

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 16-020

**ANGELA BROWN,
Claimant–Petitioner,**

v.

**WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
Self-Insured Employer–Respondent.**

Appeal from a Compensation Order on Remand issued January 29, 2016 by
Administrative Law Judge Nata K. Brown
AHD No. 14-466, OWC No. 692619

(Decided July 6, 2016)

Krista N. DeSmyter for Claimant
Sarah O. Rollman for Employer

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

HEATHER C. LESLIE for the Compensation Review Board:

DECISION AND REMAND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

The procedural history pertinent to the current appeal is described by the Compensation Review Board (CRB) in a prior Decision and Remand Order (DRO),

Angela Brown (Claimant) was employed by the Washington Metropolitan Area Transit Authority (Employer) as a bus driver.

In 2009 she injured her right knee while employed by Employer. After a period of time during which she was off work and received medical care, Claimant and Employer agreed by Stipulation that Claimant had sustained a 16% permanent partial impairment to her right leg as a result of that injury. Employer paid the amount as set forth in the Stipulation.

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On June 4, 2012, Claimant was again injured while working. The injury occurred when the bus she was operating was rear-ended by another of Employer's busses while sitting at a stop light. Claimant injured her neck, low back and right hip.

As a result of these injuries, Claimant remained off work and received temporary total disability benefits until September 2012, when she returned to a light duty position, and eventually she was able to return to full duty.

She also received medical care from Dr. Frederic Salter and Dr. Richard S. Meyer in the offices of Phillips & Green.

On April 2, 2014, Dr. Meyer authored a report, addressed to Claimant's counsel. Because the report consisted of six "answers" to questions that were not included in the report, it is difficult to completely understand. However, answer number 1 states "Chronic sprain, right hip"; number 2 states "Yes"; number 3 states "With specific reference to the Fifth Edition of the AMA Guide to the Evaluation of Permanent Impairment, the patient has a 0% permanent partial impairment as far as the tables and charts"; number 4 states "Pain, 5% lower extremity, loss of endurance 5% lower extremity"; number 5 states "10% right leg", and number 6 states "No specific restrictions have been proffered during the last visit". CE 3.

A week later, on April 9, 2014, Dr. Meyer wrote another report in which he stated that he had reevaluated Claimant. In this report, after detailing his findings on examination regarding range of motion, neurological conditions and complaints of pain, he wrote:

Based on the reevaluation of 4/9/14 with reference to the Fifth Edition of the AMA Guides to Evaluation of Permanent Impairment, Table 17-9, the patient has a total of 4% lower extremity permanent partial impairment of her right hip which equals 10% lower extremity permanent partial impairment. This should be added to the already documented permanent partial impairment resulting from weakness, pain and loss of function and endurance which was 10% lower extremity coming to a total of 20% lower extremity permanent partial impairment from the 6/4/12 injuries.

CE 2.

Then, on July 16, 2014, Dr. Meyer issued a third report, addressed to Claimant's counsel, stating in its entirety:

In response to your inquiries of July 7, 2014, as previously noted, I did issue a reevaluation report on 4-9-14 at which time I assigned the patient a 30% lower extremity permanent partial impairment which I attributed to the 6-4-12 injuries. This was specifically

related to the hip problem and not affected in any way by any preexisting orthopedic problems.

CE 1.

Prior to this third report from Dr. Meyer, Claimant had been seen by Dr. Mark Scheer at Employer's request for the purpose of an independent medical evaluation (IME). After detailing his review of the medical records, the history as related by Claimant, and the results of his physical examination, Dr. Scheer opined that, under the AMA Guide, Claimant had sustained a 0% permanent partial impairment to the right lower extremity, and further that, taking into account the "5 factors of pain, weakness, atrophy, loss of function and loss of endurance [Claimant has a] 1% lower extremity impairment rating for her subjective right hip complaint ...". EE 1.

Employer made a voluntary payment equivalent to 4% permanent partial disability to the right leg.

Claimant filed an Application for Formal Hearing in the Administrative Hearings Division (AHD) of the Department of Employment Services (DOES), contending that the payment by Employer was insufficient, and seeking an award of 20% permanent partial disability (PPD) to the right leg under the schedule. Claimant argued that Dr. Meyer's opinion should be read as clearly stating that regardless of any preexisting problems Claimant had, the instant injury to the hip caused a 20% PPD to the right leg.

Employer opposed the award of any additional PPD, arguing that the 20% PPD that Claimant was claiming had been fully paid, considering that she had already been compensated 16% per the prior stipulation. Employer also argued that any PPD Claimant currently experiences is unrelated to the work injury, and is the result of an intervening non-work related automobile accident.

A formal hearing was conducted on November 20, 2014 before an Administrative Law Judge (ALJ) in AHD, following which the ALJ issued a Compensation Order on June 19, 2015 (the CO).

In the CO, the ALJ reached the following Conclusion and made the following Order:

CONCLUSION OF LAW

I hereby find and conclude, based upon a review of the record evidence as a whole, that Claimant's current condition is medically causally related to her June 4, 2012 work related injury. Claimant is entitled to a 4% permanent partial disability award to her right lower extremity.

ORDER

It is **ORDERED** that Claimant's claim for a 20% permanent partial disability award to the right lower extremity is hereby **DENIED**. Claimant is **GRANTED** a 4% permanent partial disability award to the right lower extremity.

CO, p. 7.

Claimant filed an Application for Review of the CO and a memorandum of points and authorities in support thereof (Claimant's Brief) with the CRB, seeking reversal of the CO and asking that it be remanded to AHD.

Employer filed an Opposition to Claimant's Application for Review and a memorandum of points and authorities in support thereof (Employer's Brief) seeking affirmance of the CO. Employer did not file a cross-appeal challenging the finding of a causal relationship between Claimant's condition and the instant work related injury.

Brown v. WMATA, CRB No. 15-115 (December 21, 2015).

After addressing the arguments presented by the parties, the CRB determined:

CO contains no analysis that permits us to discern where the 4% came from. The ALJ does not state whether she accepts any part of Dr. Meyer's opinions, nor does she state how any the medical impairment correlates to the PPD award.

DRO at 6.

The CRB determined that the CO was contrary to the District of Columbia Court of Appeals (DCCA) decision in *Jones v. DOES*, 41 A.3d 1219 (D.C. 2015). The CRB vacated the award and remanded the case for further analysis.

A Compensation Order on Remand (COR) issued on January 27, 2016. In that COR, the ALJ found Dr. Meyer's opinion that Claimant suffers from a 20% permanent partial impairment to her right lower extremity more persuasive and awarded Claimant 20% permanent partial disability to her right lower extremity. As Employer had already paid 20% permanent partial disability, the ALJ noted "no further payment is due."

Claimant timely appealed. Claimant argues that as the parties already stipulated to a 16% permanent partial disability to the prior injury, and as the ALJ found Dr. Meyer's opinion that Claimant suffered from an additional 10% permanent partial impairment for the June 4, 2012 injury, the COR "must be reversed, with Orders to enter a finding that Ms. Brown suffered a 26% permanent partial disability to the right lower extremity." Claimant's argument at 5.

Employer opposes the appeal, arguing the COR is supported by the substantial evidence in the record and in accordance with the law.

ANALYSIS¹

Claimant argues:

While Dr. Meyer only found 10% permanent partial disability to the right lower extremity as a result of the 2009 accident, this Agency has established, through stipulation, that the right lower extremity had a pre-existing 16% disability. Thus, if the Compensation Order on Remand properly considered Dr. Meyer's medical opinions, it should have found that Ms. Brown suffered from a 26% permanent partial disability to the right lower extremity: 10% as a result of the accidental injury in 2012, 16% due to the accidental injury in 2009. By only finding a total of 20% to the right lower extremity, the Compensation Order on Remand did not properly consider the prior disability.

Claimant's argument at 5.

Claimant relies upon the DCCA decision in *Daniel v. DOES*, 673 A.2d 205 (1996)(*Daniel*) in support of the above quoted argument.

Employer argues the COR is correct in stating no further benefits are due, as Claimant was already compensated for 16% of that 20% permanent partial disability in the prior stipulation, and the additional 4% for the 2012 injury.

In reviewing the COR, the ALJ stated:

In evaluating Claimant's current disability in right lower extremity in regard to her hip injury, Dr. Sheer and Dr. Meyer provided their opinions for Claimant's disability rating and attributed a percentage specifically for Claimant's hip injury. Dr. Sheer opines that Claimant has 1% right lower extremity impairment rating for her right hip injury. On April 9, 2014, Dr. Meyer originally opined that Claimant had a 4% lower extremity permanent partial impairment to her hip which, equated to a 10% permanent partial impairment to the right lower extremity, and that this should be added to the 2009 impairment for a total of 20% permanent partial impairment to the right lower extremity. Dr. Meyer issued a reevaluation on July 16, 2014, opining that Claimant has a 30% lower extremity permanent partial impairment due to the June 4, 2012 work related injury.

¹The scope of review by the CRB is generally 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 § 32-1501, *et seq.*, (the Act) at § 32-1521.01 (d)(2)(A), and *Marriott International v. DOES*, 834 A.2d 882 (D.C. 2003). Consistent with this standard of review, the CRB and this review panel must affirm 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 this panel might have reached a contrary conclusion. *Id.* at 885.

In the latest report on July 16, 2014, Dr. Meyer does not use the AMA guides to explain how he determines an increase in the impairment rating of Claimant's disability to 30%. For this reason, the July 16, 2014 report from Dr. Meyer is not credited.

The record, including the credible testimony of Claimant and medical notes and reports from her treating medical providers, describes symptoms which affect her ability to use her hip and right lower extremity. Claimant testified that she has difficulty walking for long periods of time. (HT 18) While shopping, running errands, or doing household chores, she has to periodically stop and sit due to pain on her right side, lower back, and hip. (HT 18) Claimant also has difficulty climbing stairs or wearing heeled shoes. (HT 20) With a knee injury compounded on a hip injury, it is reasonable to assess that there is an increase in Claimant's disability. Dr. Sheer does not detail how the 1% may affect Claimant's total disability rating for her right lower extremity. For these reasons, Dr. Sheer's opinion that Claimant has a 1 % right lower extremity impairment rating for her right hip injury is too low. (EE 1) Dr. Sheer's opinion is also not credited.

Dr. Meyer's original opinion that Claimant has a total 20% permanent partial disability encompassed more detail than Dr. Sheer's opinion.

The preponderance of evidence establishes that Claimant has a 20% permanent partial disability to her right lower extremity.

COR at 5.

We agree with Claimant, but on different grounds. As the Court in *Daniel* noted D.C. Code § 32-308(6)(a) (now D.C. Code 32-1508(6)(a)) states:

If an employee receives an injury, which combined with a previous occupational or nonoccupational disability or physical impairment causes substantially greater disability or death, the liability of the employer shall be as if the subsequent injury alone caused the subsequent amount of disability . . .

Claimant and Employer stipulated that Claimant suffered from a 16% permanent partial disability from the 2009 injury. Claimant sought 20% permanent partial disability for the 2012 injury, a 4% increase from the 2009 injury.

With the above numbers in mind, it was in error for the ALJ to state in the COR:

As Employer has already paid Claimant a total of 20% permanent partial disability award to the right lower extremity, no further payment is due.

COR at 6.

As the statute states above, the liability of Employer to pay 20% permanent partial disability is based upon the 2012 injury. Per the statute, Employer is not entitled to a credit for a payment made for the 2009 injury, as the 2012 injury has caused a substantially greater disability: an increase of 4% overall is a 25% increase in the amount of the disability, and that is not insubstantial.

We are forced to remand the case with instructions to the ALJ to strike that portion of the award which states no payment is due as this is not supported by the substantial evidence in the record or in accordance with the law. The record shows Employer only paid 4% as it relates to the 2012 injury, thus Claimant is owed the balance of the 20% award.

Regarding Claimant's argument that the ALJ should have awarded 26% permanent partial disability, we only will state Claimant sought an award of 20% permanent partial disability for the 2012 injury, not 26%. The Claimant cannot on appeal seek a greater amount of disability benefits than what was sought at the Formal Hearing.

CONCLUSION AND ORDER

The COR is REVERSED and REMANDED. The ALJ is ordered to ALJ to strike that portion of the award which states no payment is due as this is not supported by the substantial evidence in the record or in accordance with the law.

So ordered.