because Dr. Johnson's report concluded with the attestation that his opinion with respect to apportionment was reached "within a reasonable degree of medical certainty." Employer's Brief at 5 – 6.

On February 21, 2017, Claimant filed Claimant's Opposition to the Employer's Application for Review and Memorandum of Points and Authorities in Support of Claimant's Opposition to the Employer's Application for Review ("Claimant's Brief"), arguing that the ALJ's underlying basis for rejecting Dr. Johnson's opinion was that it was "speculative", a determination which Claimant asserts is supported by substantial evidence. Claimant's Brief at 4.

Because the ALJ's rejection of Dr. Johnson's opinion because it was speculative is supported by substantial evidence, we affirm the COR.

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*. 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 v. DOES,* 834 A.2d 882, 885 (D.C. 2003).

ANALYSIS

The sole argument raised in this appeal is that the ALJ erred in deeming Dr. Johnson's opinion inadequate due to a failure to state that the opinion was reached within a reasonable degree of medical certainty. Employer asserts that because the Additional Medical Evaluation ("AME")

report concludes with a statement that it was reached under such a degree of certainty, the ALJ's reasoning is flawed. Related to this Employer notes that Claimant's evaluation report from Dr. Pour is silent as to whether it was reached within a reasonable degree of medical certainty.

Claimant counters that the ALJ's characterization of the AME report as "speculative" is accurate. Claimant stresses that not only does the doctor state that he was "unable to tell within a reasonable degree of medical certainty" whether a possible, suspected partial tear in the rotator cuff "was directly related to the [work-related] injury of March 27, 2009 or was symptomatically aggravated from that injury and actually due to an earlier injury in the 1990's" (Claimant's Brief at 4, quoting from COR's quotation from Dr. Johnson's report, EE 6. *See* COR at 6), but that he states only that there "probably" was a preexisting tear. Employer also argues that the ALJ not only rejected Dr. Johnson's opinion, but that he accepted that of Dr. Pour, and gave "valid" reasons for that acceptance. Claimant's Brief at 4.

We agree with Claimant. The fact that Dr. Johnson concluded his report with an assertion that his opinions were expressed "to a reasonable degree of medical certainty" at best renders the report subject to being viewed as ambiguous. The fact that the ambiguity deals with a factor so closely related to the issue of apportionment adds to the significance of the ALJ's expressed view.

Regarding Employer's argument that Dr. Pour's report lacks any reference to its degree of "medical certainty", we point out that (1) in this administrative setting, recitation of the magic words for admissibility of expert opinion has never been required in order for an ALJ to consider medical opinion, and (2) even if the lack of that statement in Dr. Pour's report was of any legal significance, that significance extends only to (a) admissibility, which was not questioned, or (b) weight, to which determination the ALJ is entitled to great deference.

Lastly, related to this, we note that silence by the doctor as to the standard employed is not equivalent to stating that a certain degree of certainty has not been reached. To argue otherwise is unduly speculative.

CONCLUSION AND ORDER

The decision by the ALJ to reject the opinion of Dr. Johnson as being "speculative" is supported by substantial evidence and is in accordance with the law. The Compensation Order on Remand is AFFIRMED.

So ordered.