GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR

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INTERIM DIRECTOR

COMPENSATION REVIEW BOARD

DEPT. OF EMPLOYMENT SERVICES
COMPENSATION REVIEW BOARD
2014 MAY 1 PM 12 00

CRB No. 14-008

ZACHARIAH PETERS,
Claimant-Petitioner,

v.

NEXTGEN CORPORATION AND RENOVATIONS and XCHANGING,
Employer/Insurer-Respondent.

Appeal from a December 19, 2013 Compensation Order By
Administrative Law Judge Linda F. Jory
AHD No. 13-475, OWC No. 607572

Michael J. Kitzman for Petitioner
John P. Rufe for Respondent

Before MELISSA LIN JONES, HENRY W. MCCOY, and JEFFREY P. RUSSELL, *Administrative Appeals Judges*.

MELISSA LIN JONES for the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

On July 12, 2004, a chimney collapsed on Mr. Zachariah Peters while he was working as a laborer for Nextgen Corporation and Renovations ("Nextgen"). At Washington Hospital Center, he was diagnosed with a stable L4 lateral wedge compression fracture and possible non-displaced fractures in his right foot. In addition, his right shoulder was separated.

By May 2005, Mr. Peters' back fracture had healed as had his foot fractures. His treating physician released him to work in his normal capacity with an exercise program to improve "strength and mobility of his lumbar spine prior to resuming full duty."[1]

[1] *Peters v. Nextgen Corporation and Renovations*, AHD No. 13-475, OWC No. 607572 (December 19, 2013), p. 2. It is unclear how full duty differs from Mr. Peters' normal capacity.

After treatment with other doctors, two independent medical examination physicians, Dr. Joel Fechter and Dr. Jonathan S. Fish, evaluated Mr. Peters at his request for permanent partial impairment ratings. At Nextgen's request, Dr. James Tozzi examined Mr. Peters for the same purpose.

At a formal hearing, Mr. Peters' sought "scheduled loss awards of permanent partial disability based upon a rating of 50% permanent partial impairment to the right leg and 24% to the left leg and 17% to the right arm."[2] An administrative law judge ("ALJ") awarded Mr. Peters "payment of permanent partial disability benefits based on the schedule representing a 10% permanent partial impairment of the right foot and 17% permanent partial impairment of the right upper extremity."[3]

On appeal, Mr. Kitzman argues the ALJ erred in concluding there is no basis for Dr. Fechter's opinion that there are ratable, radicular symptoms because the ALJ did not address Mr. Peters' physical complaints and the impact those complaints have on his ability to function. Mr. Kitzman also argues the ALJ presented no basis for rejecting Mr. Peter's leg ratings in favor of a foot rating and no determination of the location of the disability awarded. Finally, Mr. Kitzman states

> Here, the Compensation Order does not even focus on actual wage loss, but rather reaches the conclusions that there is [*sic*] no need to review future earnings based solely on the minimum wage in the claimant's state of residency. This conclusion is both arbitrary and capricious. The minimum wage rate in Washington State, in addition to being irrelevant is not supported by any evidence of the record. Further, the conclusion that it has the highest minimum wage in the United States is not supported by any evidence of the record.
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> In addition, adjusting the level of disability based on a claimant's zip code is not in accordance with either the Act or any of the decisions of the Court of Appeals. As a result, the Compensation Order's decision to rely on this 'evidence' is not in accordance with the law and means that the Compensation Order is not supported by the substantial evidence.[4]

For these reasons, Mr. Kitzman requests the Compensation Review Board ("CRB") reverse the Compensation Order.

In response, Mr. Rufe asserts a fact-based argument that the record is devoid of objective clinical findings and testing results or evidence of wage loss. Mr. Rufe requests the CRB affirm the Compensation Order.

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[2] *Id.*

[3] *Id.* at p. 6.

[4] Memorandum of Points and Authorities in Support of Application for Review, p. ii (which is the seventh page of the memorandum).

ISSUE ON APPEAL

1. Is the December 19, 2013 Compensation Order supported by substantial evidence in the record and in accordance with the law?

ANALYSIS[5]

Although Petitioner's Memorandum of Points and Authorities in Support of Application for Review makes generic arguments, it fails to substantiate disputes in this case with detailed references to the facts or to the law. Similarly, Respondent's Opposition to Application provides little legal argument for why the Compensation Order should be affirmed. Nonetheless, we are obligated to review the Compensation Order to ensure it is supported by substantial evidence and is in accordance with the law, and under these circumstances, the best way to accomplish that requirement is to examine the award to each schedule member.

Right Leg and Left Leg

Although disability experienced in a schedule member may be compensable even if the anatomical situs of the injury is in a non-schedule body part,[6] any award of such permanent partial disability benefits must be substantiated by appropriate findings of fact. In this case, there are no findings of fact that establish an injury to either leg; the finding of fact do reference a back injury which may have a disabling impact on Mr. Peters' legs, but there are no specific findings to that effect. The ALJ's fails to accept any impact Mr. Peters' back injury has on his legs:

> At the outset, the undersigned must point out that the scant medical evidence does not contain any diagnostic test results which establish that claimant has radiculopathy or disc herniations which would result in radiculopathy in any extremity. Dr. Fechter's ratings of 24% to the right and lower extremities is not only excessive but not supported by any diagnostic tests. The evidence does establish that claimant had a fracture at the L4 and fractured transvers processes from L1 to L4 level, however according to Dr. Tozzi on May 19, 2005, x-rays taken showed the fractures had healed. Although also not made part of the record Dr. Fechter also refers to Dr. Lauerman's July 6, 2007 report and that the lumbar MRI ordered by Dr. Lauerman did not reveal any evidence of fracture or disc injury.
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> When asked by the undersigned at the hearing if he obtained any treatment in Seattle, WA claimant answered "no" although Dr. Fechter refers to a May 23,

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[5] The scope of review by the CRB is limited to making a determination as to whether the factual findings of the appealed 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. Section 32-1521.01(d)(2)(A) of the District of Columbia Workers' Compensation Act, as amended, D.C. Code §32-1501 to 32-1545 ("Act"). Consistent with this standard of review, the CRB is constrained to uphold a Compensation Order that is supported by substantial evidence. *Marriott International v. DOES*, 834 A.2d 882, 885 (D.C. 2003).

[6] *Washington Metropolitan Area Transit Authority v. DOES*, 683 A.2d 470 (D.C. 1996).

> 2012 visit at the Everett Clinic and that claimant believed he had MRI scans performed of the lumbar spine and perhaps the shoulder but the reports were not provided to Dr. Fechter. HT at 46. The record does not contain any MRIs.[7]

To the contrary, the ALJ's statement that "the undersigned must point out that the scant medical evidence does not contain any diagnostic test results which establish that claimant has radiculopathy or disc herniations which would result in radiculopathy in any extremity"[8] leads to a conclusion that Mr. Peters has not suffered any leg disability; however, the ALJ goes on to award permanent partial disability benefits for his foot:

> With regard to claimant's healed fractured fourth and fifth metatarsals, Dr. Fechter has rated claimant's right extremity as opposed to his right foot and has not converted his 26% rating of the entire extremity to permanent partial impairment of the right foot. Similarly Dr. Tozzi did not provide a converted rating to the right foot. *See Lopez v. York Building Services* CRB No. 09-025, AHD No. 03-134B (June 29, 2009).
>
> The only rating to the right foot is provided by Dr. Fish and the undersigned finds Dr. Fish's 10% right foot impairment rating to be reasonable in light of the injury he sustained to the right foot. The remaining ratings of Dr. Fish are to body parts not included in §32-1508, *i.e.*, whole person and right shoulder and cannot be considered.[9]

A review of the Joint Pre-Hearing Statement and the hearing transcript reveals Mr. Peters did not request permanent partial disability benefits for his foot. Consequently, the award for 10% permanent partial disability benefits for the foot was beyond the ALJ's consideration and must be vacated.

<u>Right Arm</u>

As for the award of 17% permanent partial disability benefits for Mr. Peters' right arm injury, the ALJ credited Mr. Peters' testimony that he is unable to perform construction work requiring use of a hammer and, therefore, accepted Dr. Fechter's 17% impairment rating; however, the ALJ went on to determine that because Mr. Peters is working in the state of Washington, the impairment rating need not be augmented when assessing a disability rating:

> With regard to the upper right extremity, Dr. Fechter appropriated 17% due to the right shoulder pain, weakness and range of motion limitations. Against this employer relies on the 10% rating of Dr. Tozzi which he appropriated for the grade 2 AC separation.

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[7] *Peters, supra*, at p. 5. (Footnote omitted.)

[8] *Id.*

[9] *Id.*

> Claimant testified that he is unable to lift a hammer anymore and his range of motion is limited in the right arm[. T]he undersigned finds it reasonable that he is unable to perform construction work which would require use of a hammer. Accordingly, notwithstanding the lack of diagnostic evidence, the undersigned accepts Dr. Fechter's 17% rating to the right upper extremity to be supported by a preponderance of evidence. Claimant testified that he is working full time and that the state of Washington has the highest minimum wages in the country. Accordingly additional percentages need not be added to the generous ratings of Dr. Fechter and Dr. Fish as any effect of claimant's future earnings is minimal.[10]

Pursuant to *Negussie*, when determining permanent partial disability, the role of the ALJ is to weigh competing medical opinions of impairment together with other relevant evidence and to arrive at a determination on the issue of the nature and extent of any disability. In the end, this determination can result in accepting one physician's medical rating over another or in reaching a different conclusion altogether because the fact-finder is not bound by the opinions of the evaluating physicians, even when one of them is the treating physician.[11] To assist in making that determination, an ALJ may consider actual wage loss insofar as that loss is indicative of an effect upon future wage earning capacity,[12] and the ALJ considered Mr. Peters' future wage earning capacity in the context of his current employment in the state of Washington. Mr. Peters' himself testified about the minimum wage in that state:

> Q. Okay. So what – what's the hourly rate you're earning right now working at GNC?
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> A. The hourly rate is, I believe minimum wage for Washington State is 9.17 currently.
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> Q. About 9.17 an hour?
>
> A. Yeah. It's actually the highest – one of the highest in the country…[13]

Although for purposes of instituting vocational rehabilitation and related issues an employer is permitted to restrict the search for alternative employment to the District of Columbia metropolitan area,[14] in this case, Mr. Peters was hired in Washington state and is working there. His actual employment in Washington state helps define his future wage earning capacity through direct evidence of work capacity and potential wage loss; therefore, we find no fault

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[10] *Id.*

[11] *Negussie v. DOES*, 915 A.2d 391 (D.C. 2007).

[12] *See Ulloa v. Hotel Harrington*, CRB No. 12-006, AHD No. 10-556A, OWC No. 669607 (August 7, 2012).

[13] Hearing Transcript, p. 31.

[14] *Joyner v. DOES*, 502 A.2d 1027 (D.C. 1986).

with the ALJ accepting Mr. Peters' testimony and applying that testimony to assess the impact his impairment has on his future wage earning capacity.

CONCLUSION AND ORDER

The award of 10% permanent partial disability benefits for the right foot is not in accordance with the law and is VACATED. The award of 17% permanent partial disability benefits for the right arm is in accordance with the law, is supported by substantial evidence, and is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

MELISSA LIN JONES
Administrative Appeals Judge

May 1, 2014
DATE

APPEAL RIGHTS

To appeal a final Order or Decision of the Compensation Review Board, you must file a Petition for Review with the District of Columbia Court of Appeals within 30 calendar days of the mailing date shown on the Certificate of Service attached to that Order or Decision.

The D.C. Court of Appeals is located at 430 E Street NW, Washington DC 20001 and is open from 8:30 a.m. to 5:30 p.m., Monday through Friday, except for legal holidays. For information about the D.C. Court of Appeals procedure please call the Court at 202-879-2700.

In addition to filing a Petition for Review with the D. C. Court of Appeals, to appeal this decision you also must send copies of the Petition for Review to:

(1) The counsel for the opposing party at the address shown on the Certificate of Service attached to the Order or Decision.

(2) Todd S. Kim, Esq., Solicitor General
Office of the Attorney General
441 4th Street NW Suite 600S
Washington DC 20001

(3) Compensation Review Board
Department of Employment Services
4058 Minnesota Avenue NE Suite 4005
Washington DC 20019

Note: A request for reconsideration filed with the Compensation Review Board does not extend or eliminate the 30 calendar day deadline for filing an appeal with the District of Columbia Court of Appeals.

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CERTIFICATE OF SERVICE

I certify that on May 1, 2014 the attached Decision & Order was sent by U.S. mail, First Class postage pre-paid, or hand-delivered, as noted, addressed as indicated below:

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