GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR

LISA M. MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 11-084

DEPT. OF EMPLOYMENT SERVICES
COMPENSATION REVIEW BOARD
2011 OCT 26 AM 9 45

JUNE ARCHER-SMITH,
Claimant–Petitioner,

v.

HOWARD UNIVERSITY HOSPITAL and SEDGWICK CMS,
Employer/Insurer–Respondent.

Appeal from a Compensation Order by
The Honorable Linda F. Jory
AHD No. 11-119, OWC No. 578350

David Kapson, Esquire for the Petitioner
William Schladt, Esquire, for the Respondent

Before MELISSA LIN JONES, HEATHER C. LESLIE,[1] and HENRY W. MCCOY, *Administrative Appeals Judges.*

MELISSA LIN JONES, *Administrative Appeals Judge*, for the Compensation Review Board.

DECISION AND ORDER

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board ("CRB") pursuant to §§32-1521.01 and 32-1522 of the District of Columbia Workers' Compensation Act of 1979, D.C. Code, as amended, §32-1501 *et seq.*, ("Act"), 7 DCMR §250, *et seq.*, and the Department of Employment Services Director's Administrative Policy Issuance 05-01 (February 5, 2005).

FACTS OF RECORD AND PROCEDURAL HISTORY

On April 11, 2002, Ms. June Archer-Smith injured her back while working as a certified nursing assistant at Howard University Hospital. Ms. Archer-Smith treated with Dr. Gary C. Dennis until 2003 when she returned to her pre-injury position with a forty-pound lifting restriction.

[1] Judge Leslie has been appointed by the Director of the DOES as a temporary CRB member pursuant to DOES Administrative Policy Issuance No. 11-02 (June 13, 2011).

In 2006, Ms. Archer-Smith injured her left knee. This injury led her to return to work for Howard University Hospital as a monitor technician, a position that did not require lifting patients.

A dispute arose over Ms. Archer-Smith's entitlement to permanent partial disability benefits as a result of her 2002 back injury. Consequently, on July 14, 2011, the parties proceeded to a formal hearing; at that hearing, the only issue for resolution was the nature and extent of Ms. Archer-Smith's alleged disability.

In a Compensation Order issued on July 29, 2011, the administrative law judge ("ALJ") denied Ms. Archer-Smith's request for a schedule loss award based upon 20% impairment to her left leg and 16% impairment to her right leg. On appeal, Ms. Archer-Smith asserts the July 29, 2011 Compensation Order must be vacated because the ALJ raised the issue of causal relationship which was not in dispute and because the ALJ considered actual wage loss in the analysis of the nature and extent of Ms. Archer-Smith's permanent partial disability.

On September 13, 2011, Howard University Hospital filed a Motion for Extension of Time to File Brief ("Motion"). In its Motion, Howard University Hospital asserts that preparation of an opposition to the Application for Review was delayed because the Application for Review had been received on August 30, 2011 when counsel was out of the office. Furthermore, an assertion is made that the opposition would be filed on or before September 16, 2011. To date, Howard University Hospital has filed no opposition, and its Motion hereby is denied.

ISSUES ON APPEAL

1. Did the ALJ address causal relationship as a contested issue?

2. Did the ALJ rely on actual wage loss to support the finding that Ms. Archer-Smith did not prove any permanent partial disability?

3. Is the July 29, 2011 Compensation Order supported by substantial evidence in the record?

ANALYSIS

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[2] in the record and whether the legal conclusions drawn from those facts are in accordance with applicable law.[3] 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.[4]

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[2] "Substantial evidence" is relevant evidence a reasonable person might accept to support a conclusion. *Marriott, International v. DOES*, 834 A.2d 882, 885 (D.C. 2003)

[3] Section 32-1521.01(d)(2)(A) of Act.

[4] *Marriot, supra.*

The only issue to be resolved at Ms. Archer-Smith's formal hearing was the nature and extent of her disability, if any.[5] On appeal, Ms. Archer-Smith characterizes the ALJ's conclusion that she is not entitled to permanent partial disability benefits as resulting from a finding that there is a lack of causal connection between Ms. Archer-Smith's leg disability and her original injury. This position reflects a misreading of the Compensation Order.

When assessing the extent of permanent disability in Ms. Archer-Smith's legs as a result of her back injury, the ALJ noted

> [a] thorough review of the treating physician Dr. Green's records reveals an inconsistency as to which leg she was feeling pain in 2002. While Dr. Green does indicate he felt there was radiculopathy there is no evidence that claimant sought treatment for any back or radicular pain after 2003. Thus the undersigned finds it inconceivable that she experiences the level of pain she described to Dr. Fechter seven years later. While the undersigned cannot make a conclusion that claimant testified incredibly, I cannot find her scripted unemotional testimony to be support a finding that her 2002 work injury has resulted in any permanent partial impairment to the lower extremities.[6]

This analysis does not raise the issue of causal relationship. This analysis is a consideration of Ms. Archer-Smith's basis for asserting a schedule member disability when she sustained a non-scheduled member injury: Ms. Archer-Smith has not treated for leg symptoms since 2003 and given that Ms. Archer-Smith did not seek medical assistance, it is inconceivable that she experiences the significant level of leg pain she described to her independent medical examination physician seven years later.

Furthermore, in rejecting Howard University Hospital's independent medical examination physician's opinion, the ALJ determined

> Dr. Collins [*sic*] opinion that claimant would have a 3 percent impairment of the right lower extremity due to the muscle atrophy there is also not supported by the medical evidence of record as there is simply no evidence that claimant received any treatment for right leg pain. While the undersigned is mindful, employer has not challenged the causal relationship between the atrophy of the right leg and the

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[5] There is no presumption regarding the nature and extent of a claimant's disability. *Dunston v. DOES,* 509 A.2d 109, 111 (D.C. 1986). Moreover, the claimant must prove the nature and extent of disability by a preponderance of the evidence. *Washington Metropolitan Area Transit Authority v. DOES*, 926 A.2d 140, 149 (D.C. 2007).

In the opening sentence of the Analysis section of the Compensation Order, the ALJ states the proper burden, but by the end of that paragraph, the ALJ states "claimant has the burden of proving by substantial credible evidence that she is entitled to the requested level of benefits." *Archer-Smith v. Howard University Hospital*, AHD No. 11-119, OWC No. 578350 (July 29, 2011), p.3. Because the analysis contained throughout the Compensation Order culminates in recitation of the appropriate standard at the conclusion of the Analysis section and in the Conclusion of Law section, we find the reference to "substantial credible error" to be harmless error.

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

> low back injury, claimant has never treated for any right leg pain which would lead to or explain underuse and/or the right calf atrophy. Moreover, as the Court of Appeals has instructed this forum, "it is not enough simply to establish that petitioner has problems (even significant problems) with her . . . legs, we must underscore the difference between an injury and a disability" citing *Negussie, supra* and "The ALJ is required by statute to consider all the evidence and to exercise independent judgment in determining whether the claimant has a permanent disability and, if so, the extent of that disability". *See Golding Alleyne, supra.* at 398.[7]

Again, contrary to Ms. Archer-Smith's assertions on appeal, this ruling does not raise an issue of causal relationship; it is the analysis for the rejection of Dr. Robert E. Collins' opinion regarding permanent partial impairment to Ms. Archer's right leg. At this point, it bears noting that Howard University Hospital stipulated to Ms. Archer-Smith's April 11, 2002 lower back injury, not any leg injury, and although disability experienced in a schedule member may be compensable despite the fact that the anatomical situs of the injury is in a non-schedule body part, the evidence must support that there actually is disability to the schedule member.[8]

Next, when reviewing a Compensation Order that awards permanent partial disability benefits for a schedule member, we are mindful that

> unlike other questions that ALJs are called upon to decide in connection with contested compensation claims, there is no dichotomous answer in schedule award cases. That is, there is no "a" or "b" choice in schedule disability awards, as there is in cases where the ALJ must make a choice between compensable or non-compensable, causally related or not causally related, employment relationship or no employment relationship, timely notice or untimely notice, etc. Those questions present scenarios in which there is presumably a right answer and a wrong answer. However, schedule loss cases present the problem of prediction: the goal is to make the best approximation of the effect of a scheduled injury on future wage loss, and then to express that approximation in percentage terms of the member in question, which in the words of the Court of Appeals result in an award based upon an "arbitrary" number of weeks of benefits. See, *Smith v. District of Columbia Department of Employment Services,* 548 A.2d 95 (1988), at 101. Only time will determine whether, in any given case, the approximation arrived at through the hearing process is close to "the right answer", or is wildly under reality, or wildly over it. That may be unfortunate, for either the employer or the worker, but as the Court of Appeals has recognized, that is the nature of the system.[9]

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[7] *Id.* at 4-5.

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

[9] *Majano v. Linens of the Week*, CRB No. 07-066, AHD No. 06-285, OWC No. 578369 (April 24, 2007).

In other words, when determining permanent partial disability, the role of the ALJ is to weigh competing medical opinions together with other relevant evidence and to arrive at a determination on the issue of the nature and extent of any schedule loss. In the end, this determination can result in accepting one physician's rating over another or in reaching a different conclusion altogether because the fact-finder is not bound by the opinions of the evaluating physicians.[10]

Ms. Archer-Smith characterizes the medical evidence as in agreement that she has sustained at least a 3% permanent partial disability of her right leg. Ms. Archer-Smith's misuse of the word "disability" renders her argument without merit; although it is true that Dr. Collins opined that Ms. Archer-Smith has sustained a 3% impairment of her right leg, Dr. Collins rendered an opinion regarding medical impairment, not economic disability, and his medical opinion does not automatically entitle Ms. Archer-Smith to benefits.[11]

Finally, Ms. Archer-Smith asserts the ALJ took into consideration actual wage loss in stating:

> Moreover claimant conceded at the formal hearing that she continues to work for employer as a monitor technician but that she was provided this sedentary work after she suffered an injury to her left knee. The undersigned concludes Dr. Fechter's rating is excessive given the lack of any treatment for the alleged leg pain for more than seven years, and the consistency of her employment since the injury.[12]

This portion of the Compensation Order does not support Ms. Archer-Smith's argument.

Ms. Archer-Smith took a modified duty position after sustaining a left knee injury unrelated to this claim; the change in Ms. Archer-Smith's physical capacity (and the resulting change to her job position) is not related to this claim. Thus, "the consistency of her employment since the injury" refers to physical abilities related to the nature and extent of Ms. Archer-Smith's disability, if any, not to actual wage loss.

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[10] *Negussie v. DOES*, 915 A.2d 391 (D.C. 2007).

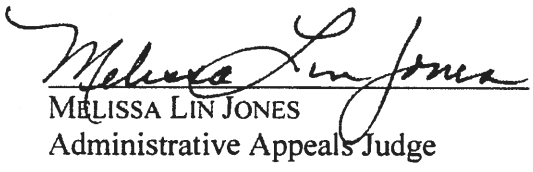
[11] *Id.*

[12] *Archer-Smith, supra*, at 4.

CONCLUSION AND ORDER

In the end, the ALJ conducted a thorough review of all the medical evidence along with other relevant evidence regarding Ms. Archer-Smith's disability and determined Ms. Archer-Smith is not entitled to permanent partial disability to her legs as a result of her back injury. Because the ALJ properly considered the record evidence and because the ALJ committed no error in the manner in which the law was applied, the July 29, 2011 Compensation Order is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:



MELISSA LIN JONES
Administrative Appeals Judge

October 26, 2011
DATE