GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

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COMPENSATION REVIEW BOARD

DEPT. OF EMPLOYMENT SERVICES
COMPENSATION REVIEW BOARD
2016 AUG 10 AM 9 10

CRB No. 16-036

ARION P. JONES,
Claimant–Respondent,

v.

GEORGE WASHINGTON UNIVERSITY and
PMA GROUP,
Self-Insured Employer/Third Party Administrator-Petitioner.

Appeal from a February 23, 2016 Compensation Order
by Administrative Law Judge Gregory P. Lambert
AHD No. 07-144B, OWC No. 633281

(Decided August 10, 2016)

Sarah M. Burton for Employer
David J. Kapson for Claimant

Before JEFFREY P. RUSSELL, GENNET PURCELL, *Administrative Appeals Judges* and LAWRENCE D. TARR, *Chief Administrative Appeals Judge*.

JEFFREY P. RUSSELL, for the Compensation Review Board.

DECISION AND REMAND ORDER

PRELIMINARY MATTERS

The Compensation Order under review followed a rehearing of a claim by Arion P. Jones (Claimant) for compensation for an injury sustained while he was employed by George Washington University (Employer) which was initially heard many years ago.

The procedural history of this case is long and complex, and involves numerous prior Compensation Orders, Decision and Remand Orders, Compensation Orders on Remand, and other administrative orders issued by the Administrative Hearings Division (AHD) and the Compensation Review Board (CRB) within the Office of Hearings and Adjudication (OHA) in the District of Columbia Department of Employment Services (DOES). Several of those orders were authored by Anand Verma, a former attorney disbarred for dishonesty and deception, who spent many years acting as an administrative law judge (ALJ) in AHD before his status was

discovered and he was removed from his position. Numerous orders have been entered that assumed the validity of Verma's orders.

Employer opposed Claimant's request for a rehearing in AHD, and argues in this appeal that the determination that Claimant is entitled to a rehearing is erroneous.

Were it incumbent upon the CRB to reach an independent assessment of the administrative law judge's (ALJ's) analysis of that history as it relates to whether conducting a new hearing was required under the consolidated cases of *Sandoval v. Hotel & Restaurant Employees' International Union*, CRB No. 12-002(R) and *Sinclair v. Howard University Hospital*, CRB No. 13-024(R), (November 14, 2014) (*Sandoval*), we would set forth that history in detail.

However, because *Sandoval* states that "Nothing in our decisions limits DOES from voluntarily authorizing new hearings" in Verma cases, we will dispense with such a recitation, and merely incorporate the procedural history as set forth in the Compensation Order of February 23, 2016 (the CO) at pages 1 – 3, by reference.[1] *Sandoval*, at 12, n. 5.[2]

Although it may be that Employer's arguments concerning Claimant's entitlement to a new hearing as *a matter of right* have merit, we need not consider them inasmuch as the law, as it presently stands, affords AHD the discretion to conduct a new hearing if the ALJ is persuaded that the circumstances justify that course. While Employer argued before the ALJ and argues in this appeal that Claimant is not entitled to such a rehearing, it makes no argument that the ALJ abused his discretion in proceeding to rehear the matter.

Accordingly, our review shall be undertaken as if the formal hearing conducted by Verma in May 2007 had not occurred, and shall consider this appeal based solely upon the CO issued on February 23, 2016 following the formal hearing conducted October 1, 2015.

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[1] Our incorporation of the well-constructed chronology in the CO should not be read as our agreeing with the specific legal analyses and conclusions concerning such matters as the legal effect of the various prior orders in this case under the *Sandoval* paradigm. However, we find that the sheer number and potential inter-relationships between the various prior orders and rulings involving fact-finding by Verma render the decision to conduct a new hearing to be within the sound discretion of the ALJ, as contemplated by *Sandoval.*

We are cognizant of the fact that the District of Columbia Workers' Compensation Act, D.C. Code § 32-1501 *et seq.* (the Act) does not give ALJs the authority to vacate prior orders that are no longer pending in in AHD. Nonetheless, we recognize that in many senses this case is *terra incognita*, and for the purposes of this case we vacate such orders as the CO deems vacated, and agree that vacating said orders renders the denominated CRB orders moot.

[2] The footnote reads in full:

> Before the DCCA issued the *Sandoval* and *Sinclair* decisions, the CRB remanded for new hearings all of the cases on the review docket that involved ALJ Verma decisions. AHD also reassigned to different ALJs those cases in which ALJ Verma held formal hearings but did not issue a decision before his departure. We see nothing wrong with this even if some of those cases would not meet the criteria for requiring a new hearing. Nothing in our decisions limits DOES from voluntarily authorizing new hearings.

In the CO, the ALJ ruled that Claimant's disability is medically causally related to the work injury, and that he is and has been temporarily totally disabled since October 15, 2006. The ALJ denied Claimant's claim for interest on accrued benefits.

Employer filed an Application for Review of the CO and a memorandum of points and authorities in support thereof (Employer's Brief). Employer argues that the ALJ erroneously determined that Claimant was entitled to a new formal hearing under *Sandoval*; that the ALJ erroneously accorded treating physician status and afforded a treating physician preference to the opinions of Drs. Gupta and Yu, because their treatment of Claimant was not authorized by Employer (Employer's Brief at 10 – 11); that Claimant's medical records do not support the ALJ's conclusion that Claimant's neck, back right knee and left shoulder are medically causally related to the work injury (Employer's Brief at 11 – 15); that the CO erroneously determined that Claimant's ongoing medical treatment was reasonable and necessary (Employer's Brief at 16 – 17); and that the ALJ erred in determining that Claimant was and has been disabled from October 16, 2006 to the present and continuing, in part because the ALJ erroneously concluded that Employer had failed to rebut Claimant's *prima facie* showing of total disability (Employer's Brief at 17 – 18).

Claimant filed an Opposition to the Application for Review (Claimant's Brief). Claimant argues that the determination that a new formal hearing was correct given that "the previous decisions of the Agency [in this claim] were based upon the fact-finding of a serial liar [Anand Verma]" (Claimant's Brief at 8); that Claimant invoked the presumption of compensability by his testimony and the medical opinions of Drs. Steuart, and Yu (Claimant's Brief at 11 – 12); that Employer's evidence had failed to overcome that presumption (Claimant's Brief at 13); that even had the presumption of compensability been overcome, Claimant's evidence was so superior to Employer's that he has established a medical causal relationship by a preponderance of the evidence (Claimant's Brief at 13 – 15); that Claimant has established his entitlement to the temporary total disability benefits awarded (Claimant's Brief at 15 – 17) and that the medical care that he has received has been reasonable and necessary (Claimant's Brief at 17 – 18).

Claimant did not appeal the denial of an award of interest.

Because under *Sandoval* AHD has the authority to exercise its discretion in permitting a rehearing in Verma's cases, and there is no showing of any abuse of that discretion, we affirm the determination that Claimant be permitted to present his claim at a new formal hearing.

Because the evidence supports the conclusion that Drs. Steuart and Yu were treating physicians, we affirm the ALJ's according them that status and affording their opinions a preference over that of Employer's IME physicians.

Because the CO fails to make adequate findings of fact concerning the issues of medical causal relationship, the nature and extent of disability, and the reasonableness and necessity of Claimant's medical care, we vacate the award and remand for further consideration and the issuance of a new Compensation Order which contains findings of fact and citation to the record in support of those findings on the issue of medical causal relationship, and if necessary, the remaining issues of nature and extent and reasonableness and necessity.

FACTS OF RECORD

The following facts are taken from the CO. These facts all appear to be undisputed. Comments in brackets are added by this review panel.

Claimant is a credible witness. [The CO contains no descriptions of Claimant's testimony.]

Claimant worked as a janitorial worker for Employer. The job required significant physical exertion, including mopping, shampooing carpets, lifting and carrying heavy trash containers and bags either alone or with assistance, as well as stooping and bending to clean floors and commodes.

On October 15, 2006, Claimant slipped and fell backward on a wet floor that had recently been mopped by a co-worker. On October 21, 2006, he sought medical attention at Employer's emergency room. His right wrist was x-rayed and it was determined that he had not sustained a fracture.

Claimant returned to the emergency room on October 30, 2006, where it was determined that there was decreased strength in the right wrist. The records from these two visits do not include reference to any complaints relating to Claimant's neck, back, right knee or left shoulder.

The emergency room physician authored an off-work slip for two days due to the wrist injury, followed by another emergency room off-work slip issued November 5, 2006 which indicated that he should remain off-work through November 9, 2006.

The following month, Claimant began treatment with orthopedic surgeon Dr. Rafael Lopez Steuart, and complained of pain in the right wrist and right knee. An MRI ordered by Dr. Steuart revealed a torn meniscus in the right knee.

On November 8, 2006, Dr. Steuart issued an off-work slip, which he renewed periodically, and which he never rescinded for the following two years that he continued to treat Claimant. Dr. Steuart, who opined that the tear resulted from the fall at work and required surgery, referred Claimant to another orthopedic surgeon, a Dr. Cohen, for a second opinion. Dr. Cohen concurred that the right knee required surgery. [There is no finding concerning when Claimant was seen by Dr. Cohen or whether he expressed an opinion on causation.]

Claimant underwent an independent medical evaluation (IME) at Employer's request by Dr. Robert Gordon in December 2006 who provided an IME report, and authored an addendum several weeks later. [There is no finding concerning the results of the IME, the contents of the report or addendum, the specific opinions expressed therein, or the basis for those opinions.]

Another IME was performed at Employer's request in early 2007 by a Dr. Callan. [There is no finding concerning the results of the IME, the specific opinions expressed therein, or the basis for those opinions.]

An arthroscopic repair of the right meniscus was performed on May 21, 2007. Claimant was placed in a knee immobilizer but developed complications from the surgery, in the nature of a large accumulation of blood in the knee joint (hemathrosis). Except for a brief, two-day return to work in early 2007, Claimant has not been employed since the date of the fall. Employer has not offered to make work available to Claimant within his claimed limitations.

In September 2007, a Dr. Danziger performed an IME at Employer's request. [There is no finding concerning the results of the IME, the specific opinions expressed therein, or the basis for those opinions.]

Dr. Steuart moved from the area in late 2008 [no date is included in the CO], at which time Claimant returned to Employer's emergency room. He was treated by a Dr. Gupta, and referred by Dr. Gupta to a Dr. Yu "for persistent problems related to his injury in October of 2006" (CO at 14 – 15), who first saw Claimant March 16, 2010. [There are no findings concerning what Claimant complained about or what these doctors diagnosed.]

In April 2010, Dr. Yu recommended that Claimant avoid repetitive heavy lifting and twisting. Dr. Yu also prescribed physical therapy and injections. [There are no findings concerning why these limitations were imposed or where on Claimant's person the injections were administered.]

In 2010, Employer obtained a Utilization Review (UR) report. [There are no findings concerning the contents of the UR report.]

In 2012, a Dr. Fechter performed an IME at Claimant's request. [There are no findings concerning the contents of the IME report.]

Dr. Yu ordered an MRI in 2014. Based upon the MRI, Dr. Yu recommended surgical intervention, which Claimant declined due in part to his age and his past experiences with surgical interventions. Dr. Yu continued to recommend physical therapy, and opined that Claimant's neck, back and shoulder complaints were related to the subject work injury. [The CO does not state upon what body part or parts the MRI was performed, what the findings were, or what surgery was recommended.]

ANALYSIS

Before discussing the above recitation of facts, we shall dispose of Employer's first argument in this appeal, that the ALJ erred in affording Dr. Yu and Dr. Gupta the benefit of the treating physician preference. Employer's Brief at 10.

Simply put, the ALJ correctly identified these two physicians as having provided medical care to Claimant for the claimed injuries. As Claimant points out, Employer misapprehends the meaning of "treating physician", and conflates it with "attending physician" as that term is used in the Act.

The treating physician preference is premised upon the relationships between the physician, the claimant/patient, and the medical case at issue. The preference is a matter of evidentiary weight

stemming from an assumed heightened insight and understanding of a claimant's medical condition based upon the physician having treated a claimant over a long period of time, having commenced a connection with the case at a time closer to the work injury than the IME physician's exposure to the case, and the physician's relationship to the matter being more than simply for the purposes of litigation. It has nothing whatever to do with the concept of "attending physician", a concept which exists for purposes of controlling an employer's liability for payment of medical expenses.

As the CRB has stated previously:

> These cases recognize that, given the realities of modern medical practice, the Act and the regulations necessarily anticipate that there is a difference between an "attending" physician, on the one hand, and a physician who provides treatment on the other, for the purposes of the "change of physician" process.[3] This determination is compelled by merely recognizing that there can be many "treating physicians" in a case, if that term means nothing more than a physician who renders medical care, but at any given time, the terms of the regulations permit only a single "attending" physician, and it is that physician with whom the regulations deal.
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> 3 We hasten to add that this analysis should not be read to affect other areas of the law as they relate to "treating physicians", particularly to the treating physician preference in evaluating competing medical evidence, as set out in numerous cases, including *Short v. District of Columbia Department of Employment Services*, 723 A.2d 845 (D.C. 1998), and *Stewart v. District of Columbia Department of Employment Services*, 606 A.2d 1350 (D.C. 1992). That set of rules and considerations are based not upon statutory or regulatory assignments of such status, but rather are premised upon factors revolving around the relationship of the physicians to the patient and to the litigation, and are matters of credibility and reliability, not medical case management.

Gonzalez v. UNNICO, CRB No. 07-005 (February 21, 2007) at 5.

Regarding Employer's argument that the ALJ should not have afforded a new hearing to Claimant, the argument is discussed above and is rejected for the reasons previously set forth. *Sandoval*, *supra*, at 12, nt. 5

We now turn to more substantive matters.

The above recitation of facts constitutes the only "facts" referenced within the sections of the CO dealing with the merits of the claim. We are frustrated in our mission of assessing the legal sufficiency of the CO because the CO is often informal, imprecise and uninformative. {If it can be put aside, can it be deleted instead?} The CO fails to give relevant dates which would make understanding the sequence events clear, referring instead to general characterizations such as "early" or "late" in some year, or just stating a year without reference to "early" or "late". It references numerous IMEs and other medical assessments (e.g., the UR report) without setting forth or describing their contents and does not state with specificity what those opinions or assessments are.

Nowhere that we can find does the CO indicate when Claimant first experienced pain in his neck, shoulder or back. The CO makes references to Claimant being taken "off-work", but fails to state upon what basis (i.e., for what medical condition) the "off-work" slips were written. It makes reference to Claimant being a credible witness, but does not set forth what Claimant's testimony was with respect to the issues in dispute.

While both Claimant and Employer describe in their Briefs their view of what the record contains, the task of the CRB is to assess the legal sufficiency of Compensation Orders, and that assessment must begin with what is contained within the four corners of the Compensation Order being reviewed. While the CO contains citations to exhibits and portions of the transcript, it does not contain specificity as to what the ALJ maintains those portions of the record say.

In order to conform to the District of Columbia Administrative Procedure Act and to withstand substantial evidence review, an Agency decision, including a Compensation Order, must state findings of fact and conclusions of law on each contested material issue, those findings must be supported by substantial evidence identified in the record, and the conclusions must flow rationally from those findings. *See Perkins v. DOES*, 482 A.2d 401 (D.C. 1984).

While the record may very well, and probably does, contain sufficient evidence upon which factual findings could be made on the disputed issues in this case, in the first instance it is the task of the ALJ to describe and identify the record evidence upon which a Compensation Order's legal conclusions are based. It is not enough for the parties to fill in the missing pieces in their briefs, and the CRB is without inclination or authority to do so. And, as we often point out, we are not empowered to fill in the gaps in fact finding in a Compensation Order that comes before us on appeal. *See King v. DOES,* 742 A.2d 460 (D.C. 1999). We can no more fill in the gaps in our review of a Compensation Order than can the DCCA. *See also Brown v. DOES*, 700 A.2d 787, 792 (D.C. 1997) ("the agency is required to make basic findings of fact on all material issues. Only then can this court determine upon review whether the agency's findings are supported by substantial evidence and whether those findings lead rationally to its conclusions of law" (citations omitted). "If the agency 'fails to make a finding on a material, contested issue of fact, this court cannot fill the gap by making its own determination from the record, but must remand the case for findings on that issue.'" *Mack v. DOES*, 651 A.2d 804, 806 (D.C. 1994) (quoting *Colton v. DOES*, 484 A.2d 550, 552 (D.C. 1984)); *Williams v. District of Columbia Public Schools*, CRB No. 13-100 (November 5, 2013); *Eze v. Children's National Medical Center*, CRB 16-007 (June 8, 2016).

Because of these gaps in the CO, we are unable to carry out our responsibility to assess whether the ultimate findings and conclusions in the CO are supported by substantial evidence.

CONCLUSION AND ORDER

The determination that a new hearing should be conducted was not arbitrary, capricious or an abuse of discretion, and is affirmed.

The determination that Drs. Steuart and Yu are treating physicians for the purpose of the evidentiary weight to be accorded their opinions is supported by substantial evidence, is in accordance with the law, and is affirmed.

The denial of interest on accrued benefits was not appealed, and is therefore the law of the case.

The Compensation Order fails to make record-based findings of fact on the material issues concerning medical causal relationship, nature and extent of disability or reasonableness and necessity of medical care. The award is therefore unsupported by substantial evidence, and is vacated. The matter is remanded for further record-based findings of fact and conclusions of law based thereon on the issue of medical causal relationship of each of Claimant's claimed compensable injuries, and if necessary, the nature and extent of Claimant's disability, and the reasonableness and necessity of medical care, including what medical care is in dispute.

So ordered.