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. 03-124

LISA CENTORCELLI,

Claimant–Petitioner,

v.

AMERICAN RED CROSS AND NATIONAL UNION FIRE INSURANCE COMPANY,

Employer/Carrier–Respondent.

Appeal from a Compensation Order of
Administrative Law Judge Reva M. Brown
OHA/AHD No. 99-127B, OWC No. 284070

Stephen D. Karr, Esquire, for the Petitioner

Robert C. Baker, Esquire, for the Respondent

Before JEFFREY P. RUSSELL, LINDA F. JORY and FLOYD LEWIS, *Administrative Appeals Judges*.

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 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.

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 15, 2003, the Administrative Law Judge (ALJ) granted Petitioner's claim for permanent partial disability to her right leg; however, the ALJ awarded a 7% permanent partial disability to the leg, rather than the 40% permanent partial leg disability sought by Petitioner. Further, the ALJ denied Petitioner's request for authorization for additional physical therapy

As grounds for this appeal, Petitioner alleges as error that, in choosing the lower of two competing ratings rendered by Petitioner's treating physician, the ALJ based the permanency award upon factors that were legally irrelevant, by improperly and impermissibly considering factors relating to Petitioner's earning and vocational capacity. Petitioner also asserts that the rating selected by the ALJ was legally deficient because in arriving at the rating, the physician made no specific reference to the "Maryland Factors", and based the rating upon an edition of the *American Medical Association Guidelines to the Evaluation of Permanent Impairment* (the *A.M.A. Guides*) which was not "the most recent edition" thereof, contrary to the Act.

Respondent argues that the decision of the ALJ is supported by substantial evidence and is in accordance with the law.

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.

Turning to the case under review herein, Petitioner asserts that the ALJ's decision to accept the 7% medical impairment rating to the right leg made by one of Petitioner's treating physicians, Dr. Cherrick, was legally deficient because in arriving at the rating, the physician made no specific reference to the "Maryland Factors", and based the rating upon an edition of the *A.M.A. Guides* which was not "the most recent edition" thereof, asserting that such a decision is contrary to the Act. However, the Act makes use of the *AMA Guides* and the "Maryland Factors" permissive, not mandatory, by using the word "may" as opposed to "shall". See, D.C. Code § 32-1508 (3) (U-i). While the failure to utilize the *AMA Guides*, or the most recent edition thereof, or to consider

specifically the "Maryland Factors", are certainly legitimate reasons to discount a permanency evaluation opinion, such failures go to the weight of the evidence, and not to its admissibility, and to the extent that such evidence is admissible (as it is in this instance) it is not error for the ALJ to have relied upon it in reaching her conclusion.

Petitioner also asserts that there are other compelling reasons why the ALJ should have elected to accept a higher rating from the same treating physician, in the amount of 40% rather than 7% to the right leg, including the reasons that the higher rating was more recently rendered, and was arrived at by reference to the 5th Edition, rather than the 4th Edition, of the *AMA Guides*. As before, however, these complaints are merely arguments as to why the ALJ might have reached a contrary conclusion, not whether such a contrary conclusion was compelled as a matter of law.

However, we do detect an error that compels a remand. In discussing the evaluation of the evidence and her options with respect to making an award for permanent partial disability under the Act, the ALJ wrote:

> Given the Director's ruling [in *Deguzman v. Bell Atlantic-Washington*, Dir. Dkt. 99-73, OHA No. 99-231, OWC No. 016376 (May 31, 2002)] that a medical determination, without a vocational assessment of claimant's capacity, is all that is required, the undersigned is constrained to choose one of the ratings issued by the parties' competing physicians herein.

Compensation Order, page 10. From this and other language in the Compensation Order, it is evident that the ALJ felt that she had no choice but to select one or another of the medical impairment evaluations as the number to be assigned for the permanent partial disability award. However, as we recently have noted, in connection with a Compensation Order issued approximately one week before the instant Compensation Order, such perceived constraints on the ALJ's discretion are not consistent with the Act. In that case, *Wormack v. Fischback & Moore Elect., Inc.*, CRB (Dir. Dkt.) No. 03-159, OHA/AHD No. 03-151, OWC No. 564 (July 21, 2005), we wrote:

> 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.

…

From the outset, how this … [constraint] 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.

…

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-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.

Wormack, supra, pages 3 – 7 (footnotes omitted). Thus, in this case, it appears that the ALJ's decision was the result of constraints upon her discretion to make a permanent partial disability award that was something other than either the 0% as opined by Respondent's independent medical evaluator (IME), the 7% opinion rendered by the treating physician initially, or the 40% opinion rendered by that same physician later. Accordingly, and particularly in light of the fact that we discern that the ALJ would have preferred to award a greater amount than the 7% to which she felt she was limited, we remand the matter for further evaluation and consideration, consistent with the aforegoing discussion and giving the ALJ the discretion to make an award based upon the factors including the degree of medical impairment and considering the effect of said impairment upon Petitioner's industrial disability.

Regarding the denial of authorization for further medical treatment, the ALJ indicated that the request for further physical therapy was denied because "at various times … claimant has shown that she is a reluctant participant [in physical therapy]. There is one occasion … when she shed tears at … [the] mere suggestion of a strengthening program; … [a] visit with the same doctor in which claimant exerted submaximal effort in strengthening her right knee; and claimant's testimony in which she admitted that physical therapy is not a priority for her. … Hence, it appears claimant would not gain the intended amount of benefits from a course of physical therapy". The ALJ also noted that one of her treating physicians, Dr. Cherrick, stated that Petitioner "had obtained no significant benefit from physical therapy". Because of this, the ALJ determined that the requested physical therapy was "neither reasonable, nor necessary". Compensation Order, page 12.

Given that it is a claimant's burden to establish by a preponderance of the substantial evidence entitlement to the requested benefits, under *Dunston v. D.C. Dept. Of Employment Services,* 509 A.2d 109 (1986), the ALJ's determination in this regard is within her discretion and is supported by substantial evidence and for the reasons cited in the Compensation Order.

CONCLUSION

The Compensation Order of September 15, 2003 is, in part, supported by substantial evidence in the record and is in accordance with the law, in that the determination that the requested medical care, in the nature of physical therapy, is not reasonable or necessary, is supported by substantial evidence and is in accordance with the law; and is not, in part, in accordance with the law, to the extent that the ALJ erroneously constrained herself to selecting one or the other medical impairment ratings when assessing permanent partial disability under the schedule.

ORDER

The Compensation Order is hereby AFFIRMED IN PART regarding the denial of the claim for additional physical therapy treatments, and REVERSED AND REMANDED for reconsideration regarding the nature and extent of permanent partial disability to the right leg.

FOR THE COMPENSATION REVIEW BOARD:

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JEFFREY P. RUSSELL
Administrative Appeals Judge

November 3, 2005
DATE