GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR

F. THOMAS LUPARELLO
ACTING DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 14-056

ANTHONY LAWSON,
Claimant–Respondent,

v.

M.C. DEAN and
ZURICH AMERICAN INSURANCE CO.,
Employer/Insurer-Petitioner.

DEPT. OF EMPLOYMENT SERVICES
COMPENSATION REVIEW BOARD
2014 SEP 17 AM 10 52

Appeal from an April 14, 2014 Compensation Order by
Administrative Law Judge David L. Boddie
AHD No. 06-431E, OWC No. 627344

D. Stephenson Schwinn for the Petitioner
Eric M. May for the Respondent

Before MELISSA LIN JONES, HEATHER C. LESLIE, and JEFFREY P. RUSSELL, *Administrative Appeals Judges.*

MELISSA LIN JONES for the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

On April 1, 2006, Mr. Anthony Lawson injured his neck and shoulders while working for M.C. Dean. As a result of his injuries, Mr. Lawson experienced pain radiating into his arms.

Eventually, Mr. Lawson was diagnosed with a torn left rotator cuff. He underwent surgical repair and received physical therapy but experienced little improvement in his neck and shoulder pain radiating into his arms.

Mr. Lawson also was diagnosed with a torn right rotator cuff, and following multiple MRI's, Mr. Lawson was diagnosed with herniated disc at C5-C6 and bilateral carpal tunnel syndrome. In October 2009, he underwent an anterior discectomy and fusion of his cervical spine but

continued to experience pain radiating into his arms. In December 2012, his right-sided carpal tunnel syndrome was surgically repaired.

Although Mr. Lawson has reached maximum medical improvement, he continues to experience pain radiating into his arms. This pain affects his ability to function and decreases the strength in his right arm.

As a result of his ongoing disability, Mr. Lawson asserted entitlement to an award for 50% permanent partial disability to his right arm and 30% permanent partial disability to his left arm. The parties proceeded to a formal hearing, and in a Compensation Order dated April 14, 2014, an administrative law judge ("ALJ") awarded Mr. Lawson 45% permanent partial disability for the right arm and 30% permanent partial disability for the left arm.[1]

On appeal, M.C. Dean takes exception to the fact that Mr. Lawson was awarded schedule member permanent partial disability benefits even though

> Claimant sustained neck and shoulder injuries while lifting at work on April 1, 2006. Although he continues to work regular duty in his usual occupation, and has never experienced any permanent wage loss, the Claimant has been awarded more than $130,000 in benefits for a combined 75% permanent partial disability of his arms.[2]

M.C. Dean argues Mr. Lawson's neck and shoulder injuries cannot support a permanent partial disability award because Mr. Lawson has not lost any wages and has not demonstrated a separate disability in his arms distinct from the disability in his neck and shoulders. Furthermore, even if there is a separate and distinct disability in Mr. Lawson's arms, M.C. Dean argues "there is no factual basis for Judge Boddie's decision to allocate Claimant's entire disability to his arms [as opposed to his arms, neck, back, and shoulders]."[3]

In addition, M.C. Dean asserts the ALJ erred by supplementing Mr. Lawson's medical impairment ratings with consideration of personal, social, and occupational impacts of the disability. Next, M.C. Dean argues that when determining the extent of Mr. Lawson's disability, the ALJ erred by considering the impact of Mr. Lawson's disability on his occupational capacity. Finally, M.C. Dean asserts it is entitled to a credit for temporary total disability benefits paid from December 7, 2012 until March 14, 2013 and should not have to pay "retroactive permanent benefits for the same time period in which temporary benefits have already been paid."[4]

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[1] *Lawson v. M.C. Dean*, AHD No. 06-431E, OWC No. 627344 (April 14, 2014).

[2] Employer and Carrier's Memorandum of Points and Authorities in Support of Application for Review, p. 1.

[3] *Id.* at p. 9.

[4] *Id.* at p. 18.

For these reasons, M.C. Dean urges the Compensation Review Board ("CRB") to reverse the April 14, 2014 Compensation Order and to

> take this opportunity to restore the original intent of the District of Columbia Council to limit awards for non-scheduled disabilities to cases where the claimant can demonstrate actual wage loss. At a minimum, the Board must use this case as a vehicle to inform ALJs of the limits of their discretion and the statutory elements to be considered when awarding benefits.[5]

In opposition, Mr. Lawson

> argues that the ALJ correctly interpreted the law; did not err in granting a schedule award to the upper extremities; that the ALJ's conclusions were based on substantial evidence; that he acted within his permissible discretion in awarding additional benefits for the personal, social, and occupational impacts of the injury; and that the Act permits concurrent awards for the same injury.[6]

Mr. Lawson asserts his lack of actual wage loss is irrelevant because his neck and shoulder injuries distinctly affect his arms, the situs of his disability. Mr. Lawson also asserts that the ALJ did not err in relying on (1.) Dr. Peter Moskovitz's impairment rating because Dr. Moskovitz appropriately assessed Mr. Lawson's arm disability in a way that conforms to statutory requirements in the District of Columbia or (2.) the effect of Mr. Lawson's disability on his personal, social, and occupational capacities. Finally, Mr. Lawson advocates the CRB not to exceed its authority when applying existing law and to affirm the Compensation Order.

M.C. Dean filed a reply to Mr. Lawson's opposition. M.C. Dean emphasizes that in order to recover a schedule member award, Mr. Lawson must experience symptoms in and impairment to his arms, and "[t]here is no question that the focus of Claimant's treatment has been almost exclusively on the neck and shoulders."[7] M.C. Dean, again, objects to Dr. Moskovitz's conversion of his whole body rating to an arm rating.

ISSUES ON APPEAL

1. Is it the situs of the injury or the situs of the disability that determines whether a schedule member permanent partial disability award is appropriate?

2. Has Mr. Lawson proven disability in his arms which forms the foundation for his schedule permanent partial disability claims?

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[5] Employer and Carrier's Memorandum of Points and Authorities in Support of Application for Review, p. 4.

[6] Claimant's Memorandum of Points and Authorities in Opposition to Employer/Carrier's Application for Review, p. 5.

[7] Employer and Carrier's Reply in Support of Application for Review, p. 1.

3. Is the April 14, 2014 Compensation Order supported by substantial evidence and in accordance with the law?

ANALYSIS[8]

M.C. Dean argues that in order to justify a schedule award when an injury to a non-scheduled part of the body affects a scheduled body part, the claimant must demonstrate that the injury has caused a separate and distinct disability to a scheduled member.

It is axiomatic that disability experienced in a schedule member may be compensable even if the anatomical situs of the injury is a non-schedule body part.[9] Upon this foundation, M.C. Dean is correct in asserting that in order to be entitled to schedule member permanent partial disability benefits, the claimant must experience a disability in the schedule member, and in this case, the ALJ, in a lengthy discussion, noted the following disabilities in Mr. Lawson's arms:

- "[R]ight arm [h]as weakness, swelling, loss of strength he estimated to be 60 to 70 per cent less than what he previously had, decreased endurance, limited range of motion, pain and numbness, sensitivity to cold;"[10]

- "[T]he current condition of his left arm [is] that he has [] at least a 50 to 60 per cent loss of strength, has pain most of the time in his left arm daily and numbness, loss of endurance, trouble lifting things, and limitations in range of motion."[11]

- "The Claimant testified that his work injury has also affected his work duties and how he is able to perform them, and that he is unable to work as efficiently as before he was injured, and that his arms and hands go numb and get colder faster than before, at which point he has to stop and sit in the truck to warm them up over the heater and then go back to work. He further stated that he felt pressure on the job to perform well and that because of his limitations he has had work taken away from him and reassigned to someone else because he can't perform particular types of work or duties. HT pp. 48-50."[12]

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[8] The scope of review by the CRB is limited to making a determination as to whether the factual findings of the appealed 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. Section 32-1521.01(d)(2)(A) of the District of Columbia Workers' Compensation Act, as amended, D.C. Code §32-1501 to 32-1545. Consistent with this standard of review, the CRB is constrained to uphold a Compensation Order that is supported by substantial evidence, even if there also is contained within the record under review substantial evidence to support a contrary conclusion and even if the CRB might have reached a contrary conclusion. *Marriott International v. DOES*, 834 A.2d 882, 885 (D.C. 2003).

[9] *Washington Metropolitan Area Transit Authority v. DOES*, 683 A.2d 470 (D.C. 1996).

[10] *Lawson*, *supra*, at p. 6.

[11] *Id.*

[12] *Id.*

- "He further testified that while he has changed jobs seeking less physically demanding employment, he still continues to work as an electrical engineer, but is unable to perform some tasks due to a loss of strength in his upper extremities, and physical limitations regarding overhead work. As a result some work assignments he was previously able to perform prior to his April 1, 2006 work injury, are not given to him."[13]

- "Regarding consideration to whether work injury to the left upper extremity has altered the Claimant's capacity to meet personal, social, or occupational needs, or statutory or regulatory requirements, the evidence in the record reflects that the Claimant's personal and social activities have been altered or impacted by the work injury."[14]

All of these facts led the ALJ to conclude Mr. Lawson is entitled to permanent partial disability awards to his arms. There is no reason to disturb this conclusion.

These findings of fact and conclusions of law naturally lead to M.C. Dean's next argument that there is no factual basis for the ALJ's allocation of Mr. Lawson's disability to his arms because "Dr. Moskovitz's impairment rating was based on conditions and symptoms of the neck, back, and shoulders which had nothing to do with claimant's arms. Notwithstanding this, Dr. Moskovitz allocated the entirety of Claimant's disability to Claimant's upper extremities. This was improper as a matter of law."[15]

M.C. Dean is correct that Dr. Moskovitz did not assign any impairment rating to Mr. Lawson's arms until "prompted to do so by Claimant's counsel;"[16] However, we find nothing inappropriate in either Mr. Lawson's attorney's obtaining the appropriate evidence to prove Mr. Lawson's claim for relief or in Dr. Moskovitz's asserting his medical opinion that a 27% impairment rating to the body as a whole equates to a 31% permanent partial impairment of the right arm and a 16% impairment of the left arm. Cross-examination or additional medical evidence may have provided the ALJ with a basis to reject this conversion (or even Dr. Moskovitz's opinions altogether), but based upon the current state of the medical evidence, the ALJ's reliance upon Dr. Moskovitz's arm ratings is supported by substantial evidence in the record. The ALJ was under no obligation to "determine what portion of the impairment rating is attributable to the neck and shoulders, and what portion is attributable to the arms."[17] In fact, for the ALJ do have done so would have been an inappropriate declaration of a medical opinion.

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[13] *Id.* at p. 10.

[14] *Id.* at pp. 10-11.

[15] Employer and Carrier's Memorandum of Points and Authorities in Support of Application for Review, p. 9. M.C. Dean rules upon *Cather v. US Elevator*, AHD No. 96-395C (November 21, 2005) for support of its proposition; however, Compensation Orders do not have authority as precedent.

[16] Employer and Carrier's Memorandum of Points and Authorities in Support of Application for Review, p. 9.

[17] Employer and Carrier's Reply in Support of Application for Review, p. 4.

M.C. Dean next argues that "[n]o additional benefits are available for Claimant's lost capacity to engage in personal or social activities, because this is not an economic impairment and has nothing to do with wage loss."[18] At first blush, it may appear that considering a disability's impact on personal or social activities should be beyond the scope of compensation offered for work-related injuries, but such a position is shortsighted. A claimant's inability to perform personal or social activities can demonstrate an effect on the ability to perform job duties. In this case, Mr. Lawson worked as a street light technician moving 600 pound poles, obtaining replacement equipment including transformer bases weighing 200 pounds, and removing bolts with wrenches and ratchets; his inability to physically carry shopping bags and groceries and to play ball both demonstrate an inability to perform arm functions similar to those required by his job.

As for M.C. Dean's objection to the consideration of the disabilities' effect on Mr. Lawson's occupational capacity, consideration of a disability's effect on occupational capacity is precisely what an ALJ is tasked to do when assessing schedule member permanent partial disability. Such is the foundation for the axiom that disability is an economic concept, not a medical condition. Additionally, as set forth in *Smith*, there is a conclusive presumption that "actual wage loss would sooner or later result;"[19] therefore, "schedule benefits for permanent partial disability are payable regardless of actual wage loss."[20] Thus, M.C. Dean's argument that

> even if the injury's effect on earning capacity could be considered in determining the extent of Claimant's disability, the undisputed evidence shows that Claimant has been able to continue to perform full time, regular duty work in his usual occupation for the D.C. government. Indeed, the quality of his work was recognized in 2011, when he was selected as District Department of Transportation Employee of the year. A66. Therefore, any effect on his occupational ability is *de minimis*, and consideration of this factor should have reduced his disability rating.[21]

is without merit.

Finally, after a thorough review of the Joint-Prehearing Statement, Employer's Exhibits, and the hearing transcript (wherein at the formal hearing M.C. Dean waived the opportunity to give an opening statement), there is no indication that M.C. Dean's alleged entitlement to a credit was raised as an issue before the ALJ. Consequently, the CRB declines to address that issue for the first time on appeal.[22]

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[18] Employer and Carrier's Memorandum of Points and Authorities in Support of Application for Review, p. 14.

[19] *Smith v. DOES*, 548 A.2d 95, 101 (D.C. 1988).

[20] *Id.*

[21] Employer and Carrier's Memorandum of Points and Authorities in Support of Application for Review, p. 17.

[22] See *Transportation Leasing v. DOES*, 690 A.2d 487 (D.C. 1997).

CONCLUSION AND ORDER

The situs of a disability determines whether a schedule member permanent partial disability award is appropriate, and Mr. Lawson proved to the ALJ's satisfaction that the situs of his disability is his arms. The April 14, 2014 Compensation Order is supported by substantial evidence, is in accordance with the law, and is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

/s/ Melissa Lin Jones

MELISSA LIN JONES
Administrative Appeals Judge

September 17, 2014
DATE