

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 16-072

**KEON ANDERSON,
Claimant-Petitioner,**

v.

**CATHOLIC CHARITIES OF WASHINGTON, D.C. and
GALLAGHER BASSETT SERVICES,
Employer/Third-Party Administrator-Respondent**

Appeal from an April 29, 2016 Compensation Order
by Administrative Law Judge Gregory P. Lambert
AHD No. 15-502 OWC No. 725988

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2016 OCT 4 AM 10 04

(Decided October 4, 2016)

Benjamin E. Douglas for Claimant
Jason A. Heller for Employer

Before GENNET PURCELL, LINDA F. JORY and HEATHER C. LESLIE, *Administrative Appeals Judges*.

GENNET PURCELL for the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

Keon Anderson (“Claimant”) was employed as a charity assistant by the Catholic Charities of Washington, D.C., (“Employer”). During the relevant time at issue in this case, Claimant also worked a second job with the Department of Veteran’s Affairs.

On February 27, 2015, Claimant was working for Employer when he sustained an accidental, work-related dislocation injury to his left shoulder. Claimant initially received treatment from the emergency room where his shoulder was relocated and he was prescribed an injection and pain medication. Claimant pursued follow-up care at Kaiser Permanente and thereafter transferred his treatment to Phillips & Green, M.D.

Overall Claimant was treated conservatively for his left shoulder injury; he was prescribed a sling and attended physical therapy. He did not undergo surgery to treat the left shoulder, nor

was surgery ever recommended. Claimant was restricted from working from March 2, 2015 to March 8, 2015. On March 16, 2015, Dr. Fredric Salter of Phillips & Green, M.D., restricted Claimant from returning to work at the Employer part-time job only. This restriction continued until June 18, 2015, when Claimant was released to return to work full time and full duty, at both jobs, by Dr. Richard S. Meyer of Phillips & Green, M.D.

In preparation for a formal hearing at the Administrative Hearings Division (“AHD”) of the Department of Employment Services (“DOES”), Claimant requested an independent medical evaluation (“IME”) with Dr. Jeffrey H. Phillips of Phillips & Green, M.D. Dr. Phillips cited to the American Medical Association (“AMA”) Guide to Permanent Partial Impairment 5th Edition (the “Guides”) No. 5 Figures 16-40, 16-43, 16-46, and considering the Maryland Five Factors, opined that Claimant sustained a 27% permanent impairment to his left arm.

Dr. Phillips offered the following range of motion and partial impairment breakdown for Claimant’s left arm:

Range of Motion:

Flexion	80°	Extension	45°
Abduction	90°	Adduction	35°
Int Rotation	65°	Ext Rotation	75°

* * *

Figure 16-40: Flexion	7	Extension	1
Figure 16-43: Abduction	4	Adduction	1
Figure 16-46: Internal Rot	2	External Rot	0

The patient has the following additional impairment to the upper extremity.

Pain	3
Weakness	3
Atrophy	0
Loss of Function	3
Loss of Endurance	3

Coming to a permanent partial impairment of the upper extremity of 27%.

Claimant Exhibit 1 at 8.

At Employer’s request, on September 29, 2015, the Claimant was also examined by Dr. Willie E. Thompson who, although citing to Chapter 3, pages 43-44, figures 38 and 41 (an incorrect section of the Guides) opined that Claimant had flexion of 160 degrees resulting in 1% impairment to the left arm, and adduction to 150 degrees resulting in 1% impairment and resulting in a total 2% impairment to the left arm, as a result of the February 27, 2015 accidental injury. Taking into consideration the Maryland Five Factors, Dr. Thompson did not add any addition to the 2% total impairment.

Despite the full time, full duty release, Claimant did not attempt to return to his employment at Employer. Claimant has continued to work in his position at the Department of Veteran’s Affairs, full time and full duty. Claimant has looked for entry-level security and housekeeping work since the date of his injury.

A full evidentiary hearing was held on January 14, 2016, before Administrative Law Judge (“ALJ”) Gregory P. Lambert. Claimant sought benefits for temporary total disability for the period of February 27, 2015 through March 8, 2015, and permanent partial disability award of 54% to the left upper extremity.

On April 29, 2016, the ALJ issued a Compensation Order (“CO”) granting Claimant’s claim for temporary total disability for the requested period and awarding permanent partial disability benefits for 2% impairment to Claimant’s left upper extremity. *Keon Anderson v. Catholic Charities of Washington, D.C.*, AHD No. 15-502, OWC No. 725988 (April 29, 2016).

Claimant timely appealed the CO to the Compensation Review Board (“CRB”) by filing Claimant’s Application for Review of the Compensation Order and Memorandum of Points and Authorities in Support of Application for Review (“Claimant’s Brief”). In its appeal Claimant asserted that the CO failed to specify the reason for the 2% permanent partial disability finding, wrongly credited Dr. Thompson’s report and discounted Dr. Phillips report in error. Claimant’s Brief, Argument I, page 4 - 6. Claimant requests that the CO be reversed with regard to its findings of “only 2% permanent partial disability to the left upper extremity, and affirmed in all other regards”.

Employer opposed the appeal by filing Employer and Insurer’s Opposition to Claimant’s Application for Review (“Employer’s Brief”). In its opposition, Employer asserted the CO is supported by substantial evidence and should be affirmed.

ANALYSIS¹

Claimant’s first argument asserts that the CO “fails to specify the reason for the 2% permanent partial disability finding”. In addressing this argument we note the District of Columbia Court of Appeals’ (“DCCA”) recent opinion in *Bowles v. DOES*, 121 A.3d 1264 (2015), stating that ALJs must specify the reasoning behind a calculated finding of permanent partial disability. In reaching that conclusion, the Court reasoned it could not discern the values the ALJ assigned to each of the Maryland Five Factors in determining permanent partial disability, in that case and therefore, was unable to evaluate whether substantial evidence supported the ALJ’s determination. *Id* at 1269. In short, as previously enunciated in *Jones v. DOES*, 41 A.3d 1219, 1226 (D.C. 2012), prevailing law requires an award whose arithmetic computation is reviewable. As the DCCA succinctly mandates in *Bowles*, when calculating permanent partial disability awards, ALJ’s are required to show their work. *Bowles*, *supra* at 1269.

¹ The scope of review by the CRB as established by the District of Columbia Workers’ Compensation Act (“Act”) and as contained in the governing regulations is limited to making a determination as to whether the factual findings of a Compensation Order on appeal are based upon substantial evidence in the record, and whether the legal conclusions drawn from those facts flow rationally from those facts and are otherwise in accordance with applicable law. D.C. Code § 32-1521.01(d)(2)(A). “Substantial evidence” as defined by the District of Columbia Court of Appeals (“DCCA”), is such evidence as a reasonable person might accept to support a particular conclusion. *Marriott Int’l. v. DOES*, 834 A.2d 882 (D.C. 2003) (“*Marriott*”). Consistent with this scope of review, the CRB is also bound 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 members of the CRB review panel considering the appeal might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

Claimant argues:

[T]he ALJ's affirmation of Dr. Thompson's vague finding of 2% permanent partial disability fails to specify why the number arrived at was 2%, rather than, say, 8% or 15%. The ALJ states that the complaints are "minor" (CO 7)—which, however much Claimant may disagree, is a judgment made as finder of fact—but that, too, does not explain why another "minor" number—like 8%, or 15%—was not found. As such, the ALJ's finding of 2% permanent partial disability did not rest on sufficiently specific grounds, and must be reversed and vacated.

Claimant's Brief at 4.

With the above in mind, the Panel determines that the ALJ in the instant matter assessed Claimant's scheduled disability in accordance with the law. The CO does not, as the Claimant asserts, arrive at a calculated permanent partial disability percentage on vague and unsubstantiated grounds. Neither did the ALJ substitute his own medical opinion in lieu of Dr. Phillips IME opinion. The ALJ correctly rejected Dr. Phillips impairment rating, reasoning that Claimant's range of motion findings were egregiously inconsistent with his partner doctor's findings made only weeks earlier and was inconsistent with Claimant's credible testimony. In discounting Dr. Phillips impairment rating, the ALJ deemed reliable, and without any calculation, accepted, Dr. Thompson's 2% rating and rationale, factual evidentiary support in the record and Claimant's testimony in support thereof. We affirm the CO's conclusions on this matter.

Next, Claimant argued that the CO "wrongly credits Dr. Thompson's report despite its lack of any accurate citation to the AMA guides" and "discounts Dr. Phillips report for a reason that applies equally well to Dr. Thompson's report".

Specifically, Claimant asserts:

As noted above, the ALJ credited Dr. Thompson's report without any recognition of any specific AMA evidence that could justify it, and without adequate explanation of why its mis-citation and failure to account for most range of motions do not discredit it [sic]. In addition, the ALJ states [sic] that Dr. Phillips' rating "is exaggerated, prepared for litigation, unreliable, and rejected." (CO 7.) While the above arguments express why Dr. Phillips' rating is actually more thorough and credible, the inclusion of "prepared for litigation" in the reasons for rejecting is plain error, inasmuch as Dr. Thompson's rating was also "prepared for litigation." (EE 1 (labeling the report as an "IME"; HT 12.) If a prominent stated reason for preferring one report to another applies equally to both reports in questions, it cannot be stated that the findings "flow rationally from the facts." See generally *John Hamilton v. Mega Bus*, CRB No. 15-030 (June 25, 2015).

Claimant's Brief at 6.

As an initial matter we note that Claimant's general reference to *John Hamilton v. Mega Bus*, CRB No 15-030 is substantially inaccurate. Further, the ALJ's description of both Claimant's

and Employer's IME reports as documents "prepared for litigation" yet choosing to prefer one report over the other cannot be the basis of our concluding that these findings do not flow rationally from the facts when these findings are indeed true; both documents were prepared for litigation. Most relevantly, the ALJ provided several other prominent and distinct reasons for crediting Dr. Thompson's IME over Dr. Phillips'.

Turning to that issue now, notwithstanding the incorrect citation to the Guides, we find no reversible error in the ALJ's conclusion determining Dr. Thompson's IME reliable. In his deliberation, the ALJ stated that Dr. Phillips' rating "untenably inflates the Claimant's real complaints." The ALJ stated further, that Claimant's ranges of motion findings were glaringly inconsistent with the ranges of motion findings from Dr. Wagner only two months prior.

Our review of the evidence confirms Claimant's marked range-of-motion improvement between his May 21, 2015 and June 18, 2015 follow-up visits to Dr. Wagner where significant improvements in both forward flexion and abduction were noted; increases from almost 90 degrees and 75 degrees, to 140 degrees and 135 degrees, respectively. On July 2, 2015, reports indicated Claimant continued to improve, and was discharged from active care with Dr. Wagner. Notably, Claimant was also advised to discontinue any medication prescribed from Phillips & Green, M.D., and was instructed to continue working full time, full duty. At his IME only five (5) weeks later, Claimant's steady progress seemingly declined and without explanation, Dr. Phillips re-evaluation of his left arm yielded a decreased range of motion forward flexion and abduction of 80 degrees and 90 degrees, respectively.

In further support of the ALJ's crediting of Dr. Thompson's IME, the ALJ considered and appropriately weighed Claimant's corroborating testimony at the formal hearing. Specifically, when asked to address his current symptoms, the Claimant testified that he only experienced "random pains around once a month." The ALJ considered, but due to the substantive relevance of Dr. Thompson's evaluation, dismissed as a citation error, the incorrect reference to the AMA Guide referenced in Dr. Thompson's IME report.² Indeed, given the otherwise consistent IME report, we agree the report is not made fundamentally unreliable merely due to an error in citation. The ALJ took into consideration the totality of the evidence, including Claimant's credible testimony regarding his injury, his intermittent pain upon reaching MMI and since his June 18, 2015 release to full time, full duty employment, as well as the absence of any diminished earning capacity on Claimant's part.

We reject Claimant's argument that the CO is unsupported by substantial evidence because the ALJ incorrectly credited Dr. Thompson's report despite its lack of accurate citation to the AMA Guides, and referenced the IME supporting Dr. Phillips 27% impairment rating as being "...prepared for litigation . . . [.]" We affirm the CO's conclusions on these issues.

We determine the CO's conclusion finding that Claimant proved by a preponderance of the evidence that he was entitled to a 2% permanent partial disability rating to his left arm is based upon substantial evidence in the record, and that that conclusion flows rationally from the CO's findings of facts and is otherwise in accordance with applicable law.

² Claimant's counsel did not raise any objection at the formal hearing to Employer's Exhibit 1, the sole exhibit submitted into the record on Employer's behalf. Hearing Transcript at 11-12.

CONCLUSION AND ORDER

The April 29, 2016 Compensation Order is supported by substantial evidence, is in accordance with the law, and is AFFIRMED.

So ordered.