

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR



F. THOMAS LUPARELLO
ACTING DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 13-089

**JASON VALENTINE,
Claimant-Petitioner,**

v.

**WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
and SEDGWICK CMS
Employer/Insurer-Respondents.**

Appeal from a June 20, 2013 Compensation Order By
Administrative Law Judge Gerald Roberson
AHD No. 13-203, OWC No. 653690

Krista N. DeSmyter, Esquire, for the Claimant
Sarah O. Rollman, Esquire for the Employer

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

HEATHER C. LESLIE for the Compensation Review Board; JEFFREY P. RUSSELL, concurring.

DECISION AND ORDER

OVERVIEW

This case is before the Compensation Review Board (CRB) on the request for review filed by the Claimant-Petitioner (Claimant) of the June 20, 2013 Compensation Order (CO) issued by an Administrative Law Judge (ALJ) in the Hearings and Adjudication Section 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 upper extremity. We **AFFIRM.**

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BACKGROUND AND FACTS OF RECORD

The Claimant was employed by the Employer as a mechanic helper. On September 24, 2008, the Claimant injured his right arm and shoulder when a crate filled with glass panels fell forward trapping his right arm under the crate. The Claimant sought medical treatment at Concentra where he received physical therapy and was placed under light duty restrictions. The Claimant also underwent an MRI of the cervical spine and right shoulder. No abnormalities were detected.

The Claimant then came under the care and treatment of Dr. Louis Levitt. Dr. Levitt diagnosed the Claimant with a grade 1 acromioclavicular separation and a right shoulder strain as a result of the work injury. Dr. Levitt recommended physical therapy and two more weeks of work restrictions. At a second visit, Dr. Levitt administered a cortisone and xylocaine injection into the shoulder and released the Claimant to full duty.

On March 12, 2012, the Employer sent the Claimant for an independent medical evaluation (IME) with Dr. Anthony Unger. Dr. Unger took a history of the injury and treatment and performed a physical examination. Dr. Unger opined the Claimant suffered from a 1st degree right AC separation/strain and as a result, has a 5% impairment to his right upper extremity according to the AMA Guides, 6th Edition.

On October 3, 2012, the Claimant underwent an IME with Dr. Michael Franchetti. Dr. Franchetti also took a history of the Claimant's injury and treatment. After performing a physical examination, Dr. Franchetti opined the Claimant suffered from a 32% right upper extremity impairment.

A full evidentiary hearing occurred on May 7, 2013. The Claimant sought an award of 32% permanent partial disability to the right upper extremity, causally related medicals and interest. The sole issue raised was the nature and extent of the Claimant's disability, if any. A CO was issued on June 20, 2013 which granted the Claimant's claim for relief, in part, finding the Claimant was entitled to an award of 13% permanent partial disability to the right upper extremity.

The Claimant timely appealed. The Claimant argues the ALJ conclusion is not supported by the substantial evidence in the record and does not flow rationally from the evidence in the record. The Claimant argues in support of its appeal that the ALJ, after rejecting Dr. Unger's and Dr. Franchetti's ratings, then relies in part on those ratings to support the conclusion. The Claimant also argues that the ALJ substituted his own medical judgment when determining the nature and extent of Claimant's disability by rejecting the AMA Guides.

The Employer opposes the Application for Review, arguing the CO is supported by the substantial evidence in the record and should be affirmed.

THE STANDARD OF REVIEW

The scope of review by the Compensation Review Board ("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, ("Act"). 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).

DISCUSSION AND ANALYSIS

The Claimant first argues that the ALJ's conclusions do not flow rationally from the facts as after the opinions of Dr. Unger and Dr. Franchetti were rejected, the ALJ then utilized their opinions in part to come to the conclusion that the Claimant suffered from a 13% permanent partial disability to the right upper extremity.

A review of the CO reveals the ALJ, after reviewing the medical opinions of the two IME physicians, determined that the Claimant had established a medical impairment to the right upper extremity. However, the ALJ rejected the medical impairment rating of both physicians. On this point the ALJ stated,

As such, Dr. Franchetti's findings appear to be unreliable and not consistent with the medical evidence from the treating physician. Similarly, Dr. Unger, who provided an impairment rating based on the AMA Guides 6th edition, did not refer to any specific tables in the AMA Guides 6th edition, and provide supporting medical rationale. Therefore, Dr. Unger has not offered a proper foundation to support his impairment rating.

CO at 7.

We conclude there is no error in the above analysis. The ALJ found both IME physician ratings to be suspect in their ultimate determinations, listing cogent reasons questioning both doctors.

The Claimant argues that as the ALJ rejected the opinions of the IME physicians, to then rely in part on those opinions is contradictory and renders the CO as not supported by the substantial evidence in the record requiring reversal. We reject this reading of the CO. The ALJ, after discounting the ultimate conclusion of the IME physicians, did utilize part of their opinions, those that were consistent with the treating physician's records, to determine what permanent partial disability award the Claimant was entitled to after determining that the Claimant had established a medical impairment to the right upper extremity. The ALJ determined,

The record does not contain sufficient evidence to ascertain how the IME physicians established their medical impairment ratings based on the application of the AMA Guides to Claimant's condition, but the IME physicians agree Claimant sustained a medical impairment to the right upper extremity due to the work incident. Based on the IME reports and the medical evidence from the treating physician, the record establishes Claimant has a medical impairment for the right upper extremity due to the work incident of September 24, 2008.

Id.

The ALJ awarded 5% to the right upper extremity based on Dr. Unger's opinion due to crepitus associated with deficits in the Claimant's range of motion. An additional 4% was awarded based on Dr. Franchetti and Dr. Levitt's opinions regarding the pain the Claimant still suffered. Utilizing Dr. Levitt and Dr. Unger's findings and examinations regarding loss of function and loss of endurance, an additional 2% for each was awarded to the Claimant for a total of 13% permanent partial disability to the right upper extremity. Ultimately, the ALJ utilized all of the

medical opinions when coming to his determination regarding the medical disability the Claimant suffered.

The Claimant urges this panel to reverse and remand the CO to the ALJ with instructions to accord Dr. Franchetti's opinion more weight than that of Dr. Unger. In essence, the Claimant is asking us to reweigh the evidence in favor of the Claimant's IME physician over that of the Employer's IME. This we cannot do as it is beyond our authority. As we have stated before, 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.

The Claimant's next argument is that the ALJ substituted his own medical opinion when he rejected the use of the AMA guides in determining the Claimant's disability. We disagree with the Claimant's characterization. The ALJ did not reject the AMA Guides when determining the Claimant's disability. The ALJ rejected the IME physician's ultimate conclusion regarding the amount of medical impairment the Claimant was entitled to. The ALJ rejected Dr. Unger's assessment of a 5% permanent impairment to the right upper extremity and Dr. Franchetti's 32% permanent impairment to the right upper extremity. The ALJ, after finding the impairment ratings deficient, then utilized all of the physician's findings, examinations, and opinions when determining that the Claimant suffered from a 13% permanent partial disability to his right upper extremity. Thus, the ALJ did not substitute his own medical opinion when determining the appropriate medical impairment. Moreover, as the ALJ noted¹, the District of Columbia Court of Appeals in *Negussie v. DOES*, stated,

There is nothing in the plain words of these statutory provisions stating explicitly, or even implicitly, that the determination of disability is the sole function of a medical doctor. And, the legislative history of this code provision cautions against the notion that only doctors may determine disability, as defined in the statute.

915 A.2d 391, 396 (D.C. 2007)

We affirm the award and further conclude the above analysis to be sufficient enough to satisfy the DCCA's rationale outlined in *Jones v. DOES*, 41 A.3d 1219 (D.C. 2012), where the Court indicated that any award of disability must be explained with specificity.

Finally, the Claimant argues that the disability rating did not consider the potential for future wage loss. However, as the ALJ points out, the Claimant conceded at the Formal Hearing that "there is not claim for industrial loss *today*."² Hearing transcript at 56. As the Claimant did not put forth any claim for industrial loss, the Claimant's argument is rejected. The only award proper for the Claimant is based on the medical impairments submitted, which in turn will serve as a proxy for any future wage loss the Claimant may suffer. For the ALJ to speculate, without any evidence submitted, would go against the DCCA's admonition in *Jones, supra*, that while a

¹ CO at 6.

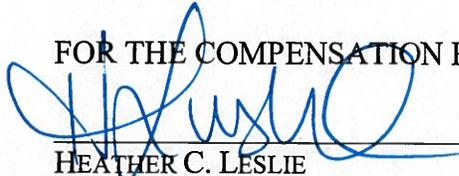
² We emphasize the word "today" as we take it to mean the Claimant isn't arguing there is not potential for any future wage loss, just that as of the Formal Hearing, Claimant was not prepared to make any argument regarding current lost earnings or permanent partial disability based upon wage loss. As Claimant conceded there was not a claim for industrial loss, it is not in error for the ALJ to determine the record failed to establish any future industrial loss.

predictive nature is inherent in scheduled losses, such predictions must be based upon some evidence and fully explained.

CONCLUSION AND ORDER

The June 20, 2013 Compensation Order is supported by the substantial evidence in the record and in accordance with the law. It is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:



HEATHER C. LESLIE
Administrative Appeals Judge

May 20, 2013

DATE