

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

Department of Employment Services

VINCENT C. GRAY  
MAYOR



F. THOMAS LUPARELLO  
ACTING DIRECTOR

**COMPENSATION REVIEW BOARD**

**CRB No. 14-023**

**MICHAEL E. SMITH,  
Claimant-Petitioner,**

v.

**FACCHINA CONSTRUCTION and LIBERTY MUTUAL INSURANCE CO.,  
Employer/Carrier-Respondent**

DEPT. OF EMPLOYMENT  
SERVICES  
COMPENSATION REVIEW  
BOARD  
2014 JUN 9 PM 1 31

Appeal from a January 30, 2014 Compensation Order on Remand by  
Administrative Law Judge Leslie A. Meek  
AHD No. 06-015B, OWC No. 604142

Krista N. DeSmyter for the Petitioner  
Curtis B. Hane for the Respondent

Before: HENRY W. MCCOY, JEFFREY P. RUSSELL, and MELISSA LIN JONES, *Administrative Appeals Judges.*

HENRY W. MCCOY for the Compensation Review Board.

**DECISION AND REMAND ORDER**

**FACTS OF RECORD AND PROCEDURAL HISTORY**

Claimant injured his left knee in September 2004 when a pipe fell on it. Claimant sought a schedule award for a 44% permanent partial impairment to his left leg and in an Errata Compensation Order issued on February 10, 2012, an administrative law judge (ALJ) awarded Claimant a 10% permanent partial impairment to his left leg, which consisted of an initial

determination of 17% minus a credit to Employer of 7.5% for a prior permanent partial impairment award to Claimant's left leg.<sup>1</sup>

In appealing the ALJ's ruling, Claimant argued the decision was unclear, lacked reasoning and was not supported by substantial evidence in the record. On September 19, 2012, the Compensation Review Board (CRB) vacated the Errata Compensation Order and remanded this matter to the ALJ to provide an "explanation of the reasoning applied to arrive at the permanent partial disability award" pursuant to the recent standard for such awards established by the D.C. Court of Appeals in *Jones v. DOES*.<sup>2</sup> Specifically, the ALJ's reasoning was faulted for her failure to explain her evaluation of the medical opinions or other evidence of record when reaching her conclusion.<sup>3</sup>

In a January 30, 2014 Compensation Order on Remand (COR), the ALJ again awarded Claimant a 17% permanent partial disability to his left leg, with the percentage assigned for each of the five factors delineated and the same 7.5% credit to Employer for the prior award.<sup>4</sup> Claimant filed a timely appeal with Employer filing in opposition in addition to a motion to dismiss the application for review (AFR).<sup>5</sup>

On appeal, Claimant argues the ALJ made no findings as to his loss of industrial capacity, failed to explain the allocation of percentages for the five factors, and failed to give proper consideration to the treating physician's opinion. Employer argues that the COR should be affirmed.

#### STANDARD OF REVIEW

The scope of review by the CRB, 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.<sup>6</sup> *See* D.C. Workers' Compensation Act of 1979, as amended, D.C. Code §§ 32-1501 to 32-1545 (2005), at § 32-1521.01(d)(2)(A). 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

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<sup>1</sup> Neither party appealed the issues of credit or apportionment or the calculation error.

<sup>2</sup> 41 A.3d 1219 (D.C. 2012).

<sup>3</sup> *Smith v. Facchina Construction*, CRB No. 12-036, AHD No. 06-015B, OWC No. 604142 (September 19, 2012).

<sup>4</sup> *Smith v. Facchina Construction*, AHD No. 06-015B, OWC No. 604142 (January 30, 2014) (COR).

<sup>5</sup> On March 19, 2014, the CRB denied Employer's motion in an order entitled an "Order Denying Respondent's Motion to Dismiss."

<sup>6</sup> "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).

conclusion, and even where the reviewing authority might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

In the initial assessment of Claimant's disability, the ALJ determined that Claimant was entitled to an award of 17% permanent partial impairment predicated upon pain, atrophy, and weakness as reported by Claimant and his treating physician. In the CRB's review of this determination, it was noted that while it was previously held there was no requirement to state what portion of the awarded was attributable to the five factors<sup>7</sup>, the D.C. Court of Appeals decision in *Jones* now demanded more precision from an ALJ to explain the "reasoning in arriving at a disability award."<sup>8</sup>

In the discussion section of both decisions, the ALJ repeated the same statement as to Claimant's testimony concerning his left knee complaints of pain, the knee giving out and the knee getting stiff and numb. In the COR, no new findings are made regarding Claimant's disabling symptoms; however, the ALJ does provide more detail for her 17% impairment rating.

In the Errata Compensation Order, the ALJ reasoned:

The pain and atrophy and weakness reported by Claimant and his treating physician warrant a schedule award of seventeen percent (17%) for his left lower extremity. See *Wormack and Negussie, Supra*.

In the COR now under review, the ALJ has reasoned:

The pain, atrophy, weakness, loss of endurance and loss of function reported by Claimant and his treating physician warrant a schedule award of seventeen percent (17%) for his left lower extremity. See *Wormack and Negussie, Supra*.

Regarding Claimant's left leg, five percent is attributed to his pain, two percent is attributed to his weakness, three percent is attributed to his atrophy, three percent is attributed to his loss of endurance and four percent is attributed to his loss of function.

While the ALJ has provided more detail by assigning a percentage to each of the five factors, this revised assessment suffers from the same lack of explanation as its previous iteration. As Claimant argues in his appeal, the ALJ has added loss of endurance and loss of function but has retained the same overall percentage impairment, all without any explanation and ostensibly based on the same findings as to Claimant's disabling symptoms. We return this matter again for an explanation.

We also note that in both decisions, the ALJ concluded:

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<sup>7</sup> See § 32-1508(3)(U-1).

<sup>8</sup> *Jones, supra*, at p. 1225.

Based upon a review of the record evidence as a whole, I find and conclude the nature of Claimant's on-the-job injury to his lower left extremity is permanent and the extent of Claimant's disability is seventeen percent. Employer is entitled to a credit of 7 ½ percent pursuant to the March 14, 2006 *Stevens, Supra* order.

While the ALJ has concluded that the nature of Claimant's disability is permanent, there is no separate medical impairment rating given to represent that assessment, only the assignment of percentages to the five factors are provided and no explanation for this is given. We noted this anomaly in a recent review of a decision:

And, while we are convinced that the ALJ accepted that Petitioner sustained a significant medical impairment to her left leg, we are puzzled that the entire award of 10% was broken down in the Compensation Order to be derived from the "five factors". While we recognize the "five factors" are in some ways duplicative of the same considerations that go into arriving at an AMA impairment rating, we nonetheless cannot discern how the award was derived.<sup>9</sup>

While we acknowledge the Act allows for the permissive utilization of both the AMA Guides and the five factors, we have to stress the new requirement imposed by *Jones* for more precision by the ALJ in explaining how a disability award is reached.

The COR presents the same problem as previously in that we are unable to review the decision reached given the minimal change executed with no clarifying explanation. We are therefore constrained again to return this matter for the ALJ to explain the correlation between the medical opinions and other evidence of record and her assignment of percentages to the five factors to reach the conclusion as to extent of Claimant's permanent impairment.

Claimant also argues that the ALJ erred as a matter of law in not according the treating physician preference to the medical opinions of Dr. Edward Rabbitt, Claimant's treating orthopedic surgeon. Dr. Rabbitt rated Claimant as having a 27% permanent partial impairment. Claimant was also rated independently by Dr. Joel Fechter, who deemed him to be 44% impaired and it was based on this rating that Claimant sought to be compensated and it was this rating that the ALJ specifically discredited on the basis that it was provided solely for litigation. As between Dr. Rabbitt and Employer's rating provided by Dr. Robert Gordon, the ALJ makes no finding as to which is found either more persuasive or used in any manner as a foundation for her assessment of Claimant's permanent partial impairment. On remand, the ALJ can correct this omission by identifying which medical opinion is being accorded the greater weight and why.

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<sup>9</sup> *Padilla v. M & N Contractors*, CRB No. 13-154, AHD No. 10-600A, OWC No. 660339 (May 13, 2014), p. 5.

CONCLUSION AND ORDER

The January 30, 2014 Compensation Order on Remand is VACATED. This matter is remanded for the ALJ to provide an explanation of the reasoning applied to arrive at the schedule award for permanent partial impairment pursuant to the decision in *Jones* and this decision and remand order.

FOR THE COMPENSATION REVIEW BOARD:

  
HENRY W. MCCOY  
*Administrative Appeals Judge*

June 9, 2014  
DATE