

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

**Department of Employment Services**

VINCENT C. GRAY  
MAYOR



LISA MARÍA MALLORY  
DIRECTOR

**COMPENSATION REVIEW BOARD**

**CRB No. 12-102**

**FALAH AL-ROBAIE,  
Claimant–Respondent,**

**v.**

**FT. MYER CONSTRUCTION CORP. and LIBERTY MUTUAL INSURANCE CO.,  
Employer/Carrier - Petitioner**

Appeal from a June 21, 2012 Compensation Order on Remand by  
Administrative Law Judge Heather C. Leslie  
AHD No. 09-383, OWC No. 642015

Eric M. May, Esquire, for the Claimant/Respondent  
Gerard J. Emig, Esquire, for the Employer-Carrier/Petitioner

Before: HENRY W. MCCOY, MELISSA LIN JONES, and JEFFERY P. RUSSELL, *Administrative Appeals Judges*.

HENRY W. MCCOY, for the Compensation Review Board, with JEFFREY P. RUSSELL, *concurring in part and dissenting in part*.

**DECISION AND REMAND ORDER**

**FACTS OF RECORD AND PROCEDURAL HISTORY**

Claimant worked for Employer as a helper electrician. On April 19, 2007, Claimant injured his lower back while lifting a cable wheel. Employer commenced paying Claimant temporary total disability benefits. Claimant subsequently filed a for permanent partial disability benefits which were denied following a formal hearing. The presiding administrative law judge (ALJ) determined that insofar as Claimant had not reached maximum medical improvement

(MMI), an award of permanent partial disability would be premature. Claimant timely appealed to the Compensation Review Board (CRB).

On review, the CRB determined that the ALJ had substituted her legal judgment on the issue of MMI as the medical evidence showed two doctors deemed Claimant to be at MMI and the ALJ was also found to have erred in her consideration that Claimant had not returned to any type of gainful employment. Accordingly, the matter was remanded with the following direction:

Upon remand, the ALJ is directed to reconsider the Claimant's request for permanent partial disability benefits without any consideration of wage loss except to the extent that such wage loss correlates with or is indicative of loss of wage earning capacity or economic impairment.<sup>1</sup>

On remand, the ALJ determined that after taking into consideration the CRB's instructions and the D.C. Court of Appeals (DCCA) decision in *Jones*<sup>2</sup> that Claimant was entitled to an award of permanent partial disability of 53% to the right lower extremity and 28% to the left lower extremity.<sup>3</sup> Employer timely appealed with Claimant filing in opposition.

On appeal, Employer argues that the Compensation Order on Remand (COR) is internally inconsistent because the finding of no medical impairment to the left lower extremity but an economic loss, is contrary to District law, and is not supported by substantial evidence. Claimant argues the ALJ conducted the proper analysis consistent with the prevailing case. After reviewing the record and the competing arguments, we REVERSE and REMAND.

#### STANDARD OF REVIEW

The scope of review by the CRB, 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.<sup>4</sup> *See* D.C. Workers' Compensation Act of 1979, as amended, D.C. Code. §§ 32-1501 to 32-1545 (2005), at § 32-1521.01(d)(2)(A). Consistent with this standard of review, the CRB and this Review Panel are constrained to uphold a Compensation Order (CO) 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.

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<sup>1</sup> *Al-Robaie v. Ft. Myer Construction Corp.*, CRB No. 10-014, AHD No. 09-383, OWC No. 642015 (June 6, 2012).

<sup>2</sup> *Jones v. DOES*, 41 A.3d 1219 (D.C. 2012).

<sup>3</sup> *Al-Robaie v. Ft. Myer Construction Corp.*, AHD No. 09-383, OWC No. 642015 (June 21, 2012) (COR).

<sup>4</sup> "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 International v. DOES*, 834 A.2d 882 (D.C. 2003).

In the instant appeal, Employer first takes issues with the ALJ's award of a 28% permanent partial impairment to Claimant's left lower extremity. Employer states that the ALJ specifically found there was no medical impairment to Claimant's left leg but proceeded to find an economic loss in order to award a 28% permanent partial impairment to the left lower extremity. Employer argues that there cannot be an economic loss when there is no medical impairment and this internal inconsistency requires reversal of the COR.

After reviewing the case law on the treating physician preference and the basis upon which it could be rejected, the ALJ made an initial impairment assessment of the left leg stating:

"...the Undersigned is persuaded by the medical opinion of Dr. Karim regarding the right lower extremity but not with the left lower extremity. With regard to the left leg, Dr. Karim without much thought and prior discussion of any radicular complaints or positive findings on the left side, opines that the Claimant suffers from a 30% permanent impairment to his left leg. There is no explanation as to why such a significant rating to the left lower extremity is given in light of the lack of complaints noted. Although the Undersigned acknowledges that it is possible that the Claimant, whose first language is not English, made numerous complaints of his left leg sometime during 2008, one would expect that at sometime Dr. Karim would note this in his recitation of complaints if Dr. Karim found this to be of some import. It is also questionable to the Undersigned that the rating to the left leg came after unseen correspondence from Claimant's counsel. Such sketchiness and imprecision causes the Undersign to reject Dr. Karim's medical rating of the left lower extremity and finds that the Claimant suffers from a 0% physical impairment to the left lower extremity. This is not to say the Claimant doesn't have any problems with his left lower extremity, however, the Undersigned cannot accord any weight to the opinion of Dr. Karim for the reasons outlined.<sup>5</sup>

In rejecting the treating physician's 28% impairment rating to the left lower extremity, it would appear that the ALJ found more persuasive and has adopted the 0% rating rendered by Dr. Robert Gordon, who performed an independent medical evaluation (IME) for Employer. However, the ALJ makes no such statement and unlike Dr. Gordon who states his rating is due to Claimant having "no symptoms at all in the left leg"<sup>6</sup>, the ALJ confounds her rating by acknowledging that Claimant does have problems with his left leg. This unexplained inconsistency by itself requires that this matter be remanded.

Moving on to a consideration of the right lower extremity, the ALJ found the opinion of Dr. Karim to be more persuasive and proceeded to explain why. The ALJ prefaced her analysis by acknowledging that "pursuant to *Jones, supra*, the Undersigned must come to a specific number which takes into consideration not only the medical impairments of the Claimant's lower extremities but also formulate an amount to represent the best prediction of the Claimant's

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<sup>5</sup> COR at 4.

<sup>6</sup> EE 4, p. 1.

future economic loss.”<sup>7</sup> This led the ALJ to make the following assessments and ultimate determinations:

Starting first with the medical impairment, the treating physician opines the Claimant is entitled to a 55% permanent partial disability to his right lower extremity while Dr. Gordon opines the physical impairment is only 10%. Taking into consideration the opinions of both physicians, including notably the opinion of Dr. Karim the treating physician, the Undersigned finds the Claimant entitled to a 28% medical impairment which is half of the treating physicians rating rounded up. (Footnote Omitted)

Without guidance of a vocational report outlining what sedentary jobs the Claimant could gainfully be employed in, the Undersigned will assume the restrictions the Claimant will have in the future due to the injury will result in an [sic] loss of wage earning capacity of 25%. This figure takes into consideration the physical issues the Claimant testified to with walking, standing, bending, and sitting and also that *prior* to surgery the Claimant was able to work four hours per day, albeit with pain. Thus, assuming an 8 hour day, the Claimant’s economic impairment prior to surgery was 50%. Assuming some surgical benefit and a return to work in a sedentary capacity, the Claimant’s economic loss is 25% (representing half of the wage earning capacity *prior* to surgery).

Thus, the Claimant is entitled to an award of permanent partial disability in the amount of 53% to the right lower extremity and 28% to the left lower extremity. This represents the sum of the medical impairment and economic loss.<sup>8</sup>

With regard to the left lower extremity, the majority, unlike our colleague in dissent, is unwilling to assert that the ALJ has found the Claimant has sustained a 0% permanent partial disability (ppd) to the left leg. The ALJ did make a final determination of a 28% impairment rating even though she had previously determined that Claimant had 0% physical/medical impairment. The above repeated analysis appears to assign Claimant 25% impairments to each lower extremity for economic loss. Therefore, adding the medical impairment and economic loss would make the sum 25% and not 28%. Either this is an error in addition or the ALJ has unconsciously given Claimant 3% to represent the problems she has acknowledged Claimant has with his left leg. More importantly however, it begs the question how the ALJ can determine that Claimant has an economic loss when she initially determined that he has no physical impairment. Both of these questions can be resolved on remand.

Employer also argues that the ALJ based her determination of economic loss on arbitrary assumptions. We disagree. While the ALJ did preface her discussion on this aspect of the disability rating by stating that she was making an assumption based on Claimant’s restrictions, she clearly stated the facts in the record that led to her ultimate determination. The ALJ took into consideration Claimant’s physical restrictions pre and post-surgery and the amount of time he

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<sup>7</sup> COR at 6.

<sup>8</sup> *Id.* (Emphasis in original.)

was able to work per day. The determination predicting that Claimant would suffer a future economic loss of 25% is supported by substantial evidence in the record.

#### CONCLUSION AND ORDER

The award in the Compensation Order on Remand of June 21, 2012 that Claimant is entitled to a 53% permanent partial disability to the right lower extremity is supported by substantial evidence and is in accordance with the law and is AFFIRMED. The concomitant award of 28% to the left lower extremity is not supported by substantial evidence and is not in accordance with the law and is VACATED and REMANDED for further proceedings consistent with this Decision and Remand Order.

FOR THE COMPENSATION REVIEW BOARD:

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HENRY W. MCCOY  
*Administrative Appeals Judge*

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May 20, 2013  
DATE

JEFFREY P. RUSSELL, *concurring in part and dissenting in part:*

I concur with the remand with respect to the right leg.

I dissent concerning the left leg. The ALJ has found that the Claimant has sustained a 0% permanent partial disability (ppd) to the left leg. That finding is supported by substantial evidence in the nature of Dr. Gordon's medical impairment rating, and the ALJ's rejection of the treating physician's rating is adequately explained by persuasive reasons. Thus, as a matter of law, the Claimant is entitled to no award for ppd to the left leg: while impairment and disability are not identical, impairment is a *sine qua non* for disability.

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JEFFREY P. RUSSELL  
*Administrative Appeals Judge*