GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR

LISA MARÍA MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 12-129

CALVIN SMALLS,
Claimant–Petitioner,

v.

DISTRICT OF COLUMBIA WATER AND SEWER AUTHORITY,
Employer-Respondent.

Appeal from a July 6, 2012 Compensation Order of
Administrative Law Judge David L. Boddie
AHD No. 11-210, OWC No. 663192

David J. Kapson, Esquire, for the Petitioner
Douglas A, Datt, Esquire, for the Respondent

Before JEFFREY P. RUSSELL and HENRY W. MCCOY, *Administrative Appeals Judges*, and LAWRENCE D. TARR, *Chief Administrative Appeals Judge*.

JEFFREY P. RUSSELL, for the Compensation Review Panel:

DECISION AND REMAND ORDER

BACKGROUND

Calvin Smalls worked for D.C. Water and Sewer Authority (D.C. WASA) as an industrial mechanic, a job requiring heavy lifting, bending, ascending and descending ladders, and operating heavy equipment. Mr. Smalls injured his back in 2006, received a schedule award for loss of industrial use of his left leg, and returned to his pre-injury job. He sustained a second injury to his back in September 2009, obtained additional treatment, and by September 2010, he had again returned to his regular duties without restrictions.

Mr. Smalls sought an additional award under the schedule to the left leg, plus an award for schedule disability to the right leg. He based his claim upon the medical impairment rating of his treating physician, Dr. Joel Fechter, to the effect that Mr. Smalls lower extremities were both 20% permanently partially impaired.

D.C. WASA opposed the claim, and arranged to have Mr. Smalls evaluated by Dr. Mark Rosenthal for the purpose of an independent medical evaluation (IME). After several missed appointments,

Mr. Small was eventually examined by Dr. Rosenthal, who opined that Mr. Smalls had sustained a 7.5% impairment to each leg.

The matter was presented to an Administrative Law Judge (ALJ) in the Department of Employment Services (DOES) for resolution. Following the hearing, the ALJ issued a Compensation Order on July 6, 2012, in which he awarded 0% to the left leg and 5% to the right leg, under the schedule. The ALJ also awarded D.C. WASA $610.00 as costs for reimbursement of charges incurred by D.C. WASA in connection with the missed IME appointments.

Mr. Smalls appealed.

We affirm the 0% award to the left leg, and vacate the award to the right leg and the award of costs for the missed IME appointments. We remand the matter for further consideration of those claims.

STANDARD OF REVIEW

The scope of review by the CRB, as established by the Act and as contained in the governing regulations, is generally 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. *See*, D.C. Workers' Compensation Act of 1979, as amended, D.C. Code § 32-1501, *et seq.*, at § 32-1521.01 (d)(2)(A), (the Act), and *Marriott International v. DOES*, 834 A.2d 882 (D.C. 2003). Consistent with this standard of review, the CRB and this review panel must affirm 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 this panel might have reached a contrary conclusion. *Id.*, at 885.

DISCUSSION AND ANALYSIS

Regarding the schedule awards, the ALJ made initial findings relating to the degree of medical impairment to each leg. He considered the opinions of the treating physician, Dr. Fechter, as well as the opinions of the IME physician, Dr. Rosenthal. The ALJ acknowledged the existence of the "treating physician" doctrine, in which a claimant's treating physician's opinion is accorded an initial preference over IME opinion, and which requires that an ALJ give specific and persuasive reasons for accepting IME opinion over that of a treating physician. *Stewart v. DOES*, 606 A.2d 1350 (D.C. 1992); *Canlas v. DOES*, 723 A.2d 1210 (D.C. 1999); *Lincoln Hockey, LLC v. DOES*, 831 A.2d 913 (D.C. 2003).

The ALJ accepted the IME's medical impairment rating of 7.5%[1] for each leg.

In doing so, the ALJ explained that, with respect to the left leg, he rejected Dr. Fechter's opinion and impairment rating for numerous reasons, including the fact that Dr. Fechther's current rating

[1] The Compensation Order contains what we accept is a typographical error where, on page 11, it is written that the impairment sustained was ".75 permanent partial impairment to the left and right lower extremities as a result of the September 4, 2009 work injury." The medical impairment ratings given by the IME physician, which the ALJ accepted, was 7.5%.

report, while acknowledging that Mr. Smalls had sustained a prior injury to that leg, the prior leg injury had completely resolved prior to the new injury at issue in this case. The ALJ found this to be inconsistent with the fact that in the prior claim, Dr. Fechter had opined that Mr. Smalls had sustained a 20% permanent partial impairment to the left leg. Further, the ALJ stated that he found the current impairment rating to be inconsistent with the fact that the treatment notes and reports from this injury contained no specific complaints relative to the legs. The ALJ also noted that, on cross examination, Mr. Smalls admitted he made the same complaints following the prior injury that he now makes concerning this injury. The ALJ also noted that he found Mr. Smalls's testimony to lack credibility concerning the degree to which the injury has affected his functional capacity, giving credence to the testimony of a co-worker that Mr. Smalls displays no limitations in his work capacity.

The ALJ therefore concluded that the instant injury has left Mr. Smalls with no greater functional limitations than he had sustained in the prior injury, stating that "the symptoms and complaints the Claimant testified of experiencing affecting his left lower extremity are indistinguishable from those he testified regarding related [sic] to his left lower extremity following his April 2006 work injury." CO. page 11. He thus awarded no disability to the left leg.

We discern no error. Mr. Smalls's complaints on appeal concerning the left leg amount to nothing more than an erroneous assertion that the ALJ failed to give sufficient reasons for rejecting the treating physician's opinion and failed to accord Mr. Smalls's testimony adequate deference. The ALJ's findings of fact concerning the lack of any difference in the functionality of Mr. Smalls's left leg following this accident as opposed to the functionality of the leg following his prior award is supported by substantial evidence, and the denial of any disability is in accordance with the law.

Regarding the right leg, the same analysis applies *vis a vis* the ALJ's evidentiary assessment: he accepted the IME over the treating physician's opinion as it concerns the degree of medical impairment (7.5%[2]), and did so for the same reasons as with the left leg. Again, we find no error in this.

The ALJ did then proceed to make a disability award of 5% to the right leg. While it may seem incongruous that the ALJ made an award to the right leg but not the left, this incongruity is resolved when one recognizes that there was no prior award or other evidence of any pre-existing right leg impairment. Thus, while the ALJ found that the 7.5% left leg impairment did not worsen Mr. Smalls's left leg disability, he found that the 7.5% right leg impairment resulted in a new, additional disability where none had existed previously.

In assessing the degree of that disability, the ALJ properly commenced with a finding regarding the medical impairment. Having determined that there is a 7.5% medical impairment, the ALJ considered the current industrial effect of that impairment, and determined that Mr. Smalls's has presented no specific evidence of any likely future impact upon earnings resultant from that impairment. Accordingly, he assessed a figure somewhat lower (reduced by a third) than the medical impairment rating.

[2] Compensation Order, page 9; EE 1.

We are cognizant of the concerns raised by the District of Columbia Court of Appeals (DCCA) in *Jones v. DOES*, 41 A.3d 1219 (D.C. 2012), in which the court reversed our affirmance of an ALJ's numerical disability award without the ALJ explaining the arithmetic behind the number. That case differs from the one before us, in that in *Jones*, the evidence appears to have established to the DCCA's satisfaction that the medical impairment had led to a definite, quantifiable percentage of lost wage earning capacity, by rendering Ms. Jones incapable of performing the duties of her job as an arena usher. In this case, under *Jones*, the lack of any specific identifiable lost wage earning capacity could arguably have compelled the ALJ to have awarded a 0% disability, because in the absence of an evidentiary based future wage loss finding, the existence of a medical impairment alone is insufficient to support a finding of disability. However, the court did not alter the principle that, actual, currently demonstrable lost wages are but one factor to be considered, and are not a *sine qua non* for an award under the schedule.

The court felt that the ALJ's increase of the impairment rating to a higher figure for disability was inadequately explained, in other words, it was arbitrary. Unfortunately for us and the ALJ, though, the court gave no guidance as to how a non-arbitrary figure could have been ascertained.

We do not believe that the legislature intended the schedule award scheme created under the Act to operate in a fashion that requires a demonstrated, actual and current wage loss in order to allow an award under the schedule, and while prior to *Jones* we would find no fault in the level of discretion exercised by the ALJ, the court now mandates an explanation for how a number is assigned. We can not discern from the Compensation Order how the ALJ decided to award 5%, rather than 0%, or 7.5%, or some other percentage. Therefore, we must reluctantly remand the matter for further consideration of the claim, and an explanation for how the disability figure was calculated.

Finally, with regard to the ALJ's award of costs reimbursing D.C. WASA for Mr. Smalls's failure to attend two scheduled IMEs, we agree that the statute contains a penalty for failing to attend an IME, being suspension of benefits, and does not specifically authorize an award of costs as an additional or alternate sanction. Further, the ALJ cites no legal authority or rationale under which such an award is permissible.

We can not tell whether the ALJ made the award on the mistaken assumption that the Act specifically authorized or compelled it, or based upon principles of equity, or was invoking the provisions of 7 DCMR § 221.4, which permits the ALJ to "use the Rules of Civil Procedure of the Superior Court of the District of Columbia as guidelines" where a matter "is not specifically addressed" under the Act.

Therefore, we vacate the award of costs and direct that on remand the ALJ further consider the request, and identify the legal basis for either granting or denying the claimed costs.

CONCLUSION AND ORDER

The denial of an award to the left leg is supported by substantial evidence and is in accordance with the Act. The award of 5% permanent partial disability under the schedule to the right leg is not explained, and in the absence of such an explanation, is not in accordance with *Jones v. DOES*, and is vacated. Further, the ALJ identifies no legal basis upon which the award of costs was made, and it is vacated. The matter is remanded for further consideration of the claim for a schedule award to the right leg and the request for an award of costs for missed IME appointments, in a manner consistent with the aforegoing.

FOR THE COMPENSATION REVIEW BOARD:

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JEFFREY P. RUSSELL
Administrative Appeals Judge

_May 24, 2013_____
DATE