

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA MARÍA MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 13-029

**DARRYL W. THOMAS,
Claimant–Petitioner,**

v.

**WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
Self Insured Employer-Respondent**

Appeal from a February 12, 2013 Compensation Order by
Administrative Law Judge Gerald D. Roberson
AHD No. 10-418A, OWC No. 666799

Krista N. DeSmyter, Esquire, for the Claimant/Petitioner
Sarah O. Rollman, Esquire, for Self Insured Employer/Respondent

Before: HENRY W. MCCOY and MELISSA LIN JONES, *Administrative Appeals Judges* and
Lawrence D. Tarr, Chief Administrative Appeals Judge.

HENRY W. MCCOY, *Administrative Appeals Judge*, for the Compensation Review Board.

DECISION AND ORDER

PROCEDURAL HISTORY AND FACTS OF RECORD

This appeal follows the issuance on February 12, 2013 of a Compensation Order (CO) from the Hearings and Adjudication Section in the District of Columbia Department of Employment Services (DOES). In that CO, Claimant’s request for permanent partial disability benefits was granted, but not at the level of impairment as requested.

Claimant worked as a bus operator for Employer. While operating a bus on January 5, 2010, a steel box came loose and fell onto Claimant's right knee. During the course of treatment for the right knee injury, an MRI revealed a lateral meniscus tear that was surgically repaired on May 17, 2011. Post-operatively, Claimant's treatment included home exercises and a course of physical therapy, which provided him with some relief of the pain and swelling in the right knee. While Claimant testified that he returned to full duty work on March 26, 2012,¹ the Administrative Law Judge (ALJ) found that he was released by Dr. Fechter to return to full duty on August 15, 2012.²

Claimant's treating physician, Dr. Joel D. Fechter, an orthopedic surgeon, deemed him to be at maximum medical improvement on May 16, 2012 and rendered an opinion that Claimant had a permanent partial impairment to the right lower extremity of 36%. Employer had Claimant evaluated by Dr. Mark Scheer, also an orthopedic surgeon, who assessed a 2% permanent partial impairment to the right lower extremity.

After filing a claim seeking a schedule award for a 36% permanent partial impairment to the right lower extremity, a formal hearing was held with the ALJ ultimately ruling that Claimant was entitled to an award of 10%.³ Claimant timely appealed with Employer filing in opposition.

On appeal, Claimant argues the ALJ erred in failing to apply the treating physician preference and by the ALJ substituting his own medical judgment for that of the medical experts. Employer counters that the ALJ gave the treating physician's opinion the deference as required and made an appropriate assessment of Claimant's disability. After due consideration, we affirm.

ANALYSIS

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 (CO) are based upon substantial evidence in the record, and whether the legal conclusions drawn from those facts are in accordance with applicable law.⁴ *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 CO that is supported by substantial evidence, even if there is also contained within the record under review substantial evidence to support a contrary conclusion,

¹ Hearing Transcript (HT), p. 42.

² CO, p. 6. In his August 10, 2012 treatment report, Dr. Fechter did not actually release Claimant to return to work but rather made the declarative statement: "He is going to return to work 8-15-12." This is similar to Dr. Fechter's statement on March 19, 2012: "He continues on light duty restriction 3-25-12. He is going to return to work on full duty 3-26-12."

³ *Thomas v. WMATA*, AHD No. 10-418A, OWC No 666799 (February 12, 2013).

⁴ "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).

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

Claimant asserts as the first assignment of error that the ALJ in rejecting the opinion of Dr. Fechter, the ALJ did not properly apply the treating physician preference. Claimant argues there is no basis in the record evidence to reject Dr. Fechter's opinion for being faulty or lacking in accuracy as he gave an impairment rating following an examination that was correlated to a specific table in the 5th Edition of the AMA Guidelines to Permanent Partial Disability.

Prior to making an assessment of the conflicting medical opinions rating Claimant's right lower extremity impairment, the ALJ acknowledged that under the private sector workers' compensation act there is a preference for the testimonial opinions of the treating physician over the opinions of doctors retained for litigation purposes.⁵ The ALJ noted, however, that the opinion of the non-treating physician can be found to be more persuasive provided specific reasons are given for doing so.⁶ In addition, the ALJ cited recent case law in support of the proposition that he was not bound by either physician's impairment rating but had the discretion to consider both medical and non-medical evidence in determining the nature and extent of the claimed permanent partial disability.⁷

The ALJ stated that Claimant was relying on the impairment rating from his treating physician, Dr. Fechter, to support his claim. Using the AMA Guidelines, Dr. Fechter gave Claimant a 23% impairment to the right lower extremity, which the ALJ discounted, reasoning:

Dr. Fechter referred to Table 17-8 of the AMA Guidelines 5th edition (sic) to find Claimant had a 23% impairment to the lower extremity. Table 17-8 addresses weakness for different muscle groups for the lower extremity. Dr. Fechter does not expressly state how the criteria identified in Table 17-8 apply to Claimant's condition. Therefore, no impairment rating can be assessed based on his reference to a table in the guides without any supporting medical rationale.⁸

The ALJ also discounted the 2% rating provided by Employer's IME physician, Dr. Scheer. The ALJ took issue with Dr. Scheer's use of Table 16-3, which he stated addressed impairments to the lower extremity based on the knee regional grid, for failing to explain how it applied to Claimant's condition. As to both ratings, the ALJ determined:

The specific tables identified in the impairment ratings do not offer the finder of fact a basis for assessing a medical permanent impairment.

⁵ *Stewart v. DOES*, 606 A.2d 1350 (D.C. 1992); *Canlas v. DOES*, 723 A.2d 1210 (D.C. 1999).

⁶ *Short v. DOES*, 723 A.2d 845 (D.C. 1998); *Canlas, supra*.

⁷ See *Wormack v. Fishback & Moore Electric, Inc.*, CRB No. 03-159, AHD No. 03-151, OWC No. 456205 (July 22, 2005); *Negussie v. DOES*, 913 A.2d 391 (D.C. 2007).

⁸ CO, p. 9.

Therefore, Claimant has not established a permanent impairment based on the 23% rating of Dr. Fechter or the 2% rating of Dr. Scheer.

Moving on to an assessment of how the medical evidence addressed the five factors identified in D.C. Code § 32-1508(3)(U-i), the ALJ, after giving due consideration to each doctor's assessment, made his own determinations based on the evidence:

Regarding the five factors under D.C. Official Code § 32-1508(3)(A)-(U-i), Dr. Fechter found Claimant had a 5% impairment of the lower extremity due to pain, 4% for loss of function and 4% for loss of endurance. CE 2, p. 6. Dr. Scheer found no additional impairment based on pain, weakness, atrophy, loss of function and loss of endurance. EE 1. With respect to pain, Claimant testified his knee hurts if he hits the brake too hard, and he experiences a little pain when he tries to hold the brake on a hill, but sometimes he does not experience any pain when holding the brake on a hill. HT pp. 29-30. In his assessment, Dr. Fechter noted Claimant reported increased pain when going up or down stairs, and the pain prevented him from running. Given Claimant's testimony and the documented findings of Dr. Fechter, the record establishes Claimant has a 2% impairment for the right lower extremity due to pain.

In terms of loss of function and loss of endurance, Claimant testified he has knee stiffness with prolonged sitting and he has problems going down stairs at the garage. HT pp. 31 and 34. Claimant testified he was no longer able to kneel or squat to inspect the bus or check for leaks. HT p. 36. Claimant testified he accumulates fluid on his knee, and his knee swells twice a month sometimes. HT pp. 26-27. Claimant testified he had his last examination for his commercial driver's license in October 2011, and there was nothing preventing him from operating a commercial vehicle safely. HT p. 41. Claimant also testified he passed the road test, indicating he could drive the bus safely. HT p. 43. While Claimant's testimony indicates he can perform the duties of his employment safely, the record has sufficient evidence to award an impairment rating of 2% for loss of function and 2% for loss of endurance given his difficulty with kneeling and squatting and symptoms related to right knee stiffness and swelling.

Dr. Fechter and Dr. Scheer provided evidence of atrophy with respect to the right lower extremity, but they did not offer an impairment rating based on their findings. On May 16, 2012, Dr. Fechter found 1.2cm atrophy measured of the right thigh in comparison to the contralateral side. CE 2, p. 3. On July 2, 2012, Dr. Scheer stated thigh circumference measured 53.5 cm on the right compared to 54.0 on the left, and calf circumference measured 40 cm bilaterally. As such, both physicians provided documented evidence of atrophy, thus entitling Claimant to an additional impairment of 2% for the right lower extremity. Similarly, Dr. Fechter and Dr. Scheer did not offer an impairment rating for weakness

when considering the five factors under D.C. Official Code § 32-1508(3)(A)-(U-i). Dr. Fechter documented limitations with respect to weakness in his report. Dr. Fechter stated Claimant had weakness of quad and hamstring strength testing in comparison to the contralateral side. CE 2, p. 3. Dr. Scheer found Claimant had 5/5 strength to all major muscles (sic) groups. EE 1. Claimant testified he started to get some strength back in the knee with physical therapy. HT p. 26. As such Claimant has established an impairment rating of 2% for the lower extremity due to the documented weakness for a total impairment rating of 10% for the right lower extremity due to the work incident of January 5, 2010.

In assessing the medical evidence providing conflicting medical impairment ratings of Claimant permanent partial disability to his right lower extremity, the ALJ correctly noted the preference that is due the opinion of the treating physician. The ALJ also noted that it was within his discretion to not be bound by that opinion as long as he gave specific reasons. This the ALJ has done. The fact that the ALJ carried out his assessment and disfavor with the treating physician's opinion in tandem with that of the IME physician does not negate that he executed his analysis appropriately in accordance with the law.

As for Claimant argument that the ALJ erred by substituting his own medical judgment for that of the medical experts, we find no such error. After discarding Dr. Fechter's basic impairment rating, the ALJ did likewise with those elements of the five factors that he chose to rate. In arriving at his own disability rating, the ALJ, without express acknowledgment, has carried out the most recent pronouncement from the D.C. Court of Appeals in *Jones v. DOES*.⁹ In *Jones*, the Court found fault the ALJ assigning a percentage award without explaining how she determined that percentage. Here, the ALJ has methodically cited to the record evidence to support each determination he has made. As his determinations are supported by substantial evidence in the record, we find no basis to disturb them.

CONCLUSION AND ORDER

The Compensation Order of February 12, 2013 is supported by substantial evidence and is in accordance with the law. The Compensation Order is hereby AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

HENRY W. MCCOY
Administrative Appeals Judge

August 15, 2013
DATE

⁹ *Jones v. DOES*, 41 A.3d 1219 (D.C. 2012)