

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 16-062

**CIKEITHIA SELLERS,
Claimant-Petitioner,**

v.

**WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
Employer-Respondent.**

Appeal from an April 4, 2016 Compensation Order on Remand
by Administrative Law Judge Mark W. Bertram
AHD No. 12-522A, OWC Nos. 703835, 692386, 689318, 671590 and 658231

(Decided September 14, 2016)

Krista N. DeSmyter for Claimant
Mark H. Dho for Employer

Before JEFFREY P. RUSSELL, GENNETT PURCELL and LINDA F. JORY, *Administrative Appeals Judges*.

JEFFREY P. RUSSELL for the Compensation Review Board.

DECISION AND REMAND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

This appeal is from a Compensation Order on Remand issued April 4, 2016 ("COR"), and is a consolidation of multiple claims brought by Cikeithia Sellers ("Claimant") in a single formal hearing for injuries alleged to have been sustained while she was employed as a bus driver for 11 years, and a rail station manager for 3 years. In each case Claimant sought awards for permanent partial disability under the schedule to various parts of her body.

A formal hearing on these claims was conducted on June 11, 2015 before an administrative law judge ("ALJ") in the Administrative Hearings Division ("AHD") of the Department of Employment Services ("DOES"). The parties stipulated concerning the claims heard by the ALJ on that date as follows:

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<u>Date of Injury</u>	<u>OWC No.</u>	<u>Body Part(s)</u>	<u>Average Weekly Wage</u>
1. 3/03/2009	658231	low back, both legs, both shoulder, left wrist	\$1,269.93
2. 5/28/2010	671590	neck, back, left wrist/hand, right wrist, right knee	\$1,427.67
3. 2/09/2012	689318	low back	\$1,624.77
4. 4/12/2012	692386	low back, left leg, left foot	\$1,624.77
5. 4/19/2013	703835	back, right leg, left leg	\$1,193.44

Stipulation Form and Joint Prehearing Statement (JPHS), *passim*.

In a Compensation Order issued August 17, 2015 (“CO”), the ALJ concluded “Claimant’s accidental injuries arose out of and in the course of her employment and are medically causally related to her work place accidents/injuries” and made awards of 0% permanent partial disability for the arms, 15% permanent partial disability to the left leg, and 5% permanent partial disability to the right leg. CO at 12.

On September 16, 2015, Claimant filed Claimant’s Application for Review and memorandum of points and authorities in support thereof with the Compensation Review Board (“CRB”) seeking a remand to AHD with instructions to the ALJ to further consider all the awards.

On October 2, 2015, Employer filed Employer’s Opposition to Claimant’s Application for Review and a memorandum of points and authorities in support thereof, seeking an affirmance of the CO by the CRB. Employer did not file a cross-appeal contesting the awards that were made or the findings and conclusions that all the complained-of injuries arose out of and occurred in the course of Claimant’s employment or that they are medically causally related to the stipulated work injuries.

On February 12, 2016, the CRB issued a Decision and Remand Order (“DRO”). The following language from the DRO, including the internal quotations from the CO and Employer’s original brief on appeal, describe the necessary relevant background for the present appeal:

Claimant’s first argument is framed as follows:

The Compensation Order erred as a matter of law in denying Ms. Sellers’ claim for permanent partial disability for her Right and Left Arms for reasons that do not rationally flow from its determination on causal relationship of the arms.

Claimant’s Brief at 3, “ARGUMENT A.”

The basis of this argument is that:

Specifically, the Compensation Order rejects Dr. Michael Franchetti’s^[1] opinion as to the nature and extent of Ms. Sellers’ impairment based on

¹ Dr. Franchetti performed an independent medical evaluation (IME) of Claimant at Claimant’s request, and opined that Claimant suffers from a 30% permanent partial impairment to the right arm, and 25% to the left arm. CE 1.

issues pertinent to causal relationship. Specifically, the Compensation Order states, “I do note that with regards to the EMG studies, the study results with regards to the cervical area were at a time Claimant was suffering from chronic cervical issues unrelated to her work place injuries.” CO at 10. Further, it rejects Dr. Franchetti’s rating for not addressing “Claimant’s pre-existing cervical issues.” *Id.* These do not serve as valid bases for rejecting the opinion of Dr. Franchetti or in wholly discounting Ms. Sellers’ demonstration of disability to the arms because its reasoning conflicts with the determination that her arm conditions are legally and medically causally related to her work injuries.

Claimant’s Brief at 4.

Employer responds by arguing that the ALJ’s decision is supported by substantial evidence, because:

The ALJ noted that given the complexity of the multiple work related and non-work related incident [sic] and accidents in the record, Dr. Franchetti’s opinion lacks sufficient reasoning and detail. The ALJ candidly notes that,

The problem with Dr. Franchetti’s upper extremity ratings is they occur in a vacuum.

Employer’s Brief at 5.

This response represents Employer’s interpretation of the ALJ’s rationale, which Employer set forth as follows:

The medical evidence available to award any disability for Claimant’s upper extremities is lacking and confused. Claimant testified that while working she functions and her neck tightens up. Her right hand swells up and she gets a frozen arm. *I do not doubt this occurs.* I also do not doubt the objective EMG findings or to a certain extent Dr. Dawson’s physical examination findings. When Claimant was examined numerous times by Dr. Levitt she was found not to have cervical deficits. What is missing is sufficient credible, supporting evidence that the current upper extremity conditions/symptoms affecting Claimant have *caused a disability within the Act.* Even Dr. Dawson’s medical reports do not address previous non-work related cervical issues affecting her upper extremities and how they related or do not relate to any work limitations. While Claimant *undoubtedly has some form of cervical and therefore upper extremity symptomatology—she has not proven she has a disability within the meaning of the Act.*

Employer’s Brief at 5, quoting the CO at 10 (emphasis supplied).

While we do not dispute (nor do [sic] hold) that the record contains substantial evidence to support a finding of no causal relationship regarding the arm complaints and Claimant's employment, the ALJ is wrong to state that the medical opinions cited "occur in a vacuum". To the contrary, they occur in the context of (1) the presumption under *Whittaker v. DOES*, 668 A.2d 844 (D.C. 1995) that the complained-of conditions are medically causally related to the employment; and (2) the long established "aggravation rule" in this jurisdiction, which is aptly described by the DCCA:

It is well settled that "an aggravation of a preexisting condition may constitute a compensable accidental injury under the Act." *Ferreira [v. DOES]*, 531 A.2d at 660 (quoting *Wheatley [v. Adler]*, 132 U.S. App. D.C. at 182, 407 F.2d at 312). "The fact that other, nonemployment related factors may also have contributed to, or additionally aggravated [claimant's] malady, does not affect his right to compensation under the 'aggravation rule.'" *Hensley v. Washington Metro. Area Transit Auth.*, 210 U.S. App. D.C. 151, 155, 655 F.2d 264, 268 (1981), *cert. denied*, 456 U.S. 904, 72 L. Ed. 2d 160, 102 S. Ct. 1749 (1982). "The cases almost invariably decide that the fact that the injury would not have resulted but for the pre-existing disease, or might just as well have been caused by a similar strain at home or at recreation, are both immaterial." *Id.* (quoting *Wheatley*, 132 U.S. App. D.C. at 182 n. 11, 407 F.2d at 312 n. 11). The aggravation rule is embodied in D.C. Code § 36-308 (6)(A) [now §32-1508], which provides that "if an employee receives an injury, which combined with a previous occupational or nonoccupational disability or physical impairment causes substantially greater disability or death, the liability of the employer shall be as if the subsequent injury alone caused the subsequent amount of disability . . ."; *see also Washington Metro. Area Transit Auth. v. District of Columbia Dep't of Employment Servs.*, 704 A.2d 295, 297-99 (D.C. 1997) (discussing the policies underlying § 36-308 (6)); *Daniel v. District of Columbia Dep't of Employment Servs.*, 673 A.2d 205, 207-08 (D.C. 1996).

King v. DOES, 742 A.2d 460 (D.C. 1999) at 468.

The ALJ twice qualified the denial of an award to the arms with the phrase "disability within the Act" or "under the meaning of the Act". Given that the ALJ also found that he "does not doubt" that Claimant's right hand swells and right arm "freezes up" and "undoubtedly has some form of cervical and therefore upper extremity symptomatology", we can reach no other conclusion than that the denial of an award on the grounds stated by the ALJ was improperly in conflict with the factual finding of causal relationship, unchallenged in this appeal, and to which Claimant was entitled to a presumption in her favor.

We agree with Claimant that the award of 0% to the arms under the schedule does not flow rationally from the findings as set forth in the above quoted passage from the CO, and thus we reverse the implied finding of a lack of causal relationship,

vacate the awards of 0%, and remand for further findings of fact and conclusions of law regarding the nature and extent of the arm disabilities, if any, under the schedule.

DRO at 3-5.

Although numerous other matters were raised in the prior appeal, the foregoing represents the only issue upon which the CRB found error. The DRO concluded:

The basis of the award of 0% disability under the schedule to the arms is in conflict with the un-appealed findings concerning medical and legal causal relationship and the principles established in *King v. DOES*, [742 A.2d 460 (D.C. 1999) *supra*, and *Whittaker v. DOES*, [668 A.2d 844 (D.C. 1995)] *supra*. The 0% awards to the arms are vacated and the implied determination that any disability to the arms is unrelated to the work injury is reversed. The matter is remanded to AHD for further findings of fact and conclusions of law concerning the nature and extent of disability, if any, Claimant has sustained to either or both her arms.

DRO at 6.

On April 4, 2016, the ALJ issued a Compensation Order on Remand (COR), which is the matter under review herein. In the COR, the ALJ wrote:

CONCLUSION OF LAW

Claimant's accidental injury arose out of and in the course of her employment and her symptoms are medically causally related to her workplace accidents/injuries. Claimant has zero percent (0%) permanent partial disability to her upper extremities.

ORDER

It is **ORDERED** Claimant has zero percent (0%) permanent partial disability to her upper extremities.

COR at 12, 13.

Claimant filed Claimant's Application for Review and a memorandum in support thereof (Claimant's Brief) with the CRB, arguing that the COR failed to carry out the directive in the DRO to make conclusions of law that flow rationally from the findings that Claimant suffers from causally related cervical and upper extremity symptoms that result in her arms "freezing up" and her hands to swell, and also that the ALJ's rejection of Dr. Franchetti's views on medical impairment was premised in part at least upon the doctor failing to apportion the current complaints between the subject work injuries and pre-existing impairments related to prior injuries. Claimant's Brief at 4-8.²

² Claimant also argues that the awards to Claimant's legs were also insufficient, an argument that was rejected in the DRO and which we will not address again in this DRO, other than reaffirming the prior determination.

Employer filed Employer's Opposition to Claimant's Application for Review and a memorandum in support thereof (Employer's Brief), in which it argues, in various ways, that the ALJ's finding that Claimant proved no disability from the work injury is supported by substantial evidence, primarily because, in Employer's view, the only evidence relating to Claimant's upper extremity impairments are unrelated to the work injury. *See* Employer's Brief at 6, 7.

Employer also argues that "the ALJ did not base the denial of benefits on considerations of whether Dr. Franchetti failed to apportion his prior ratings", instead finding that Dr. Franchetti's opinion "lacked sufficient details of claimant's condition and pre-existing medical history" and "clearly did not rely on the laws of apportionment to formulate the final conclusion of law". Employer's Brief at 8.

Because the COR repeats the errors of the CO, and because the District of Columbia Court of Appeals ("DCCA") has issued a decision during the pendency of this appeal that requires additional analysis by the fact finder, we vacate the denial and remand for further consideration.

ANALYSIS

If there was any question at the time of the CRB's initial consideration of the first appeal as to whether the ALJ intended to find that Claimant's current medical impairments as described in the CO were causally related to the subject work injury, the COR dispels any doubts. It could not be more explicit. We repeat the concluding portion of the COR:

CONCLUSION OF LAW

Claimant's accidental injury arose out of and in the course of her employment and her symptoms are medically causally related to her workplace accidents/injuries. Claimant has zero percent (0%) permanent partial disability to her upper extremities.

ORDER

It is **ORDERED** Claimant has zero percent (0%) permanent partial disability to her upper extremities.

COR at 12, 13.

The ALJ determined that a 0% award is appropriate, based upon the failure of Claimant to "prove by a preponderance of the evidence, the nature and extent of her disability without the benefit of any presumption. In other words, Claimant must establish the percentage of disability or scheduled award once a medical causal relationship has been established. She has not done so." COR at 11.

The ALJ's reasoning is that the medical evidence supporting the degree of medical impairment presented by Claimant in the form of an independent medical evaluation (IME) performed by Dr. Michael Franchetti is not reliable for a number of reasons, the first being "the problem with Dr. Franchetti's upper extremity ratings is they occur in a vacuum, *that is, without any correlation to*

Claimant's current medical condition" and "Dr. Franchetti does not address *Claimant's pre-existing chronic cervical issues.*" COR at 10, 11 (emphasis added).

To the extent that this language has any legal significance, it can only mean one thing: Dr. Franchetti's opinion concerning the extent of Claimant's current medical impairment is rejected because the ALJ can't tell what proportion of the expressed opinion of impairment is related to the work injury, and what percentage is related to the pre-existing medical impairments.

The COR contains numerous statements of law and fact which are not in dispute. The COR also suggests that the CRB misunderstood either the CO or the law by overlooking certain other findings in the CO that would be, in the ALJ's view, supportive of the CO's final conclusion, such as the fact that the record contains medical evidence that Claimant suffers from no current medical impairment and the declaration that "What the DRO overlooked was the fact that Dr. Dawson's own medical record dated October 18, 2012 wherein he noted 'Claimant does not have any upper extremity impairment'. For the record, Claimant's 2013 accidental injury did not involve her upper extremities. Lastly, and also apparently overlooked [by the CRB in the DRO] was the finding of fact that Claimant passed physical examinations that allowed her to become a station manager." COR at 12.

We cannot overlook the fact that the ALJ's reasons listed above are irrelevant, because despite Dr. Dawson's 2012 opinion, the ALJ found otherwise, and despite the fact that Claimant passed a physical to qualify for a different job than she held when some of the injuries were sustained, the ALJ still found that Claimant suffers from current, causally related upper extremity impairments.

It is this internal inconsistency of analysis that dooms the CO and COR. The CRB is required to determine whether the facts as found by the ALJ are supported by substantial evidence and the legal conclusions reached flow rationally from those facts. The CRB may not inventory the compensation order to see if there are findings that would support a given conclusion, where the compensation order also includes findings that are in direct conflict with the relevant conclusions reached. Thus, in this case, while the ALJ found that Claimant's current medical impairments (referred to variously as "freezing up" and "swelling", among other terms) are causally related to the subject work injury, his rejection of Dr. Franchetti's opinions concerning the degree of medical impairment is rejected on the irrelevant grounds that the doctor doesn't "apportion" the impairment ratings between pre-existing and work-related conditions, that Dr. Dawson doesn't think there is any medical impairment, and Claimant passed a physical for a different job than she held when some of the injuries were sustained.

We are also compelled to point out that the ALJ's conclusion that Claimant has sustained a specific percentage of disability, being zero percent (0%), does not flow rationally from any findings of fact contained in the CO or COR. That is, the ALJ never states that doctor "X" expressed the opinion that Claimant sustained a zero percent impairment and that he, the ALJ, accepts that opinion as fairly representing Claimant's medical impairment or disability. Although the ALJ alludes to Dr. Dawson's opinion to that effect, the ALJ never accepts that opinion in the CO or the COR, and the ALJ's factual conclusions regarding Claimant's current physical impairments contradict the opinion of Dr. Dawson.

A claimant's burden is to prove entitlement to the benefits claimed by a preponderance of the evidence. The fact that a fact-finder has qualms about the quality of the medical evidence presented (qualms which in this case are based upon legally irrelevant factors) doesn't mean that the record establishes a zero percent impairment or disability. A failure of proof, even if such was the case here, is not proof of a zero percent impairment or disability.

More importantly though, the burden placed upon Claimant in this case is to establish entitlement to the claim by a preponderance of the evidence, which is:

[T]he greater weight of the evidence; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to *one side of the issue or the other*. This is the burden of proof in a civil trial, in which the jury is instructed to find for the party that, *on the whole*, has the stronger evidence, *however slight* the edge may be.

Preponderance of the Evidence, Black's Law Dictionary, (7th ed. 1999) (emphasis added).

The record undoubtedly contains substantial evidence sufficient to establish a degree of medical impairment. "Substantial evidence" is such evidence as a reasonable person might accept to support a given proposition. *Marriott v. DOES*, 834 A.2d 882 (D.C. 2003). Under the preponderance standard, the question the ALJ must decide is whose evidence is superior.

The fact-finder's task in a case under the Act is not to assess whether the evidence is clear and convincing. There will be cases where an ALJ is dissatisfied to one degree or another with the evidence presented by both sides. In such a case, assuming there is some evidence in the record which a reasonable person might accept to support a finding concerning the degree of medical impairment and a disability, it is incumbent upon an ALJ to assess which party's evidence preponderates.

This principle is of great significance in schedule loss cases, because the DCCA has recently signaled its view that determining the degree of medical impairment in a schedule loss claim is a necessary first step in assessing schedule disability.

Under the recent case of *M.C. Dean, Inc., v. DOES and Anthony Lawson, Intervenor*, No. 14-AA-1141 (D.C. July 7, 2016) ("*Lawson*") the court held:

We agree that determining "occupational capacity is precisely what an ALJ is tasked to do," but it is not clear that occupational capacity should be an independent factor in a vacuum. Limitations of occupational activities are assessed under the statutory structure (with the Maryland factors of pain, weakness, atrophy, loss of endurance, and loss of function), and our recent decisions have emphasized that *variance from the physical impairment rating to the economic disability rating should be specifically explained*. See *Bowles v. DOES*, 121 A.3d 1264 (D.C. 2015)] *supra*, at 1269–70 (remanding where disability award could not be derived from summation of the possible evidence: "No combination of 7%, 8%, and 5% add[s] up to just 10%"); *Jones, [v. DOES, 41 A.3d 1219 (D.C. 2012)] supra*, 41 A.3d at 1226 (remanding for

further findings where the basis of a 7% disability award “and not, for example, 1%, 10% or 30% -- is a complete mystery.”)

Lawson, at 24, 25 (emphasis added).

And the CRB has an established line of cases which highlight the singular importance of arriving at a determination of medical impairment as part of the process of considering schedule claims, as reviewed in *Mann v. Knight Networking*, CRB No. 16-001 (July 26, 2016), where the CRB wrote:

The usage “variance from the physical impairment” suggests that the court views medical impairment as a baseline from which disability is to be assessed, and is consistent with a framework for analysis that has been applied in CRB decisions since *Jones [v. DOES]*, 41 A.3d 1219 (D.C. 2012)].

Id., at 5, 6. See also: *Ulloa v. Hotel Harrington*, CRB No. 12-006 (August 7, 2012); *Green v. DOES*, CRB No. 12-156 (November 15, 2012); *Nickens v. Fort Myer Construction*, CRB No. 13-057 (August 6, 2013) (*Nickens I*); *Prescott v. Friendship Public Charter School*, CRB No. 13-072 (August 22, 2013); *Hawkins v. Washington Hospital Center*, CRB No. 13-063 (August 27, 2013); *Nickens v. Fort Myer Construction*, CRB No. 14-045 (August 19, 2014), (*Nickens II*); and, *Allen v. Corrections Corporation of America*, CRB No. 15-090 (October 5, 2015).

On the record before us and considering the contents of the CO and COR, while the evidence may be less than as compelling as the ALJ would prefer, it is error to hold that the record does not contain sufficient evidence from which a reasonable person could arrive at a conclusion as to in whose favor the evidence preponderates on the question of the degree of medical impairment that Claimant suffers to her arms. On remand, the ALJ is instructed to do so.

The ALJ is also instructed that it is error to discount a medical opinion regarding the degree of impairment a claimant suffers based upon considerations of causal relationship in this case, in light of the findings that Claimant’s present “symptoms and complaints” are causally related to the work injury at issue.

Upon reaching a factual determination on this issue, if it is found that Claimant has sustained a medical impairment to the arms, the ALJ is to further consider the degree of disability to the arms Claimant has sustained under the schedule, taking into account the court’s recent holding in *Lawson* as well as the other cases cited therein and above.

CONCLUSION AND ORDER

The finding that Claimant sustained a zero percent disability to each arm is unsupported by substantial evidence and is vacated. The rejection of the medical opinions of Dr. Franchetti conflicts with the finding that Claimant suffers from ongoing medical impairments of the arms, and further includes within it impermissible considerations concerning causal relationship and apportionment, and is vacated. The matter is remanded for further consideration and findings of fact concerning the degree of medical impairment to the arms suffered by Claimant, and consideration of the extent of disability that Claimant has sustained under the schedule.

So ordered.