GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR

DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 16-110

TIMOTHY HOEPFL,
Claimant-Petitioner,

v.

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

Appeal from a July 20, 2016 Compensation Order
by Administrative Law Judge Mark W. Bertram
AHD No. 05-512B, OWC Nos. 634406, 668065

(Decided January 6, 2017)

Mark D. Dho for Employer
Justin M. Beall for Claimant

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

GENNET PURCELL, for the Compensation Review Board.

DECISION AND ORDER

BACKGROUND AND FACTS OF RECORD

A summary of the background and facts of record to date are reiterated from the Compensation Review Board's ("CRB") April 7, 2014 Decision and Remand Order vacating the August 29, 2013 Compensation Order previously issued in this case:

> Claimant has worked for Employer as an elevator and escalator technician since 1966. His duties, as found by the ALJ, were:
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> > As an elevator/escalator technician, he is required to repair elevators and escalators when they have shut down or when entrapments occur in the elevators. In regards to the repair of escalators, Claimant must remove and install escalator steps, and install escalator handrails that can weigh 200 to 1,000 pounds. The

> installation of escalator handrails require Claimant to stretch the heavy handrail and balance on axles during such installation as there are no steps upon which to stand. His position with Employer requires climbing, standing, stooping, bending, and lifting. (TR p. 36)

CO at 2.

On November 28, 2006, Claimant twisted his left knee while walking through a gate at one of Employer's work sites. He first sought treatment from his family physician and then with Dr. John Byrne, an orthopedist.

In April 2007, Dr. Byrne surgically repaired Claimant's left knee (medial meniscectomy and ACL reconstruction) and prescribed physical therapy. While riding a recumbent bike during physical therapy, Claimant felt a strong tearing pain in his right groin area. After he returned home from physical therapy, Claimant fell while climbing the front steps and was taken by ambulance to a local hospital's emergency room.

Claimant underwent a right inguinal repair on May 25, 2007. Claimant previously had a hernia in this area for which he underwent surgery in 2005.

Claimant eventually was able to return to full duty but on February 19, 2010, he slipped and fell from a ladder, reinjuring his left knee. Dr. Byrne also treated Claimant for this injury and performed a second surgical repair to Claimant's left knee.

Employer had Claimant examined by Dr. Louis Levitt for IMEs on January 16, 2007, August 14, 2007, October 16, 2012 and January 22, 2013. Dr. Levitt's *de bene esse* deposition was part of the evidence submitted at the hearing. Employer also submitted reports from Dr. David Johnson, who examined Claimant on June 19, 2008, and Dr. Michael Greenberg, who examined Claimant on October 27, 2008 and June 19, 2009.

Claimant submitted several reports from Dr. Byrne to support his claim. Dr. Byrne reported in 2011 that as a result of the November 28, 2006 injury when Claimant twisted his left knee, Claimant had a 23% permanent partial disability to his left lower extremity. Dr. Byrne also rated Claimant as having a 15% permanent partial disability to "his lower extremity" for injury to lateral femoral cutaneous nerve, ilioinguinal nerve, and genitofemoral nerve. Dr. Byrne concluded "This equates to an additional 15% impairment to his lower extremity."

Dr. Johnson rated Claimant as having a 9% permanent impairment to his left leg caused by the 2006 injury. Dr. Johnson stated this rating was for the 2% impairment from the medial meniscus tear debridement and 7% to the ACL reconstruction.

Dr. Levitt opined that Claimant had 15% left lower extremity impairment caused by the 2006 injury that would be increased by an additional 2% resulting from the 2010 injury.

Claimant filed two claims: one for the November 28, 2006 injury and the other for the February 19, 2010 injury. Prior to the hearing, Employer moved to consolidate the two cases. Although Claimant consented to the consolidation, the ALJ denied the motion.

At the hearing, Claimant clarified that he was seeking an award for the 23% permanent partial impairment to his left lower extremity and for the 15% permanent partial impairment to his right lower extremity. Employer moved to continue the case because it did not have adequate notice that Claimant was making a claim for permanent partial disability to the right leg. The ALJ denied this motion.

In the CO, the ALJ held Employer failed to rebut the presumption with respect to both legs and concluded Claimant's current medical conditions are causally related to the 2006 work incident. The ALJ also determined Claimant had an 18% disability to his right leg and a 12% disability to his left leg. Employer timely appealed.

Hoepfl v. Washington Metropolitan Area Transit Authority, CRB No. 13-119 (April 7, 2014) at 1-3

On April 7, 2014, the Compensation Order issued in AHD No. 05-512B was remanded and vacated by the CRB with instructions that AHD reopen the record for additional evidence and to distinguish between Claimant's two distinct left leg injuries.

A full evidentiary hearing consolidating Claimant's claims for all of his lower extremity injuries occurred on April 28, 2016. Claimant sought an award of permanent partial disability ("PPD") benefits proportioned as follows: 23% to the left lower extremity and 30% to the right lower extremity arising out of the 2006 injury, and 10% to the left lower extremity arising out of the 2010 injury.

A second Compensation Order ("CO 2") was issued on July 20, 2016.[1] The CO 2 granted Claimant's claim for PPD benefits proportioned as follows: 23% for his left lower extremity and 15% for his right lower extremity. Claimant's request for an additional 10% for his left lower extremity preexisting condition was denied and Employer was granted a credit for benefit

[1] The ALJ presiding over the April 28, 2016 hearing determined that in light of the CRB's vacating of the April 7, 2014 CO, Claimant's application for a formal hearing in OWC No. 668065 and the consolidation of claims, a new compensation order would be issued in lieu of a compensation order on remand.

amounts previously paid to Claimant pursuant to the August 29, 2013 CO, in the amount of $62,683.63.[2] Claimant timely appealed the CO 2.

On appeal Claimant argues that the CO 2's finding that Claimant's was not entitled to the full 33% PPD recommended by treating physician was not supported by substantial evidence.

Employer opposed the appeal by filing Employer's Opposition in Reply to Claimant's Application for Review ("Employer's Brief").

ANALYSIS

Claimant argues that with regard to Claimant's 2006 left lower extremity, the administrative law judge ("ALJ") erred as a matter of law in declining to award Claimant the full 33% permanent partial disability rating as recommended by his treating physician, Dr. Byrne. Specifically, Claimant argues that the ALJ's decision to reduce Dr. Byrne's 33% rating by the 10% impairment he opined was attributable to chondromalacia/arthritis was contrary to this jurisdiction's aggravation rule, and contrary to the principle of non-apportionment or credit for pre-existing injuries or impairments under the Act.

Claimant principally relies upon *Safeway Store, Inc., v. DOES*, A.2d 1214 (D.C. 2002) (*Safeway*) in asserting that, as was affirmed by the District of Columbia Court of Appeals ("DCCA") on appeal of the CRB's affirmation of the ALJ's award of benefits based upon the full 80% disability in that case, even though one-third of his disability was due to an earlier injury, was consistent with the relevant provisions of the D.C. Workers' Compensation Act, D.C. Code 32-1501 to 32-1545 (" the Act"). Further, Claimant asserts that under the Act, "there is no apportionment or 'credit' for [a Claimant's] pre-existing injury." *Safeway* at 1222.

Employer asserts that Claimant's reliance on *Safeway* is misplaced since it was decided pursuant to the special fund provision of the Act, and the ALJ made a finding of fact "within trier of facts discretion addressing the issue of causal relationship." Employer's Brief at 6.

With regard to the nature and extent of Claimant's 2006 left leg injury, the ALJ concluded:

> On behalf of Claimant, Dr. Byrne authored reports supported by the referenced American Medical Association Guides to the Evaluation of Permanent Impairment. ("AMA Guides" or "guidelines"). Regarding Claimant's 2006 work place injury, Dr. Byrne assigned a 13% lower extremity impairment to Claimant's left knee. Dr. Byrne assigned an additional 10% extremity impairment for Claimant's chondromalacia/arthritis. There is however nothing in Claimant's medical records outlining whether or not the chondromalacia/arthritis is related to the work place injury or merely due to Claimant's natural age.
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> * * *
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> I find no reason not to credit Dr. Byrne with the treating physician's preference and as such I give his opinion more weight than the Employer's IME(s). I adapt

[2] The CO 2 incorrectly states the date of the CO as being August 29, 2003.

> Dr. Byrne's impairment rating. While I adopt his impairment ratings, I do not find that his additional 10% impairment rating for chondromalacia/arthritis is related to Claimant's 2006 work place accident. My finding regarding Claimant's chondromalacia/arthritis is supported by Dr. Levitt's discussion of this condition in his deposition testimony at EE 4 pp. 24-27.

CO 2 at 9.

Our reading of the CO 2 confirms that the ALJ accepted Dr. Byrne's 13% impairment rating upon crediting Dr. Byrne with the treating physician preference and upon citing support offered by the AMA Guidelines. The ALJ rejected the additional 10% impairment rating Dr. Byrne assigned for Claimant's chondromalacia/arthritis due to the absence of evidence supporting a medical causal relation between the condition and the 2006 workplace injury. Correspondingly, the ALJ then acknowledged Dr. Levitt's discussion of the preexisting condition in his deposition testimony and afforded the greater weight (with regard to the additional 10% rating only) to Dr. Levitt's rationale set forth therein.

It was not, as the Claimant asserts, an error as a matter of law for the ALJ to accord the treating physician preference in considering Claimant's claim, and to then conclude that Claimant is entitled to less than the recommended disability rating recommended by that treating physician. The DCCA has held that when determining permanent partial disability, the role of an ALJ is to weigh competing medical opinions together with other relevant evidence, and to arrive at a determination on the issue of the nature and extent of any schedule loss. In the end, this determination can result in accepting one physician's rating over another or, in reaching a different conclusion altogether because the ALJ is not bound by the opinions of the evaluating physicians. *Yousuf v. Colonial Parking*, CRB 10-006 (May 14, 2010) *citing Negussie v. DOES*, 915 A.2d 391 (D.C. 2007). Indeed this is what the ALJ has done. We find no error with his findings and conclusions on this matter.

With regard to the rule against apportionment as discussed by the CRB in *Johnson v. WMATA*, CRB No. 15-142, (February 19, 2016), Employer correctly argues:

> The CRB clarified a common misperception by explaining:
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> > The statutory provision cited by the DCCA above is now found at D.C. Code [Section] 32-1508 (6) (A). While it is often asserted and generally accepted that there is "no apportionment" under the Act, the statute actually provides that an employer is liable for the entire unapportioned disability were the work-related injury combines with a pre-existing condition resulting in a "*substantially greater* disability" than that which pre-existed (emphasis added).
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> *Id.* at 4.
>
> The CRB rejected claimant's argument that the ALJ had in fact apportioned claimant's prior impairment rating to discount the impact and consideration of claimant's overall claimed permanent partial disability. The CRB held that the ALJ in fact made consideration and weighed "credible evidence"

> including considerations of the subjective factors in reaching the conclusion of law. The CRB concluded that claimant's argument for the denial of a credit would "if once [sic] accepts its logic, the result would be a second award for the first injury previously awarded and paid." *Id.*
>
> Moreover, the CRB in *Johnson* dispels the notion that Section 32-1508 (6) (A) creates a *defacto* [sic] award for all prior impairments or injuries in a subsequent claim. The CRB also illustrates that the no-apportionment rule is abridged by the statutory requirement that the subsequent disability must combine to create a "substantially greater disability" and the trier of fact must identity "credible evidence" in support of an award.

Employer's Brief at 8-9.

We agree with Employer's assessment of our interpretation of the non-apportionment rule referenced in *Johnson*. As the legal underpinning of non-apportionment under the Act, the "aggravation rule," provides that preexisting disease or infirmity of the employee does not disqualify a claim under the 'arising out of employment requirement' if the employment aggravated, accelerated, or combined with the disease of infirmity to produce the death or disability for which compensation is sought. LARSON'S WORKERS' COMPENSATION LAW § 9.02 D (1) (2015).

In the case before us however, the ALJ concluded that the evidence did not support Dr. Bryne's opinion that Claimant was entitled to the 10% impairment rating assessed against his preexisting chondromalacia/arthritis. We find no error in the ALJ's analysis and determine that the ALJ's finding that the condition was not medically causally related to the work injury was a rational conclusion, supported by substantial evidence and in accordance with the law.

CONCLUSION AND ORDER

The July 20, 2016 Compensation Order, granting in part and denying in part, Claimant's claim for relief is supported by substantial evidence and in accordance with the law and is accordingly AFFIRMED.

So ordered.