

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 16-044

**SOLOMON ABEBE,
Claimant–Petitioner,**

v.

**US SECURITY ASSOCIATES HOLDINGS
and LIBERTY MUTUAL INSURANCE COMPANY,
Employer and Insurer–Respondents.**

Appeal from a Compensation Order issued March 3, 2016
by Administrative Law Judge Gregory P. Lambert
AHD No. 14-169B, OWC No. 7020579

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2016 AUG 1 PM 12 07

(Decided August 1, 2016)

Lauren E. Pisano for Claimant
Christopher R. Costabile for Employer

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

LINDA F. JORY for the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

As a security guard for Employer, Claimant was assigned to work in a CVS store. He had various duties including watching for shoplifters. On February 27, 2013, while patrolling the CVS, Claimant approached a group of four boys and two girls he thought were attempting to shoplift. In response, the group attacked him, kicking and punching him leaving him unconscious on the floor. Claimant sustained injuries to his head, face, neck and back. He initially went to Providence Hospital for treatment. Eventually he was treated by orthopedic surgeon, Dr. Christopher Magee. Dr. Magee diagnosed Claimant with post-traumatic calcific bursitis of the right shoulder, lumbosacral strain, contusion of both knees and right ankle sprain.

After an MRI of the right shoulder, Dr. Magee performed arthroscopic surgery to excise and debride a torn labral of the right shoulder on September 3, 2013. An MRI was eventually performed of Claimant's right knee which ruled out any tears.

Claimant has not returned to work.

On March 25, 2015, Claimant underwent an independent medical evaluation (IME) with Dr. Harvey Mininberg at Claimant's request. Dr. Mininberg took a history of Claimant's injury and treatment, and performed a physical examination. Dr. Mininberg opined that Claimant suffered from a 36% permanent partial impairment to the right upper extremity and 32% permanent partial impairment to the right lower extremity as a result of the work injury.

At Employer's request, Claimant was examined by Dr. Robert A. Smith on February 20, 2014 and June 9, 2015. Dr. Smith rendered an opinion that Claimant suffered from an 8% permanent partial impairment to his right shoulder, of which 4% was pre-existing and 4% related to the work injury. Dr. Smith found Claimant had 0% impairment with respect to his right knee.

A full evidentiary hearing occurred on November 10, 2015. Claimant sought an award of permanent partial disability in the amount of 36% to his right upper extremity and 32% to his right lower extremity. The sole issue presented for adjudication was the nature and extent of Claimant's disability. At the conclusion of the hearing, the Administrative Law Judge (ALJ) requested that the parties submit the relevant portions of the AMA guides relied on by the IME physicians.

In an addendum dated November 16, 2015, Dr. Mininberg indicated that he relied on figure 38 and figure 44 of the 4th Edition of the AMA guidelines for the right shoulder rating and table 37 and 62 for the right knee.

In an addendum dated January 20, 2016, Dr. Mininberg explained that his rating equates to 6% of the right shoulder based on the American Medical Association's Guides to the Evaluation of Permanent Impairment (AMA Guides) and 30% is due to the Maryland five factors of pain, weakness, atrophy, loss of endurance and/or loss of function, 5% for each of the factors.

Dr. Smith submitted a copy of Table 15-5 entitled Shoulder Regional Grid Upper Extremity Impairments in an email which was submitted by Employer as an addendum on December 2, 2015.

A Compensation Order (CO) issued on March 3, 2016 which awarded Claimant an 8% permanent partial disability award to the right upper extremity and no award for the right lower extremity.

Claimant timely appealed. Claimant argues the award is not supported by the substantial evidence in the record. Specifically, Claimant argues that the ALJ's determination that Claimant's current right knee condition deserves a 0% PPD determination is factually and legally inaccurate.

Employer opposes the appeal, arguing the CO is supported by the substantial evidence in the record and in accordance with the law.

ANALYSIS¹

Claimant does not challenge the ALJ's conclusion that Claimant is entitled to an 8% permanent partial disability (PPD) award to the right upper extremity. Claimant requests review only of the ALJ's determination that Claimant did not prove by a preponderance of the evidence that he is entitled to a permanent partial disability award for his right lower extremity.

Claimant points us to various alleged errors he believes the ALJ committed in rendering his decision that Claimant was not entitled to any PPD award for the right knee injury, the most substantive in the Panel's view is:

. . . [T]he evidence may support an impairment rating for the right knee, but "none of this translates into a specific percentage of disability that can be quantified and support [sic] in the way directed by *Bowles or Jones*." (Compensation Order at 5) . . . Contrary to Judge Lambert's interpretation, *Bowles* in no way prevents the ALJ from assigning a percentage where substantial evidence supports it, but rather only directs ALJs to rationally articulate the reasons for their percentage determinations. In reading the *Bowles* opinion, there is no mandate that the ALJ must only rely on percentages in the record. The ALJ must rely on the evidence in the record as a whole before carefully deducing a percentage impairment justified by that evidence.

Claimant's brief at 10.

With regard to his interpretation of the District of Columbia Court of Appeals (DCCA) opinion in *Bowles v. DOES*, 121 A.3d 1264 (D.C. 2015), the ALJ stated:

The Court of Appeals recently reinforced the need for ALJs of this Agency to make findings of fact and conclusions of law that can be reviewed for substantial evidence. *Bowles*, 121 A. 3d 1264. In *Bowles* the Court discussed medical impairment ratings and stressed the need for an ALJ to justify the specific percentages of disability that he or she found. *Id.* The Court observed that no set or subset of impairment percentages in the evidentiary record, which came from physician reports, added to the disability rating ultimately reached by the ALJ. *Id.*

¹ The scope of review by the Compensation Review Board (CRB) 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.*, (the Act) at § 32-1521.01 (d)(2)(A), 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.

at 1269-70 (“how the ALJ reached this conclusion of [10% disability] is a mystery; this court cannot discern which values were assigned to each factor that add up to 10%.”); *see also Jones v. DOES*, 41 A.3d 1219, 1226 (D.C. 2012) (“How the ALJ determined that the disability award should be 7% -- and not, for example, 1 %, 10% or 30% -- is a complete mystery, however.”)

One interpretation of *Bowles* might lead to the conclusion that an impairment rating from a physician – who is often a professional expert hired for purposes of litigation – is mandatory before an ALJ may make an award of partial disability. Under that standard, Mr. Abebe’s subjective complaints do not form the basis for an award: his IME physician, Dr. Mininberg, prepared an unreliable and rejected IME report; and Employer’s IME report, although reliable, attributes nothing to Mr. Abebe’s subjective difficulties. CE 1. That interpretation of *Bowles* arguably transfers the ability to determine the extent of a disability from an ALJ to experts-for-hire.

That cannot be the case; disability is an economic, not medical, concept. *See generally Negussie v. DOES*, 915 A.2d 391, 397 (D.C. 2007). *Jones*, a case relied upon by the Court in *Bowles*, agrees that disability involves a “complex of factors” which accounts for physical impairment, potential for wage loss, and the application of judgment based on logic, experience and even “prediction.” *Jones v. DOES* 41 A.3d 1219, 1224 (2012). To that end, *Bowles* does not forbid an ALJ from reaching a disability rating that is not based upon the impairment ratings of a physician so long as this Agency, through its ALJs, “show[s] its work.” *Bowles*, 121 A.3d at 1269. Unfortunately, although Mr. Abebe credibly testified about his subjective complaints, including pain, the evidentiary record provides no basis for a specific percentage of disability based upon those subjective complaints. *E.g.*, HT at 44. Reaching a percentage rating without some measurable basis would only lead to unsupportable conjecture under *Bowles* and *Jones*.

CO at 4, 5.

The ALJ added in a footnote:

Were I not so constrained, the evidence might have led to a different result. For example, Mr. Abebe could work two jobs, stand for an eight hour shift, run several times a week, and cycled on the weekends before he was assaulted. Now, even after receiving treatment for an attack that was so fierce he lost consciousness, Mr. Abebe clearly and credibly testified that he was “struggling” with pain. HT at 21-22, 27:12-13; *see also* HT at 32 *et seq.* The prescription brace that Mr. Abebe wears during cold weather only provides limited relief. HT at 27-28. His complaints of pain to his shoulder and knee have been consistent. *See* CE 5. His extensive recovery period has included significant treatment, MRIs and a surgical procedure. *See* CE 2; CE 3; CE 4; CE 5; CE 6; CE 7. He credibly testified that he can no longer stand for eight hour shifts. HT at 32, 38 (about twenty minutes at best). His ability to lift his right arm is significantly limited.

HT at 35-36. Elaborating upon his inability to ride a bicycle, Mr. Abebe stated that he “cannot even press the pedal of the cycle” because of the pain HT at 44. None of this translates into a specific percentage of disability that can be quantified and supported in the way directed by *Bowles* or *Jones*.

Id.

Relying on this footnote, Claimant asserts:

As argued in III.A above, Mr. Abebe did successfully present credible and substantial evidence of right knee impairment. Judge Lambert even appears to concede this in Footnote 3. However, because of a misreading of the *Bowles* Opinion, Judge Lambert declined to give a percentage rating after he threw out Dr. Mininberg’s ratings. Mr. Abebe does not contend that Judge Lambert had the discretion to ignore those ratings, only that it did not preclude him from assigning his own rating based on a rational and articulated explanation of the evidence that support it. Consequently, a review of the Compensation Order dated March 3, 2016 is necessary in order to clarify the true meaning of the *Bowles* opinion for the Department

Claimant’s Brief at 10, 11.

Subsequent to *Bowles* and *Jones*, the DCCA issued *M.C. Dean, Inc. v. DOES (Anthony Lawson Intervenor)*, DCCA No. 14-AA-1141 (Slip Op. July 7, 2016)(Lawson) which we cited and applied in *Mann v. Knight Networking & Web Design*, CRB No. 16-001 (July 26, 2016):

We also note that the ALJ’s consideration of any non-occupational limitations is now deemed irrelevant to consideration of the degree of disability under the schedule unless the ALJ can show a “nexus” between the non-occupational limitations and specific requirements of the pre-injury job. Under the very recent case of *M.C. Dean Inc., v. DOES and Anthony Lawson, Intervenor*, DCCA No. 14-AA-1141 (Slip Op. July 7, 2016) (*Lawson*) the District of Columbia Court of Appeals determined:

We conclude that the ALJ erred in failing to demonstrate a nexus between Mr. Lawson’s personal and social activities and his wage earning capacity, and therefore the disability award should not have been increased by non-occupational consequences of an injury. **A schedule award should not increase based on functional impairment of personal and social activities because those are beyond the economic scope of the Act.**⁹ While the CRB’s observation that personal and social activities may reflect work-related limitations is consistent with our holding, those activities are not independently compensable harms. Contrary to our concurring colleague, we conclude that consideration of personal and social activities is only consistent with the legislative

history and structure of the Act if there is a nexus to wage-earning capacity, so a remand on this issue is unnecessary.

⁹ *Smith v. District of Columbia Dep't of Emp't Servs.*, 548 A.2d 95, 100 (D.C. 1988), explains that “compensation under the Act is predicated upon the loss of wage earning capacity, or economic impairment, and not upon functional disability or physical impairment.”

Id. (bold added, footnote in original).

While the CRB had assumed that the ALJ's CO consideration of two of the “Five Factors”, specifically, loss of function and loss of endurance, would render non-occupational considerations relevant, the court determined otherwise.

Mann, *supra* at 4, 5 (footnote omitted).

Contrary to Claimant's assertion, the fact that an ALJ acknowledges that an injured worker suffers one or more of the subjective factors does not require the ALJ to assign a percentage of permanent impairment for each factor although he or she has the discretion to do so. The DCCA decision in *Lawson*, in our view, limits the ALJ's discretion further. As we further held in *Mann*:

It is clear is that a medical impairment is an appropriate baseline or starting point from which an ultimate determination of disability is to be made. It is also apparent from *Lawson* that any deviation from this baseline, if based upon the Maryland factors or otherwise, must be (1) fully explained by reference to how the amount attributed to each such factor was determined individually, and (2) can only be considered if that factor is either directly related to a claimant's job, or that there is a “nexus” between the factor being evidenced in purely personal or social settings and the physical requirements of the claimant's employment. We add that the extent of actual wage loss is also a factor that may be considered, despite AFR 2's erroneous assertion to the contrary, relying upon the no-longer applicable rule enunciated in *Corrigan v. Georgetown Univ.*, CRB No. 06-094 (September 14, 2007).

In our view, the *Lawson* case, which was decided while this appeal was pending, makes new law in the area of which of the Maryland factors (or other social or personal impairments) are properly considered in assessing disability under the schedule, by requiring an ALJ to employ only such factors if there is a demonstrable “nexus” between the factor and a claimant's earning capacity. We direct that upon further consideration of this claim, the ALJ take into account *Lawson*.

Mann, *supra* at 11, 12 (footnote omitted) quoting *Prescott v. Friendship Public Charter School*, CRB No. 13-072 (August 22, 2014) at 6.

Prior to *Lawson*, Claimant's testimony, if credited, would have had been relevant because he testified, as described in the findings of fact and footnote 3 of the CO, that he is unable to run and cycle as he did prior to the injury. Thus, while neither the ALJ nor the Panel could have predicted the Court's position in *Lawson*, the CO is nonetheless consistent with the current law with respect to PPD ratings.

CONCLUSION AND ORDER

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

So ordered.