GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

MURIEL BOWSER
MAYOR

DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 16-104

OYINADE RIDLEY,
Claimant–Petitioner,

v.

SUNRISE SENIOR LIVING and
ACE AMERICAN INSURANCE COMPANY,
Employer/Insurer-Respondent.

Appeal from a July 11, 2016 Compensation Order
By Administrative Law Judge Gerald D. Roberson
AHD No. 16-104,[1] OWC No. 672452

(Decided December 5, 2016)

Richard Basile for Claimant
Samuel J. DeBlasis, II for Employer

Before JEFFREY P. RUSSELL, LINDA F. JORY, and HEATHER C. LESLIE, *Administrative Appeals Judges.*

JEFFREY P. RUSSELL for the Compensation Review Board.

DECISION AND PARTIAL REMAND ORDER

FACTS OF RECORD AND PROCEDURAL BACKGROUND

Oyinade Ridley ("Claimant") was employed as a nursing aid when she sustained a work-related injury on July 28, 2010. Her claim for workers' compensation benefits under D.C. Code § 32-1501, *et seq.* ("the Act") was accepted by Sunrise Senior Living and Ace Insurance Company ("Employer"), which paid temporary total disability benefits from the date of the accident until March 30, 2014.

[1] To pre-emptively dispel any concern that an error has been made in connection with the Administrative Hearings Division ("AHD") and Compensation Review Board ("CRB") case numbers, we note this case presents the highly unusual coincidence of having the same AHD and CRB case numbers.

During that time Claimant underwent physical therapy, surgery on her left shoulder, surgery on her neck, surgery to her low back, and pain management from two different facilities. Her primary treating physician was Dr. Uchenna Nwaneri.

Claimant also underwent a functional capacity evaluation ("FCE") on November 15, 2012 in which Claimant was found to have the capacity for light work with restrictions on lifting and carrying no more than 15 pounds, and occasionally pushing and pulling 20 pounds. A second FCE was performed December 23, 2013, which again placed Claimant at a light duty physical capacity level with a 10 to 15 pound weight restriction.

Employer provided vocational rehabilitation assistance which did not result in finding Claimant a job. However, on March 31, 2014, Claimant found work on her own as a Dedicated Aide for the Prince George's County Public Schools.

Claimant underwent a third FCE on February 11, 2016 which resulted in a finding that Claimant was capable of full-time sedentary work with an "exertion" limit of 10 pounds of occasional force.

On October 14, 2015, in response to inquiries from Claimant's counsel, Dr. Nwaneri opined that Claimant had sustained ratable impairments to her shoulder, low back, right hip and neck. He further opined that Claimant was completely and permanently disabled from employment

Claimant was evaluated on April 25, 2016 at Employer's request for the purpose of an independent medical evaluation ("IME") by Dr. David Johnson, who agreed that Claimant was unable to return to her pre-injury job, but was capable of performing sedentary work with no lifting greater than 10 to 15 pounds. He also reviewed a job description concerning the job in which Claimant works, the Dedicated Aide position, and stated that the job was within her physical capacity despite her impairment from the work injury.

At a hearing before an administrative law judge ("ALJ") in the Administrative Hearings Division ("AHD") of the Office of Hearings and Adjudications ("OHA") in the Department of Employment Services ("DOES"), Claimant sought an award of temporary total disability from the date of injury to October 2, 2015, and an award of permanent total disability benefits from October 2, 2015 and ongoing. [2]

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[2] The parties filed a Joint Prehearing Statement and Stipulation form ("JPHS") which set forth, in addition to these claims, that Claimant was seeking schedule awards of 47% to the left shoulder, 14% to the cervical spine, 4% to the right hip, and 14% to the low back. None of these anatomical parts are scheduled members under the Act's permanent partial disability schedule, and Claimant's counsel made no reference to these claims in his opening statement or closing argument. At the formal hearing Claimant's only stated claim for relief was an award of permanent total disability. HT 15 and 88.

Further, the JPHS also indicated that Employer was raising voluntary limitation of income, and the reasonableness and necessity of medical expenses as defenses, in addition to contesting the nature and extent of Claimant's disability. However, Employer presented no evidence in the nature of a Utilization Review report or that Claimant had been offered any work that paid as much or more than she was earning when injured, and made no arguments concerning voluntary limitation of income. Rather, Employer suggested without conceding that this case was a "wage differential" case (HT at 19 – 17 and 89 – 90).

On July 11, 2016, the ALJ issued a Compensation Order ("CO"), in which neither the schedule awards claimed in the JPHS nor the voluntary limitation of income were addressed, nor did the CO address the issue of reasonableness and necessity of medical care. Rather, the CO awarded Claimant "a wage differential of $13,322.33 for 2014 subject to a credit for benefits paid from January 1, 2014 to March 14, 2014 and $8,429.33 for 2015. For successive years Claimant shall provide Employer with appropriate wage earnings in order to facilitate the issuance of a wage differential."

Claimant filed Claimant's Application for Review and Memorandum of Points and Authorities in Support of Claimant's Application for Review ("Claimant's Brief") with the Compensation Review Board ("CRB"), asserting that the ALJ improperly failed to accord Dr. Nwaneri the benefit of a treating physician preference, and improperly accepted the opinion of Dr. Johnson's IME report and deposition. Claimant also argues that the record does not establish entitlement to a credit to Employer, and that despite Claimant having returned to work, she is still entitled to an award of permanent total disability.

Employer filed Employer/Insurer's Opposition to Claimant's Application for Review and Memorandum of Points and Authorities in Opposition to Claimant's Application for Review ("Employer's Brief"). Employer argues that the denial of the claim for permanent total disability is a proper application of the law in light of Claimant having returned to work full-time.

For the reasons set forth below, the award is affirmed in part, reversed and vacated in part, and remanded to AHD with instructions as are set forth in the Conclusion and Order below.

DISCUSSION AND ANALYSIS

There are no disputes concerning any of the material facts. Claimant sustained an injury to her back, shoulder and neck while working as a Nursing Aid at Employer's assisted living facility. According to both physicians expressing an opinion on the subject, Claimant's treating physician Dr. Uchenna Nwaneri and Employer's IME physician Dr. David Johnson, as well as the evaluators performing multiple FCEs, Claimant is unable to return to work in her pre-injury job as a result of the injury. Both doctors also agree and the parties stipulate that Claimant's medical condition has reached maximum medical improvement ("MMI").

Neither party raises any issue concerning the omission from the CO of any disposition concerning reasonableness and necessity of medical care or its failure to address the voluntary limitation of income defense.

Further, it is uncontested that since March 31, 2014, Claimant has returned to work on a full-time basis as a Dedicated Aide at Parkdale High School in Prince George's County, Maryland, earning less than what she earned while employed with Employer.

Lastly, although the claim for relief contained a claim for temporary total disability, the parties stipulated that those benefits had been paid voluntarily.

Claimant argues that the ALJ erred in finding Claimant to be only permanently partially disabled, because Dr. Nwaneri characterized Claimant as being unable to work, most specifically in response to Claimant's counsel's inquiry concerning her work status, writing on December 14, 2015 that Claimant is "permanently and totally disabled" from employment.

Claimant argues further that the basis of this error was that the ALJ accepted the opinion of Dr. Johnson over that of Dr. Nwaneri, in conflict with the treating physician preference normally accorded to the weighing of competing medical opinions.

While it is true that such a preference exists, as the ALJ pointed out:

> In terms of Claimant's physical capacity to perform the position of Dedicated Aide, Dr. Johnson reviewed this job, and stated Claimant could perform the position. Dr. Johnson stated her current position is within her functional work capacity, and she may continue this type of work. EE 1, p. 115. While Claimant was working at the time Dr. Nwaneri rendered her permanently totally disabled, Dr. Nwaneri did not address whether Claimant could continue working in her present capacity as a Dedicated Aide. While the physical demands of the position of Dedicated Aide do not appear to be completely consistent with Claimant's 10 – 15 [sic] lifting limitation, which largely depends on the individual needs of the student, the record reveals the Prince George's County Public Schools has accommodated Claimant in the past, and the position description expressly states that reasonable accommodations may be made to enable individuals with disabilities to perform the essential functions. CE 66. Despite the recommended work limitations, the record reveals Claimant has performed the position of Dedicated Aide since March 31, 2014. This employment offers Claimant stable employment on a yearly basis as a Dedicated Aide. Claimant has not offered any evidence that the job opportunity is so small that she would have a problem securing other employment opportunities within the school system. Despite Claimant's contentions that her residuals prevent her from performing this employment, the record establishes Claimant has sufficient skills to allow her to participate in sedentary employment as a Dedicated Aide. As such, the record does not establish Claimant is totally disabled.

CO at 8.

Aside from the somewhat speculative reference to finding other employment within the school system should that become necessary, the ALJ's analysis is consistent with the record evidence.

To the extent that the ALJ accepted any part of Dr. Johnson's opinion, he explained that Dr. Nwaneri's opinion was deficient in two important ways. First, despite his opining that Claimant is permanently and totally disabled, she was in fact gainfully employed at that time, a conflict which the ALJ points out Dr. Nwaneri does not reconcile. Second, Dr. Nwaneri's report fails to address in any way the specific requirements of the Dedicated Aide position, or explain why it is not suitable.

Beyond this, the ALJ notes that Dr. Johnson did review the job requirements of the Dedicated Aide position, and opined that they fell within Claimant's physical capacity. That, and the fact that Claimant was in fact gainfully employed are sufficient for the ALJ to accept Dr. Johnson's opinion that Claimant is not totally disabled from gainful employment.

Further, we note that the statement that a person is unemployable is not a medical opinion, it is a vocational one, and is beyond the competence of a physician. While a physician has the expertise to render a material opinion concerning an individual's physical capacity or impairment, inasmuch as disability under the Act is "an economic and not a medical concept", it is not the proper subject of medical opinion.

As the District of Columbia Court of Appeals has written:

> The record supports the ALJ's conclusion that nothing in Dr. Muawwad's progress notes indicated that Darden's physical incapacity for work went beyond the limitations recognized in the July 28, 2002 compensation order, i.e., the need to avoid work that is physically strenuous or that requires prolonged standing. In addition, *the ALJ correctly recognized that a treating physician's opinion about whether a worker's compensation claimant has the skills for light employment is not a medical opinion and is not entitled to deference or to special weight.* Accordingly, we hold that it was neither unreasonable nor contrary to law for the Board to uphold the August 20, 2003 Compensation Order suspending Darden's disability benefits for her unreasonable refusal to participate in vocational rehabilitation.

Darden v. DOES, 911 A.2d 410, 415 (D.C. 2006) (emphasis added).

It is also worth noting the following DCCA quote:

> It is significant that D.C. Code § 32-1501 (8) uses the language, "compensation for disability," and that disability is defined in terms of an "injury which results in the loss of wages." In that regard, our cases, like Maryland workers' compensation cases, repeatedly have emphasized that "[d]isability . . . is an economic concept rather than a medical condition." *Washington Post v. District of Columbia Dep't of Employment Servs.*, 853 A.2d 704, 707 (D.C. 2004) (citing *Washington Post v. District of Columbia Dep't of Employment Servs.*, 675 A.2d 37, 41 (D.C. 1996); see also *Potomac Elec. Power Co. v. District of Columbia Dep't of Employment Servs.*, 835 A.2d 527, 531 (D.C. 2003), "Disability is an economic and not a medical concept.") (citing *Harris v. District of Columbia Dep't of Employment Servs.*, 746 A.2d 297, 301 (D.C. 2000) (other citation and internal quotation marks omitted); *Upchurch v. District of Columbia Dep't of Employment Servs.*, 783 A.2d 623, 627 (D.C. 2001) (citation omitted) ("Disability is an economic and not a medical concept and any injury that does not result in loss of wage-earning capacity cannot be the foundation for a finding of disability,"); *Smith* [*v. DOES*, 548 A.2d 95 (D.C. 1988)] [...] at 101) ("A schedule award is intended to

compensate only for economic, not physical impairment."). Disability, as defined in our statute, ultimately requires a legal determination.

Negussie v. DOES, 915 A.2d 391, 399 (D.C. 2007).

D.C. Code § 32-1508 governs the method of calculating permanent partial disability rates based upon actual wage loss, and provides:

> Compensation for disability shall be paid to the employee as follows:
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> * * *
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> (3)(V)(i) In other cases [i.e., cases not involving schedule disability awards for certain listed body parts] the employee shall elect:
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> (I) To have his or her compensation calculated in accordance with the formula set forth in either sub-subparagraph (ii)(I) or (II) of this subparagraph; and;
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> (II) To receive the compensation at the time the employee returns to work or achieves maximum medical improvement.
>
> (ii) The compensation shall be 66 2/3% of the greater of:
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> (I) The difference between the employee's actual wage at the time of injury and the average weekly wage, at the time of injury, of the job that the employee holds after the employee has a disability; or
>
> (II) The difference between the average weekly, at the time the employee returns to work, of the job the employee held before the employee had the disability and the actual wage of the job that the employee holds when the employee returns to work.

Although this statute is complex, it anticipates, in a general sense, that a permanently partially disabled employee who seeks a non-schedule permanent disability award (i.e., one based upon ongoing wage loss caused by the work injury), the employee is entitled to 2/3 of the amount of the wage loss, with two possible methods of calculating that loss.[3]

Since the record does not contain sufficient evidence to employ the calculation method provided in § 32-1508 (3)(V)(i)(II)(ii)(I), Claimant has established entitlement to an award calculated by applying § 32-1508 (3)(V)(i)(II)(ii)(II).

Neither party has complained in this appeal that the ALJ erred in the amount of the permanent partial disability wage loss compensation rate as calculated by the CO at page 9, thus we need not review the ALJ's calculations, or that they are unsupported by substantial evidence. Hence they are affirmed.[4]

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[3] In order to calculate the proper compensation rate under sub-subparagraph (I) of subparagraph (I), one would need evidence of what the average weekly wage of the Dedicated Aide position was on July 28, 2010.

[4] Although little or no evidence was submitted at the formal hearing concerning Claimant's wages pre- or post-injury, Employer submitted a letter to the ALJ post-hearing containing the figures employed by the ALJ as inputs in reaching his calculation regarding the extent of Claimant's wage loss differential. The ALJ did make specific reference to the letter on page 9 of the CO, and Claimant raises no objection in this appeal to the ALJ's implied

Further, neither party has raised any complaint about the mechanism utilized by the ALJ to facilitate calculation of the rate of compensation payable on accrued or ongoing permanent partial disability compensation. Usually the CRB only considers matters raised by a party. However, because the mechanism employed in the award in some ways is inconsistent with certain fundamental issues concerning the remedial and humanitarian nature workers' compensation systems generally and the Act specifically, we will address it.

The Decision portion of the CO contains the specific award made:

> Based upon the record herein, and the applicable law, it is hereby ordered that:
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> 1. Claimant's claim for relief is hereby **Granted in part**. Employer shall pay Claimant a wage differential of $13,322.33 for 2014 subject to a credit for benefits paid from January 1, 2014 to March 30, 2014 and $8,429.33 for 2015. For successive years, Claimant shall provide Employer with the appropriate wage earnings in order to facilitate the issuance of a wage differential.
>
> **SO ORDERED.**

CO at 10.

All payments of compensation that have been made to date have been voluntary payments of compensation, and are therefore governed by 7 DCMR § 209, "Voluntary Payments of Compensation".

7 DCMR § 209.1 provides that "compensation shall be paid directly to an employee or beneficiary by the insurer on behalf of the employer without an award unless the employer controverts in writing, on a form prescribed by the Office [of Workers' Compensation Programs within DOES], the liability to pay [...][under the Act]."

7 DCMR § 209.2 provides that the "first payment of compensation, including accrued benefits, if any, shall be made within fourteen (14) working days after the employer has knowledge of the injury."

7 DCMR § 209.3 provides that "Compensation shall be paid promptly every two (2) weeks thereafter."

The Act also has provisions governing payment of compensation. D.C, Code § 32-1515, "Payment of Compensation", provides, in subparagraph (a), that "Compensation under this chapter shall be paid periodically, promptly, and directly to the person entitled thereto, except where liability to pay compensation has been controverted by the employer." Subparagraph (b) provides "The 1st installment of compensation shall become due on the 14th day after the employer has knowledge of the job-related injury or death, on which date all compensation shall

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acceptance of the letter into the record. For the purposes of this case we will denominate the document, a letter dated June 30, 2016, as Post-Hearing Exhibit 1, and deem it to have been admitted into the record without objection.

be paid. Thereafter compensation shall be paid in installments, biweekly, except where the Mayor determines that payment in installments shall be made monthly or some other basis."

Subparagraph (f) governs payments of compensation pursuant to a compensation award; thus it applies to non-voluntary payments such as those awarded in this case. It provides:

> If any compensation, payable under the terms of an award, is not paid within 10 days after it becomes due, there shall be added to such unpaid compensation an amount equal to 20% thereof, which shall be paid at the same time as, but in addition to, such compensation, unless review of the compensation order making such award is had as provided by § 32-1522 and an order staying payments has been issued by the Mayor or court. The Mayor may waive payment of the additional compensation after a showing by the employer that owing to conditions over which it had no control such installment could not be paid within the period prescribed for payment.

Nowhere else in the Act or regulations are there time frames established for payment of compensation. Therefore, it is evident that, although the language establishing the frequency and timing of payments that are contained in the Act and regulations initially refer to such time frames as being relevant to voluntary payments of compensation, subparagraph (f) makes those same time frames applicable to compensation payments once an award has been made.

In this case, the award concerns three separate time periods: (1) March 31, 2014 through December 31, 2014; (2) January 1, 2015 through December 31, 2015; and (3) "successive years" following 2015.

The reason for this approach is that the information provided to the ALJ, and from which the wage differentials were calculated, was aggregate data from 2014 and 2015, and contained no information on income earned in 2016 up to the date of the formal hearing. Given this limited information, the ALJ did all that could been done for the first two closed periods, and in this case, we do not view making an award calculated on that aggregate data to be an abuse of discretion: the ALJ had no other choice. And, given that the payments had not yet been made, the ALJ's approach did not result in any additional delay in Claimant's receipt of those benefits.

However, for the third period, i.e., the "successive years" following 2015, the award does not appear to foster or advance the statutory and regulatory goals of "prompt" and regular biweekly payments. In that regard, the method implied in the award of Employer making yearly payments based upon the aggregate earnings in each successive year is not in accordance with the Act and is an abuse of discretion.

Accordingly, we must vacate that portion of the award which provides "For successive years, Claimant shall provide Employer with the appropriate wage earnings in order to facilitate the issuance of a wage differential", and remand the matter with instructions that a new award covering successive years be made in a manner consistent with the Act and regulations.

Such an order would require that Employer make biweekly payments of compensation based upon the difference between Claimant's earnings during the biweekly period and Claimant's pre-injury average weekly wage. Of course, Employer must have sufficient information on a biweekly basis to make such a calculation; otherwise it would be the case "that owing to

conditions over which it had no control such installment could not be paid within the period prescribed for payment." On remand the ALJ must fashion such an award.

Finally, Claimant objects to the "credit for benefits paid from January 1, 2014 to March 30, 2014". The basis for this objection is that the record contains no evidence concerning the amount of that credit.

Employer does not address this argument at any length, beyond stating in the final paragraph of the "Factual Background" portion of Employer's Brief that:

> The Employer/Insurer contend that the Administrative Law Judge was correct in his findings that a credit was owed to them for temporary total disability benefits paid to the Claimant for the period January 1, 2014 to March 30, 2014, which amounted to $3,514.69.

Employer's Brief at 5.

In the opening section of the "Findings of Fact", the ALJ recited that among the stipulations of the parties is "Claimant's average weekly wage for the purposes of this claim is $417.84. Employer voluntarily paid temporary total disability benefits from July 29, 2010 to March 30, 2014". CO at 2. Also among the findings is the fact that Claimant returned to work as a Dedicated Aide on March 31, 2014. CO at 7.

Claimant does not argue that as a matter of law, an employer who has overpaid benefits while a dispute is pending or for a period of time that is later determined to contain overpayments is entitled to a credit for any such overpayment. We point out that the JPHS stipulation cited is "record evidence" for the purposes of the fact-finding undertaken by the ALJ. However, the facts do not establish any entitlement to a credit, because there does not appear to be any dispute that Claimant was totally disabled until she returned to work. The basis of the credit award is nowhere explained in the CO, nor is it justified or defended in Employer's Brief.[5]

Accordingly, the credit award is not supported by substantial evidence and is vacated.

CONCLUSION AND ORDER

The award contained in the Compensation Order of July 11, 2016 is affirmed in part, reversed in part, and vacated and remanded in part.

The portion of the award holding that "Claimant's claim for relief is hereby **Granted in part**. Employer shall pay Claimant a wage differential of $13,322.33 for 2014 [...] and $8,429.33 for 2015" is supported by substantial evidence, is in accordance with the law and is AFFIRMED.

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[5] We could speculate that the credit was in some way related to manner in which the ALJ calculated the benefits paid in 2014 to compare to the wages earned in arriving at a wage differential, but, as stated, this would be mere speculation on our part. And we reiterate that no one has raised any issue in this appeal concerning how the ALJ calculated the wage differential.

The portion of the award which reads "subject to a credit for benefits paid from January 1, 2014 to March 30, 2014" is not supported by substantial evidence, is VACATED and REVERSED.

The portion of the award holding that "For successive years, Claimant shall provide Employer with the appropriate wage earnings to facilitate the issuance of a wage differential" is not in accordance with the law and is VACATED.

The matter is REMANDED to the Administrative Hearings Division with instructions to issue an amended award requiring that Employer make biweekly payments of compensation in a timely manner commencing January 1, 2016 based upon the difference between Claimant's earnings during the biweekly period and Claimant's pre-injury average weekly wage, said payments being deemed timely if made within the statutory and regulatory time frames, in a manner consistent with the Act and regulations, and consistent with the aforegoing discussion.

So ordered.