GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR

LISA MARÍA MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 13-072

MENSA S. PRESCOTT,
Claimant-Petitioner,

v.

FRIENDSHIP PUBLIC CHARTER SCHOOL, and
CHARTIS INSURANCE
Employer/Insurer-Respondents.

Appeal from a May 16, 2013 Compensation Order By
Administrative Law Judge Gerald Roberson
AHD No. 13-162, OWC No. 684106

Krista N. DeSmyter, Esquire, for the Claimant
Jennifer L. Ward, Esquire for the Employer

Before HEATHER C. LESLIE, JEFFREY P. RUSSELL, *Administrative Appeals Judges,* and LAWRENCE D. TARR, *Chief Administrative Appeals Judge*.

HEATHER C. LESLIE for the Compensation Review Board.

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 May 16, 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 leg and right arm. The CO also concluded that the Claimant's average weekly wage at the time of the injury was $895.13. We VACATE, in part and AFFIRM, in part.

BACKGROUND AND FACTS OF RECORD

The Claimant was employed by the Employer as a lead teacher and a soccer coach when on September 14, 2011 an altercation between students occurred in her classroom. The Claimant was caught between several desks and tables when two students were fighting. The Claimant felt back pain almost immediately.

Prior to the work injury, the Claimant did suffer from a prior injury to her neck and back as a result of a motor vehicle accident (MVA) in March of 2010. The Claimant sought treatment from the physicians at Phillips and Green. The Claimant underwent physical therapy and injections for her injuries stemming from the MVA and was prescribed medications. The Claimant was discharged from care for the MVA injury on September 2, 2011.

After the work injury, the Claimant again came under the care and treatment of the physicians at Phillips and Green. The Claimant was diagnosed with an acute cervical strain, an acute lumbosacral strain, and posttraumatic headaches. The Claimant, in subsequent visits, began to complain of discomfort and pain in her right arm and right leg. After undergoing conservative treatment, the Claimant was released to work full duty on December 20, 2011.

On September 12, 2012, Dr. Jeffrey Phillips examined the Claimant. After performing a physical examination and reviewing the results of objective tests, Dr. Phillips opined the Claimant suffered from a 16% permanent partial impairment of the right upper extremity and a 7% permanent partial impairment to the right lower extremity.

The Employer sent the Claimant for an independent medical evaluation (IME) with Dr. Louis Levitt on two occasions, November 8, 2011 and November 13, 2012. On November 13, 2012, Dr. Levitt performed a physical examination and reviewed medical records. Dr. Levitt opined the Claimant did not suffer from any residuals as a result of her work injury and indicated she did not suffer from any impairment to her upper and lower extremities.

A full evidentiary hearing occurred on April 8, 2013. The Claimant sought an award of 16% permanent partial impairment of the right upper extremity and 7% permanent partial impairment to the right lower extremity. The issues raised were whether or not the Claimant's current conditions were medically causally related to the work accident, the nature and extent of the Claimant's disability, and the Claimant's average weekly wage (AWW). A CO was issued on May 16, 2013 which granted the Claimant's claim for relief, in part, finding the Claimant was entitled to an award of 4% permanent partial disability for the right upper extremity and 3% for the right lower extremity as a result of the work accident. The CO also concluded the Claimant's average weekly wage was $895.13.

The Claimant timely appealed. The Claimant argues the ALJ erred in calculating her AWW as her wages were fixed by the year, pursuant to D.C. Code § 32-1511(a)(3). Further, the Claimant argues the ALJ erred as a matter of law by failing to apply the treating physician preference and by substituting his own medical opinion when determining to what degree of permanent impairment the Claimant was entitled.

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 erred in calculating the AWW. Specifically, the Claimant argues the ALJ erred in failing to apply 32-1511(a)(3) because the Claimant's wages were fixed by the year. The Employer counters asserting that the Claimant did not provide any reliable evidence that her salary was fixed for the 2011-2012 school year and that her testimony on this point was inherently reliable.

As the ALJ acknowledged, D.C. Code § 32-1511(a)(3) states,

> If at the time of the injury the wages are fixed by the year, the average weekly wage shall be the yearly wage so fixed divided by 52;

On this point, the ALJ stated,

> At this time, Claimant has not provided a contract covering the year for 2011, and she has not offered any other records to substantiate her annual income for the year 2011. At the hearing, Claimant testified she was paid a salary on a yearly basis at the time of the September 14, 2011 incident. HT p. 25. Claimant testified she had a yearly contract of $ 37,000.00 when she started with Employer, and it moved up to $ 55-57,000.00 for the 2011-2012 school year. HT p. 26. Given the fact Claimant has not provided her annual contract for the year in question, the Office cannot make a determination consistent with § 32-1511(3). The record contains the wage statement for the 26 week period preceding the work injury. For the period of March 11, 2011 to September 2, 2011, Claimant earned $ 23,273.28. Therefore, Claimant has established total earnings of $ 23,273.28 for the 26 week period of March 11, 2011 to September 2, 2011, and when dividing $ 23,273.28 by 26 weeks, Claimant has an average weekly wage of $ 895.13. Claimant's argument that the weekly amount should be $ 1,047.12 does not appear to be factually correct because the wage statement indicates she earned $ 1,047.12 for only four weeks prior to the work incident. While Claimant has submitted a second wage statement, which includes an allowance of $ 623.60 per week, this document has not been signed. CE 5, p. 32. During the hearing, Claimant did not offer any testimony regarding any allowance in addition to her wages. Therefore, no such allowance will be included in the calculation of her average weekly wage.

CO at 14.

We cannot agree with the ALJ's assertion that the Claimant failed to offer any records to substantiate her annual income. A review of the evidence shows the Claimant submitted her 2010-2011 school year contract, showing that she was paid on a yearly basis. The Claimant also submitted a wage statement showing that her salary increased on August 1, 2011. Claimant's exhibit 5 at 31-32. The wage statement shows that from March 11, 2011 through August 11, 2011, she was paid $908.80 weekly. Thereafter, reflecting her wage increase, the Claimant was paid $1,047.12. The Claimant testified that her contract was on a yearly basis, with the rate of pay increasing from a starting salary of $37,000 approximately six years ago to $55,000-$57,000 in annual salary for the 2011-2012 school year. Hearing transcript at 26.

The Employer argues that the Claimant's testimony regarding her salary for the 2011-2012 was equivocal and inherently unreliable as she could not testify to a set salary but rather a range. We reject this argument. The evidence submitted is consistent with the Claimant's testimony that she was paid pursuant to an annual contract that was renewed each year. Consistent with the wage statement submitted, the Claimant's annual salary increased at the start of the new school year, from a weekly salary of $908.80 to $1,047.12. While it would have been preferable for the Claimant to state exactly what her annual salary was with more specificity, it is clear based upon the documents submitted that the Claimant's annual salary was $54,450.24. Thus, as of the date of the injury, September 14, 2011, the Claimant's weekly salary was $1,047.12.

As the District of Columbia Court of Appeals has stated in *UPS v. DOES*, 834 A.2d 868, 872 (D.C. 2003),

> Workers' compensation is to be so calculated as to produce an honest approximation of claimant's probable future earning capacity. The average weekly wage is intended to provide a fair and reasonable estimate of what the employee in question would have been able to earn in the labor market in the absence of a work-injury.

We cannot agree with the ALJ's conclusion that the Claimant's AWW is $895.13 as it is not supported by the substantial evidence in the record. Indeed, this number is lower than any number on the wage statements submitted by either the Claimant or the Employer. Thus, based upon the statute and in line with the DCCA's rationale enunciated in *UPS, supra*, the Claimant's wages on the date of the injury was fixed by the year.[1] The Claimant's annual salary for the 2011-2012 school year was $54,450.24 when the accident occurred on September 14, 2011. Divided by 52, the Claimant's AWW is $1,047.12, which best represents the Claimant's future earning capacity.

The Claimant's next argument is that the CO erred by not applying the treating physician preference and substituting its own medical opinion in lieu of the treating physician's opinion regarding the impairment rating. The Employer argues the ALJ's conclusion that the Claimant suffered a 4% permanent partial disability to the right upper extremity and a 3% permanent partial disability to the right lower extremity is well reasoned and supported by the substantial evidence in the record. We agree with the Employer.

As we have recently stated,

[1] See Claimant's exhibit 5, the Employee's contract, page 37. "The base salary of the Employee will be paid in equal installments over the course of the year…"

> It would be proper for the ALJ to make a determination as to the degree of medical impairment as one step in analyzing the extent of the claimant's disability. However, it is incumbent upon the ALJ to consider whether the record contains sufficient specific, non-speculative evidence upon which to assess whether the impairment sustained is such that the medical impairment overstates, understates, or fairly represents the effect of the impairment on future earnings.

Nickens v. Ft. Myer Construction Company, CRB No. 13-057, AHD No. 12-455 (August 6, 2013).

A review of the CO reveals the ALJ first began his analysis by acknowledging the treating physician preference. CO at 10-11. After reciting this preference, the ALJ then outlined several reasons why he found the opinion of Dr. Phillips to be lacking. CO at 12-13. The ALJ noted that Dr. Phillips failed to provide any rationale to support his impairment rating including any objective testing as well as discrepancies between Dr. Phillip's rating and the normal findings of Dr. Green and Dr. Slater regarding the right upper extremity. Regarding the right lower extremity, the ALJ noted the Claimant's MRI was normal for the back and that Dr. Phillips had failed to explain in light of this normal finding, how the back strain caused radiating pain and numbness into the right lower extremity. While not explicitly stated, the ALJ gave several reasons why he found the medical impairment rating by Dr. Phillips not persuasive and lacking in reliability.

Thus, pursuant to our rationale in *Nickens*, the ALJ noted the normal MRI findings as well as the normal physical findings as found by other physicians in the same practice, notably Dr. Green and Dr. Slater,[2] as reasons to find the medical impairment rating to not be supported by the evidence in the record. Such specific, non-speculative findings such as objective testing results, supported by the record evidence, and are not only reasons to reduce the medical impairment rating of Dr. Phillip's, but also reasons to decline to extend the treating physician preference to him.

The ALJ then went on to determine if any disability was warranted under the five factors outlined in D.C. Code § 32-1508(3)(A)-(U-i). The ALJ concluded,

> Regarding the five factors under D.C. Official Code § 32-1508(3)(A)-(U-i), Dr. Phillips provided an additional impairment rating of 4% for the right upper extremity for loss of function and loss of endurance based on the subjective five factors. CE 1, p. 2. Conversely, Dr. Levitt found Claimant did not sustain an impairment based on the five factors of pain, weakness atrophy, loss of function and loss of endurance. EE 1, p. 2. At the hearing, Claimant testified she continued to experience symptoms in her arm when therapy ended in December 2011. Claimant testified she has difficulty performing a number of duties as a server at the diner where she works, including running the food, clearing tables and holding plates. HT pp. 42-43. Claimant explained she cannot do her hair because of her right arm or wash out the tub. HT p. 45. Claimant reported her subjective complaints to Dr. Phillips on September 12, 2012 indicating she had pain radiating down the right arm into the thumb and index finger. CE 1, p. 1. Based on the medical evidence and the testimony, Claimant has established an

[2] As Dr. Salter stated on December 19, 2011, "there are no significant objective findings or MRI findings." Claimant's exhibit 2 at 4.

> entitlement to an impairment rating of 4% for loss of function and loss of endurance for a total impairment rating of 4% for the right upper extremity due to the injury of September 14, 2011.
>
> With respect to the right lower extremity, Dr. Phillips found Claimant sustained an impairment of 3% for loss of function and loss of endurance. CE 1, p. 2. Dr. Levitt, however, found Claimant did not sustain an impairment rating for the right lower extremity based on the five factors of pain, weakness atrophy, loss of function and loss of endurance. EE 1, p. 2. At the hearing, Claimant recalled she could walk 4-6 miles a day prior to the work incident. HT p. 31. Claimant testified she cannot kick the soccer ball or jog because she has pain in the right hip and leg, and numbness in the leg. HT p. 36. Claimant stated she experienced these right leg symptoms 5-7 times a day. HT p. 39. Claimant testified she gets shooting pain from her lower back to her buttock down her entire leg. HT p. 45. On September 12, 2012, Dr. Phillips documented Claimant's subjective complaints, indicating she had some radiating pain and numbness into the right great toe. CE 1, p. 1. Based on the medical evidence and the testimony, Claimant has established an entitlement to an impairment rating of 3% for loss of function and loss of endurance for a total impairment rating of 3% for the right lower extremity due to the injury of September 14, 2011.

CO at 13-14.

It is clear that although the ALJ did not accord Dr. Phillips the treating physician preference, he did utilize Dr. Phillips opinion when determining if the Claimant is entitled to any disability award. The ALJ did not, as the Claimant asserts, substitute his own medical opinion in lieu of Dr. Phillips. As we have said, "the schedule in the statute impliedly permits the use of the degree of medical impairment as a baseline for the extent of disability." *Nickens, supra*. Such is the case here, where the ALJ used as a baseline, Dr. Phillips opinion on the Claimants loss of function and loss of endurance when awarding 3% to the right lower extremity and 4% to the right upper extremity. We affirm the award.

We find 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. The ALJ, while finding that Dr. Phillips medical impairment rating overstated the Claimant's disability, did ultimately rely upon Dr. Phillips analysis of the Claimant's loss of endurance and loss of function when awarding 3% permanent partial disability to the right lower extremity and 4% permanent partial disability to the right upper extremity.[3]

Ultimately, what the Claimant is asking us to do is to reweigh the evidence in her favor finding a higher disability then the ALJ, a task we cannot do. As we stated above, 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, supra.*

[3] We should note that the Claimant did not argue at the Formal Hearing, nor argues in front of us, that she suffers wage loss as a result of her right upper and lower extremity disability. Instead, the Claimant relies solely on the medical evidence presented to substantiate her disability.

CONCLUSION AND ORDER

The findings of fact and conclusions of law contained in the May 16, 2013 Compensation Order are AFFIRMED in PART and VACATED in part.

Pursuant to D.C. Code § 32-1521.01(d)(2)(B), the CRB hereby amends the Compensation Order to reflect an average weekly wage of $1,047.12.

We affirm all other aspects of the Compensation Order on Remand as being supported by the substantial evidence in the record and in accordance with the law.

FOR THE COMPENSATION REVIEW BOARD:

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HEATHER C. LESLIE
Administrative Appeals Judge

August 22, 2013
DATE