GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR

LISA M. MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 12-156

MILTON GREEN,

Claimant–Respondent,

v.

DISTRICT OF COLUMBIA DEPARTMENT OF PUBLIC WORKS,

Employer – Petitioner.

Appeal from a Compensation Order by
The Honorable Fred D. Carney, Jr.
AHD No. PBL 03-005B, DCP No. 761010000120010000

Justin Zimmerman, Esquire for the Petitioner
Kirk D. Williams, Esquire for the Respondent

Before HEATHER C. LESLIE,[1] JEFFREY P. RUSSELL,[2] and HENRY W. MCCOY *Administrative Appeals Judges*.

HEATHER C. LESLIE, *Administrative Appeals Judge*, for the Compensation Review Board.

DECISION AND ORDER

OVERVIEW

This case is before the Compensation Review Board (CRB) on the request for review filed by the Employer - Petitioner (Employer) of the August 29, 2012, Compensation Order (CO) issued by an Administrative Law Judge (ALJ) in the Office of Hearings and Adjudication of the District of Columbia Department of Employment Services (DOES). In that CO, the ALJ granted in part the Claimant's request for permanent partial disability benefits to the right lower extremity. We AFFIRM.

[1]Judge Heather C. Leslie is appointed by the Director of DOES as an interim Board Member pursuant to DOES Administrative Policy Issuance No. 12-02 (June 20, 2012).

[2]Judge Russell is appointed by the Director of the DOES as an interim CRB Member pursuant to DOES Administrative Policy Issuance No. 12-01 (June 20, 2012).

FACTS OF RECORD AND PROCEDURAL HISTORY

The Claimant worked for the Employer as a sanitation technician. On January 18, 2001, the Claimant sustained injuries to various parts of his body, including his right knee. The Claimant sought medical treatment, eventually coming under the care and treatment of the physicians at the Washington Orthopedic Center. The Claimant was diagnosed with a torn medical meniscus and underwent surgery in August 2001. The Claimant continued to seek treatment for his right knee. On November 6, 2007, the Claimant underwent a right total knee replacement. On June 20, 2008, the Claimant's treating physicians indicated the Claimant was at maximum medical improvement and the right lower extremity was permanently impaired on June 20, 2008 and again on October 13, 2011 in the amount of 37%.[3] The Claimant did not return to work.

The Employer sent the Claimant for several independent medical evaluations with Drs. Steven Hughes, Robert Collins, Robert Gordon, Robert Smith and David Johnson. Pertinent to the appeal at hand, the doctors rendered the following permanent impairment opinions of the right lower extremity:

- Dr. Robert Smith opined the Claimant suffered from a 2% permanent partial impairment to the right lower extremity on November 20, 2003.
- Dr. Robert Collins opined the Claimant suffered from a 10% permanent partial impairment to the right lower extremity on December 22, 2003.
- Dr. Robert Smith opined the Claimant suffered from a 10% permanent partial impairment to the right lower extremity on December 15, 2006. Dr. Smith opined that 2% was related to the work injury and 8% was related to preexisting arthritis.
- Dr. David Johnson opined the Claimant suffered from a 37% permanent partial impairment to the right lower extremity on September 22, 2008 and a subsequent addendum affirming this rating on October 4, 2008. Dr. Johnson opined 10% of this rating was related to the work injury and 27% to preexisting causes.

A Formal Hearing was held on November 21, 2011. At the Formal Hearing the Claimant requested an award of permanent partial disability in the amount of 75% to the right lower extremity. The sole issue raised by the Employer was the nature and extent of the Claimant's disability. A CO was issued on August 29, 2012 awarding the Claimant's claim for relief in part. The ALJ awarded the Claimant 45% in permanent partial disability benefits to the right lower extremity.

The Employer timely appealed on September 26, 2012. On appeal, the Employer argues first, that the ALJ erred in not apportioning the Claimant's disability between his work related injury and his unrelated conditions. Second, the Employer argues that the ALJ erred not providing an

[3] We do note that Claimant's counsel at the Formal Hearing indicated that June 20, 2008 permanency rating was 57%. Hearing Transcript at 108. This panel has reviewed that report which is difficult to read. It is questionable whether the rating presented in the report is 57% or 37%. However as the next report, dated October 13, 2011, states the right knee "remains at 37%," we will treat the rating of June 20, 2008 as reading 37%.

explanation for how he arrived at percentages for pain, loss of endurance and loss of use. The Employer also filed a Motion to Stay the Compensation Order on October 26, 2012.

THE 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.[4] 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*. ("Act"). 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*, 834 A.2d at 885.

DISCUSSION AND ANALYSIS

The Employer first argues that the ALJ erred in failing to apportion the Claimant's disability between his work related injury and his unrelated conditions, relying upon D.C. Code § 1-623.07(d).

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.

While the Employer is correct that the D.C. Code § 1-623.07(d) currently allows for apportionment, this provision was added by the city council in 2010. Prior to 2010, section d was not a part of the statute. Moreover, on this subject, the District of Columbia Court of Appeals has held that "As a general rule, statutes operate prospectively, while judicial decisions are applied retroactively"; *Washington v. Guest Services*, 718 A.2d 1071 (D.C. 1998), at 1074, and citing *U.S. v. Security Indus. Bank*, 459 U.S. 70, 103 S. Ct. 407 (1982), which includes within it the quote "the first rule of [statutory] construction is that legislation must be considered as addressed to the future, not to the past", itself citing and quoting from and *Union Pacific R. Co. v. Laramie Stock Yards Co.*, 231 U.S. 190, 199 (1913). *See, Rice v. District of Columbia Department of Motor Vehicles*, CRB No. 08-027, AHD PBL 06-104 (December 20, 2007).[5]

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[4] "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).

[5] *Rice v. DC Dept. of Motor Vehicles*, CRB No. 08-027, AHD No. PBL 06-104 (December 20, 2007), wherein we stated,

> We are not unaware of the concept that in certain circumstances, statutory amendments may be given retroactive application. See, for example, 73 AM. JUR. 2d *Statutes* § 354 (1974) ("statutes relating to remedies or modes of procedure which do not create new or take away vested rights,

As the permanency rating rendered by the physicians in the case at bar predates the amendments and there is evidence that the Claimant began to seek from the Employer a determination regarding permanency in 2008, we will apply the statute as it stood when the Claimant was rated by his physician. The CRB rejected this argument in prior decisions (before the 2010 amendments), relying on D.C. Code § 1-623.08.[6]

As the ALJ correctly noted,

> The Compensation Review Board (CRB) held in *Barron v. District of Columbia CRB* No. 06-054**,** AHD No. PBL 05-010**,** Nos. MDMPED-0004151 (September 6, 2006) that it was error for the ALJ to reduce an award that an injured worker would receive merely because a portion of the total amount of the medical impairment is due to a preexisting condition or disability in that scheduled member, unless such preexisting condition or disability is subject to payment under a prior compensation award. *See also Ross Buchholz v. Office of the Attorney General*. CRB No. 07-082, AHD No. PBL 04-027A, DCP No.761037-0001-20002-0001 (June 7, 2007). Here, as in *Barron***,** it is clear that the instant public sector Claimant, having not been the recipient of a payment under a prior compensation order, for his pre-existing condition, should not have any award granted herein apportioned. Therefore, employer's contention that Claimant is entitled to 10% permanent partial disability, after subtracting 27% for Claimant pre-existing condition to his right leg, is rejected as contrary to the current law.

CO at 5-6.

While there is a prior Compensation Order[7] in this case, that order did not involve any preexisting condition or disability. The prior order dealt addressed this work related injury, and awarded temporary total disability benefits, payment of medical bills, and authorized a medical

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> but only operate in furtherance of the remedy or confirmation of such rights, do not normally come within the legal conception of a retrospective law, or the general rule against the retrospective operation of statutes"); 82 C.J.S. *Statutes* § 421 (1953) ("As a general rule statutes relating to remedies and procedure are given retrospective construction"). Also, "It is a well-settled principle of statutory construction that 'civil laws retroactively adding to the means of enforcing existing obligations are valid'", 2 SUTHERLAND, STATUTORY CONSTRUCTION § 41.09 (Sands 4th ed. 1986). This rule applies as long as vested or substantive rights are not altered or created by the statutory amendment.

It is clear by the nature of the D.C. Code § 1-623.07(d), it is not intended to be related to remedies and procedure and certainly does not confirm prior rights Claimant's enjoyed under the D.C. Code § 1-623.07.

[6] D.C. Code § 1-623.08, states,

> The period of compensation payable under the schedule in § 1-623.07 is reduced by the period of compensation paid or payable under the schedule for an earlier injury if: (1) Compensation in both cases is for disability of the same member or function or different parts of the same member or function or for disfigurement; and (2) the Mayor finds that compensation payable for the later disability, in whole or in part, would duplicate the compensation payable for the preexisting disability. In such a case, compensation for disability continuing after the scheduled period starts on the expiration of that period as reduced under this section.

[7] *Milton v. D.C. Dept. of Public Works*, OHA NO. PBL 03-005 DCP NO. LT2-DPW000630 (March 17, 2003).

procedure. The Employer has failed to provide any evidence of any prior award referencing a preexisting condition of the right lower extremity. The Employer's argument is rejected.

The Employer's next argument is that the ALJ erred in not explaining the basis for how the percentages were arrived at, citing the District of Columbia Court of Appeals (DCCA) decision *Jones v. DOES*.[8] In *Jones,* the DCCA, while acknowledging the predictive nature of permanent partial disability determinations, also indicated that any disability award amount must be explained and reasons for the award must be outlined.

A review of the CO reveals the following discussion,

> Based on the credible evidence of record, *i.e.*, the treating doctors reports, and Claimant's uncontradicted testimony, it is determined that Claimant has remaining permanent impairment to his right lower extremity which limits, his ability to stand and walk extensively, climb stairs perform any strenuous labor. Claimant vocational skills are limited and manual labor or jobs requiring physical exertion comprise his employment history. Claimant is ambulatory without orthotics, thus he has better than half the use, function, and mobility of his right lower extremity, by contrast he is limited from the only work he is trained to perform and is limited in performing many functions in his non industrial life. The D.C. Court of Appeals has held that "ALJs have discretion in determining disability percentage ratings and disability awards without having "to choose a disability percentage rating provided either by the Claimant's or the Employer's medical examiner." See *Negussie v. DOES*, 915 A. 2d 391 (2007), see also *Bessie Hill v. Howard University*, CRB No. 11-081, AHD No. 10-117A, OWC No. 657973 (December 22, 2011).
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> Therefore, it is determined Claimant is entitled to a disability rating to a total 46% to the right lower extremity. Considering the medical evidence of Claimant 37% physical impairment and granting him an additional 5% for the lost of use of his right lower extremity, another 2% for pain and 2% for loss of endurance, Claimant should be granted a total of 46% permanent partial disability to his right lower extremity.

CO at 7.

We must disagree with the Employer's argument that the ALJ was in error by not specifying how the ALJ concluded the Claimant was entitled to additional percentages for loss of use, pain, and loss of endurance. As the DCCA acknowledged, "we can agree with the basic premise expressed by the CRB that the determination of disability is not an exact science, and that it necessarily involves a certain amount of 'prediction,' in making a scheduled award for partial loss (or loss of use of a member)." *Jones, supra* at 1224. The ALJ adopted as a baseline the medical impairment of the treating physician and Dr. Johnson, and then added additional percentages based on the Claimant's loss of use, pain and loss of endurance to the right lower extremity, and referenced the fact that Claimant's injury has had an adverse impact upon his ability to work and perform his activities of daily living. We believe the ALJ's conclusion and explanation on how

[8] 41 A.3d 1219 (April 26, 2012).

he came about 46% is enough to satisfy the requirement to now be specific, while still acknowledging the underlying predictive nature of permanent partial disability awards.

We lastly note, as we have rendered a decision on the Employer's appeal, the Motion to Stay is rendered moot and we will not address its merits.

CONCLUSION AND ORDER

The findings of fact and conclusions of law contained in the August 29, 2012 Compensation Order is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

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HEATHER C. LESLIE
Administrative Appeals Judge

November 15, 2012
DATE