

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

**Department of Employment Services**

VINCENT C. GRAY  
MAYOR



F. THOMAS LUPARELLO  
INTERIM DIRECTOR

**COMPENSATION REVIEW BOARD**

**CRB No. 13-110**

**BETTY WILLIAMS,  
Claimant–Petitioner,**

**v.**

**PIZZA HUT, INC. and GALLAGHER BASSETT SERVICES,  
Employer/Carrier-Respondents**

Appeal from a August 9, 2013 Compensation Order by  
Administrative Law Judge Joan E. Knight  
AHD No. 05-031E, OWC No. 602284

David J. Kapson, for the Petitioner  
Barry D. Bernstein, for the Respondents

Before: HENRY W. MCCOY and HEATHER C. LESLIE, *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**

**BACKGROUND AND FACTS OF RECORD**

This appeal follows the issuance on August 9, 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, the Administrative Law Judge (ALJ) denied Claimant’s request for a schedule award of nineteen percent (19%) permanent partial disability to both her left and right lower extremities.<sup>1</sup>

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<sup>1</sup> *Williams v. Pizza Hut, Inc.*, AHD No. 05-031E, OWC No. 602284 (August 9, 2013)(CO).

Claimant worked for Employer as a delivery driver. On February 24, 2004, she sustained a low back injury when she slipped and fell at work. After receiving treatment in the form of physical therapy and pain management, Claimant filed a claim for temporary total disability benefits that Employer challenged arguing she had reached maximum medical improvement (MMI) and was able to return to work without restrictions.

In a December 8, 2006 CO, the presiding ALJ held that Claimant was temporarily and totally disabled and awarded benefits commencing August 10, 2004 and continuing. *Williams v. Pizza Hut*, OHA No. 05-031A, OWC No. 602284 (December 8, 2006). This decision was affirmed by the CRB. *Williams v. Pizza Hut*, CRB No. 07-027, OHA No. 05-031A (March 7, 2007).<sup>2</sup>

In a subsequent proceeding, an ALJ found that while Claimant had unreasonably refused to cooperate with vocational rehabilitation efforts, she did not voluntarily limit her income because she had located alternative employment.<sup>3</sup> The ALJ modified the previous award of temporary total disability benefits to an award of temporary partial disability benefits commencing July 6, 2007, the day after Claimant started work at D.C. Care Center. The ALJ also granted Employer a credit for the periods that Claimant unreasonably refused to cooperate with vocational rehabilitation. *Williams v. Pizza Hut*, OHA No. 05-031C, OWC No. 602284 (January 11, 2008).

On appeal, the CRB affirmed in part and reversed in part. The CRB affirmed the ALJ's finding that Claimant did not voluntarily limit her income but vacated the award for temporary partial disability benefits. On remand, the ALJ was instructed to determine whether Claimant was earning more in her new employment than she had in her pre-injury employment. *Williams v. Pizza Hut*, CRB No. 08-096 (May 23, 2008).

In the subsequent remand decision, the ALJ found Claimant had sustained a wage loss at her new job and entered an award for temporary partial disability benefits, with a credit to Employer for payments made in 2005 and 2006. *Williams v. Pizza Hut*, OHA No. 05-031C, OWC No. 602284 (December 23, 2008). This decision was not appealed.

Claimant later claimed that she had to stop working on July 17, 2009 because of pain in her back and legs and has not worked since. Claimant filed for a hearing that was held on August 26, 2010 seeking temporary total disability benefits from July 17, 2009 and causally related medical expenses. The presiding ALJ held that while Claimant's symptoms were medically causally related to the February 24, 2004 work injury, Claimant did not prove she was totally disabled and denied the claim for ongoing temporary total disability benefits. *Williams v. Pizza Hut*, OHA No. 05-031D, OWC No. 602284 (September 30, 2010).

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<sup>2</sup> The CRB's March 14, 2007 Decision and Order mistakenly identified the decision below as "OHA No. 231A".

<sup>3</sup> Claimant ceased working for Pizza Hut in May 2004 and has since worked for three other employers. She worked for Jones & Associates from December 21, 2005 to July 19, 2006; for Saga Adventures from July 21, 2006 to September 21, 2006; and, for D.C. Care Center beginning June 29, 2007.

On appeal, Claimant argued that the objective evidence supported her claim, that any deficiencies in the evidence were due to Employer denying approval for an updated MRI and EMG studies, that the ALJ erred in finding her an incredible witness, and that *res judicata* prevented the ALJ from finding her testimony incredible. The CRB rejected each of these arguments and affirmed the decision below even though the ALJ applied the substantial evidence burden of proof instead of by the preponderance of the evidence standard to show that she was totally disabled, deeming it harmless error insofar as Claimant had not met the burden of proof even under the lesser standard. *Williams v. Pizza Hut*, CRB No. 10-182, AHD No. 05-031D, OWC No. 602284 (January 13, 2011). This decision was not appealed.

Claimant now claims that she has a permanent disability as a result of her February 2004 work injury and filed a claim seeking a schedule award for a permanent partial disability to both lower extremities. With Claimant's treating physician rendering no opinion as any permanent impairment, Claimant obtained an independent evaluation from Dr. Joel Fechter who rated Claimant as being entitled to a 19% impairment to both the right and left lower extremities. Employer obtained an opinion from Dr. Louis Levitt who rated Claimant as having a zero percent permanent impairment.

While finding Claimant's low back and bilateral radicular symptoms to be causally related to the work injury, the ALJ found the opinion of Dr. Levitt to be more persuasive on the issue of nature and extent and concluded that Claimant had not met her burden to show entitlement to a schedule award and denied the claim for relief. Claimant has timely appealed with Employer filing in opposition.

On appeal, Claimant argues the ALJ's conclusion denying a schedule award to both lower extremities does not rationally flow from the findings and there is not supported by substantial evidence. Employer counters that based on Claimant's incredible testimony and Dr. Fechter's report being unpersuasive, the CO is supported by substantial evidence and should be affirmed.

#### 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 CO are based upon substantial evidence in the record, and whether the legal conclusions drawn from those facts are in accordance with applicable law.<sup>4</sup> 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, and even where the reviewing authority might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

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<sup>4</sup> "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).

In filing the instant appeal, Claimant takes no issue, and neither does Employer, with the ALJ's determination that her low back and bilateral radicular symptoms are causally related to the February 24, 2004 work injury. Rather, Claimant takes issue with the ALJ's determination that she did not meet her burden to show entitlement to a schedule award. Specifically, Claimant argues that the ALJ's reasons for denying the requested schedule awards to both lower extremities are not supported by substantial evidence because she has demonstrated some measurable permanent impairment due to the work injury. We disagree.

The current claim for disability benefits requested by Claimant closely parallels her previous claim requesting temporary total disability benefits. In that previous case, the presiding ALJ held that while Claimant's symptoms were medically causally related to the February 2004 work injury, she did not prove she was totally disabled and denied the claim for ongoing disability benefits.<sup>5</sup> The instant claim under review repeats that decisional sequence and analysis.

When the nature and extent of an injured worker's disability is at issue, the injured worker has the burden of proof when making a claim for disability benefits and must prove his/her case by a preponderance of the evidence.<sup>6</sup> Claimant advances the argument that her claim is supported by the medical report of Dr. Fechter and her own testimony.

As to Claimant's own testimony, the ALJ determined that "Claimant's testimony regarding her subjective symptomology has been found to be incredible and inconsistent with objective diagnostic test results and deemed unreliable."<sup>7</sup> The ALJ specifically referenced Claimant's testimony on cross-examination where she stated she was told the MRI was positive and the EMG nerve conduction study showed a pinched nerve, when both tests were normal, showing no pathology that would contribute to lumbar radiculopathy. As the ALJ has based her credibility determination on Claimant's subjective complaints versus what she claims she was told were the objective diagnostic test results, we find the ALJ's finding that Claimant's testimony was incredible and therefore unreliable to be supported by substantial evidence.

With regard to Dr. Fechter's report, Claimant asserts that it demonstrates that she continues to experience radiating pain into both legs with prolonged sitting, standing, or walking and this justifies the assignment of a 19% permanent impairment rating to both legs. With the ALJ finding her low back and radicular symptoms to be causally related, Claimant argues it was error for the ALJ not to assign a percentage impairment rating to each leg.

In commencing her evaluation of the competing medical evidence, the ALJ noted that insofar as Dr. Fechter was not Claimant's treating physician but rather an independent medical evaluator (IME) in the same posture as Employer's IME physician, Dr. Levitt, his opinion was not entitled to the treating physician preference.<sup>8</sup> As Claimant's treating physician did not render

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<sup>5</sup> *Williams, supra*, OHA No. 05-031D; affirmed, *Williams*, CRB No. 10-182.

<sup>6</sup> *WMATA v. DOES*, 992 A.2d 1276, 1282 (D.C. 2010).

<sup>7</sup> CO, p. 7, fn. 12.

<sup>8</sup> See, *Short v. DOES*, 723 A.2d 845 (D.C. 1998); *Stewart v. DOES*, 606 A.2d 1350 (D.C. 1992).

an opinion on permanent impairment, the ALJ properly determined that the competing IME opinions would be accorded equal weight.<sup>9</sup>

In reviewing and assessing Dr. Fechter's singular examination of Claimant, the ALJ noted the subjective complaints Claimant reported and the findings made by Dr. Fechter when he examined Claimant's lumbar spine, to the effect that

Dr. Fechter noted Claimant's lumbar MRI revealed no evidence of disc herniation. Citing to the "*AMA Guides*", Dr. Fechter assigned a 19% impairment to the right lower extremity and 19% impairment [to the] left lower extremity for pain, weakness, loss of endurance and loss of function."<sup>10</sup> (Emphasis in original.)

In considering the opposing medical opinion of Dr. Levitt, the ALJ noted that he characterized Claimant's work injuries as soft tissue injuries that have remained symptomatic eight years later with Claimant expressing no improvement in her clinical complaints. On this basis, the ALJ noted

Dr. Levitt opined Claimant's symptoms are non-anatomic, do not reflect root irritation or radiculopathy and manifest no findings consistent with injury related to a slip and fall event that occurred in February 2004. He noted he had evaluated Claimant multiple times and opined her clinical complaints reflect preexisting disease and subsequent automobile traumas, as well as contributions from her lupus and fibromyalgia. Citing to the 6<sup>th</sup> Edition of the *AMA Guides*, Dr. Levitt ascribed a zero percent permanent impairment rating to Claimant's right and left lower extremity [sic]. Dr. Levitt also opined Claimant had no impairment when considering additional factors for pain, weakness, atrophy, loss of function and loss of endurance.<sup>11</sup>

The ALJ proceeded to weigh the competing medical opinion, reasoning that

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<sup>9</sup> CO, p. 8.

<sup>10</sup> *Id.* In this statement and later when she states that Dr. Fechter "incorrectly cited the *AMA Guides*" (*Id.*, p. 9), the ALJ misinterprets what Dr. Fechter actually stated. In his IME report of April 2, 2012, Dr. Fechter writes: "In accordance with *AMA Guidelines* as well as taking into account pain, weakness, loss of endurance and loss of function, the patient is entitled to 19% impairment of the right lower extremity and 19% impairment to the left lower extremity." It is evident from a clear reading of this statement that Dr. Fechter is rendering his impairment rating based on the "*AMA Guidelines as well as*" the "five factors". Basically, Dr. Fechter has combined the two evaluation elements to arrive at his rating and has not "incorrectly cited to the *AMA Guides*". As the ALJ has stated other reasons for discounting Dr. Fechter's opinion, no reversible error is found in the ALJ's misinterpretation. We also note that contrary to the ALJ's statement on p. 7 of the decision, there is no statutory requirement to use the *AMA Guides*, but rather these guidelines "may be utilized" pursuant to § 32-1508(3)(U-i) as quoted by the ALJ in fn. 11.

<sup>11</sup> CO, p. 8-9.

In evaluating the conflicting medical ratings, the undersigned will accord greater weight to the physician whose opinion is found to be the most persuasive. A close scrutiny of Dr. Fechter's impairment findings reveal they were predicated almost entirely upon Claimant's subjective complaints that are uncorroborated by negative lumbar MRI and EMG results and found incredible by the undersigned. Dr. Fechter offered no explanation or rationale for his impairment findings. Furthermore, Dr. Fechter does not assign a physician impairment based upon *AMA Guides*. He incorrectly cited the *AMA Guides* rather than the additional "five factors when taking into account anatomical factors for pain, weakness, loss of endurance and loss of function to both lower extremities of 19% impairment to both lower extremities. Dr. Fechter's assessment is not supported by the treating reports of Dr. Liberman who reported Claimant had no weakness, no atrophy associated with the lower extremities. In short, Dr. Fechter's medical opinion is not substantiated by objective findings consistent with established medical guidelines. Thus, the undersigned is not persuaded by the impairment rating assessment of Dr. Fechter which is inherently flawed and unreliable.

Dr. Levitt has independently examined Claimant on at least three occasions rendering his IME opinion and finding no impairment, is more consistent with the objective medical evidence of record than Dr. Fechter's. Thus, the undersigned is persuaded that Dr. Levitt's IME is more probative and it is therefore, reasonable to accept his opinion. Based on the credible evidence in the record, Claimant's evidence does not support her claim. Claimant has failed to present substantial credible evidence of a disability entitling her to a schedule permanent impairment award under the Act.<sup>12</sup>

Using this reasoning, the ALJ concluded

Based upon a review of the record and the preponderance of the evidence in its entirety, Claimant has not met her burden to establish the existence of a permanent partial disability to her right and left lower extremities as a result of the February 24, 2004 work injury.<sup>13</sup>

The ALJ has reviewed and weighed the competing medical evidence and made the reasoned determination, supported by substantial evidence in the record, that the medical opinion of Dr. Levitt is more persuasive. Although Dr. Levitt was not a treating physician, he did have the opportunity of evaluating the progression of Claimant's injury and symptomatic complaints starting in 2007, then in 2010, and finally in 2012, as found by the ALJ. In addition, unlike Dr. Fechter analysis, Dr. Levitt factored in and discounted Claimant's non-work injury related symptoms and her intervening automobile accidents to arrive at his reasoned opinion which the

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<sup>12</sup> CO, p. 9.

<sup>13</sup> *Id.*

ALJ found to be in accordance with Claimant's current condition when evaluating the claim for a schedule award. Substantial evidence in the record supports the ALJ's conclusion that the record evidence did not preponderate in Claimant's favor.<sup>14</sup> As the evidence supports that conclusion, it will not be disturbed.

#### CONCLUSION AND ORDER

The ALJ's determination that Claimant has not met her burden by a preponderance of the evidence that she is entitled to a schedule award is supported by substantial evidence in the record and is in accordance with the law and therefore is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

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HENRY W. MCCOY  
*Administrative Appeals Judge*

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January 31, 2014  
DATE

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<sup>14</sup> We again feel constrained to note for the record that the ALJ's decision presents the appearance of misapprehending the Claimant's burden of proof. In her initial statement on "Nature and Extent", the ALJ stated "In proving a work-related injury rendered her partially disabled, Claimant herein, must therefore present substantial credible evidence of a disability entitling her to [the] level of benefits requested." This statement by the ALJ is confusing because it is a statement of the type of evidence the claimant must present without stating the actual standard of proof this evidence must reach in order to meet the burden. As the D.C. Court of Appeals as stated, a claimant's burden is to prove their case by a "preponderance of the evidence", not by substantial evidence. However, in stating that "the preponderance of the evidence in its entirety" did not show that Claimant had met her burden, the ALJ corrects any misperception on her understanding of the burden of proof.