GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR

F. THOMAS LUPARELLO
ACTING DIRECTOR

DEPT. OF EMPLOYMENT SERVICES
COMPENSATION REVIEW BOARD
2014 MAY 7 AM 10 03

COMPENSATION REVIEW BOARD

CRB No. 13-101

JACQUELINE DENT,
Claimant-Petitioner,

v.

PROVIDENCE HOSPITAL,
Self-Insured Employer-Respondent.

Appeal from a July 23, 2013 Compensation Order By
Administrative Law Judge David L. Boddie
AHD No. 12-381, OWC No. 673038

Michael J. Kitzman, for Petitioner
Todd S. Sapiro, for the Respondent

Before: JEFFREY P. RUSSELL, MELISSA LIN JONES and HEATHER C. LESLIE, *Administrative Appeals Judges*.

JEFFREY P. RUSSELL for the Compensation Review Board.

DECISION AND ORDER

OVERVIEW

Jacqueline Dent was employed as a clerical employee by Providence Hospital (Providence) on May 8, 2001, on which date she sustained an injury to her right shoulder when she sat down and her chair unexpectedly shifted beneath her, causing her to strike her right shoulder and neck against her desk. She treated with Dr. Steven S. Hughes after initially seeing him at Providence's request, and with Dr. Edward Rankin. She last treated with Dr. Rankin[1] and Dr. Hughes in 2001. Although Ms. Dent testified that she also has received treatment to her shoulder from Dr. Easton Manderson, the record contains no medical records corroborating that testimony, despite the presence of treatment records from Dr. Manderson relating to other unrelated injuries.

[1] Although identified as an exhibit on the record and on the Claimant's Exhibit List as Exhibit 3, the record does not contain any report from Dr. Rankin. Rather, Exhibit 3 is an MRI report dated July 22, 2001 by Dr. Robert L. Hamm. The transcript and exhibit list identify this report as Exhibit 4, but there are only 3 exhibits in the submission.

At the time of the injury, and for 10 years thereafter, Ms. Dent worked a second full time at Howard University Hospital. She retired from Providence in 2010, but has continued to work full time for Howard, including working overtime.

In 2012, Ms. Dent sought a schedule award from Providence, based upon an Independent Medical Evaluation (IME) from Dr. Joel Fechter, in which he assessed her condition as resulting in a 10% right arm impairment under the American Medical Association Guides to the Evaluation of Permanent Impairment (the Guides), an additional 4% for pain, and an additional 3% each weakness, loss of endurance and loss of function, as a result of the injury.

Providence had Ms. Dent evaluated by Dr. Hughes, who opined that Ms. Dent had sustained 5% permanent partial impairment under the Guides. Providence made voluntary payment to Ms. Dent for 5% permanent partial disability under the schedule.

Ms. Dent filed an Application for Formal Hearing (AFH) seeking a higher award. Following a formal hearing on September 18, 2012, an Administrative Law Judge (ALJ) in the Department of Employment Services issue a Compensation Order on July 23, 2013 (the CO) in which he denied her claim for a schedule award.

Ms. Dent timely appealed the CO to the Compensation Review Board (CRB), to which appeal Providence has filed an opposition.

Because the ALJ's determination that Ms. Dent has sustained no economic loss from her injury is supported by substantial evidence, the CO is affirmed.

DISCUSSION AND ANALYSIS[2]

Ms. Dent first argues that the ALJ's bases for denying the claim are not supported by substantial evidence. She identifies those supposedly unsupported bases as (1) remoteness in time of the injury, (2) lack of evidence to support her claims of ongoing symptoms, (3) the lack of current treatment, (4) the occurrence of intervening injuries, and (5) her ability to return to work.

In framing this argument, Ms. Dent is quoting or summarizing the concluding paragraph of the "Discussion" in the CO. That paragraph reads as follows:

> In consideration of the overall evidence in the record, the Claimant's claim is rejected due to the remoteness of her claim, the lack of evidence to support her testimony of ongoing symptoms related to the injury, lack of medical evidence to

[2] The CRB reviews a Compensation Order to determine whether the factual findings are based upon substantial evidence in the record, and whether the legal conclusions drawn from those facts are in accordance with applicable law. The CRB will affirm a Compensation Order that is supported by substantial evidence, even if there is also contained within the record under review substantial evidence to support a contrary conclusion.

> support testimony that she is currently receiving ongoing treatment related to the injury; the fact that there have been intervening injuries and treatment, and the fact that, with the exception of the time off due to other injuries, the Claimant has been able to and continued to work. Therefore, finding no reliable credible evidence in the record to support Claimant's testimony, I reject the Claimant's claim for a permanent partial disability award.

CO, page 9.

Each of the statements in the ALJ's concluding paragraph finds record support, and in fact, Ms. Dent does not dispute them specifically. The initial injury was 10 years earlier than the formal hearing, there is no evidence which we have seen or to which we have been directed supporting or corroborating Ms. Dent's testimony that she experienced any ongoing right shoulder problems during that time, or evidencing that she is currently receiving any medical care for the right shoulder. It is undisputed that there have indeed been subsequent intervening injuries to other parts of the body which caused Ms. Dent to miss work, and Ms. Dent herself testified that she has never lost time from work due to her right shoulder and arm.

Further, it is notable that this paragraph immediately follows the ALJ's acknowledgement that "the determination of the credibility of a witness ought to involve more than consideration of the witness' demeanor and appearance. It should apprehend the over-all evaluation of testimony in light of its rationality, internal consistency, and the manner in which it hangs together with the other evidence". Thus, the quoted paragraph should be read in the context of explaining the ALJ's reasons, beyond demeanor and appearance, for rejecting Ms. Dent's testimony (the only evidence presented of any ongoing problems with her right shoulder being that testimony).

The ALJ is not, as Ms. Dent argues, rejecting the claim because it arises from a 10 year old injury, or because of concerns about medical causal relationship, but rather because of what the evidence of record reveals (and fails to reveal) about the events of that decade. While the reference to "intervening injuries" to other body parts may appear at first glance to suggest that the ALJ had injected causal relationship into the mix, in context it becomes clear that the ALJ's point is that the only times in the last decade that Ms. Dent missed work were when she suffered these other, intervening and unrelated injuries. That is just another way of saying that the subject injury has not caused Ms. Dent to miss any time from employment, either at her job with Providence or her second, full time job, for over a decade.

Also, the reference to the intervening injuries must be read in the broader context of the CO as a whole, wherein the ALJ makes clear that the records of those intervening injuries give no indication that Ms. Dent has ever expressed being troubled by right shoulder problems to any of these intervening treating physicians. This is evident, for example, on page 7, where the ALJ wrote "contrary to the Claimant's testimony that Dr. Manderson provided some treatment related to her right upper extremity, while treating her for other conditions, the evidence in the record as reflected in the medical reports of Dr. Manderson fail to support that testimony". In other words, one of the physicians who treated some of these intervening injuries was said by Ms. Dent to have also treated her right shoulder, and if that were so, one would expect that testimony to be corroborated by Dr. Manderson's treatment records, yet it is not.

These same considerations lead us to reject Ms. Dent's argument that the ALJ failed to adequately explain or justify his determination that Ms. Dent was not a credible witness. Primarily, in his view, Ms. Dent's testimony did not "hang together" with the record evidence. Given the deference accorded to the fact finder on credibility issues, we will not substitute our judgment for that of the ALJ. And, lest one forget, the ability to assess appearance and demeanor are still important reasons for according much deference to the person who heard the evidence, even if they are not the only reasons to do so. *See, Dell v. DOES*, 499 A.2d 102 (D.C. 1985).

Ms. Dent also argues that the ALJ erred in finding a "lack of ongoing symptoms", suggesting that both Dr. Hughes and Dr. Fechter found "ongoing complaints and objective findings on physical examination", referring to Dr. Fechter's noting "crepitus" in the shoulder, and both doctors reporting positive "Neer" and "Hawkins" tests. But, as Ms. Dent acknowledges in her argument, the Neer and Hawkins tests rely upon a patient's report of pain to be accurate. The ALJ determined that she was not credible. Hence, it is not unreasonable for the ALJ to infer from her lack of credibility that tests based upon her report of pain are not "objective" and require some sort of corroboration, which as discussed before, the record lacks.

Further, we point out that the ALJ did find that Ms. Dent suffers a medical impairment of 5%, consistent with the medical opinion of Dr. Hughes. However, he determined that despite the existence of this medical impairment, Ms. Dent had produced no evidence that the impairment is likely to have any economic or industrial impact. Indeed, the ALJ concluded that a 10 year history of continuing to work not only the Providence job, but a second full time job, without missing any time from work or experiencing any limitations on her capacity for work was strong evidence that the impairment is not a "disability" in this case, citing *Negussie v. DOES*, 915 A.2d 391 (D.C. 2007), and the statutory definition of disability, which is defined as "physical or mental incapacity because of injury which results in the loss of wages". D.C. Code § 32-1501(8).

Ms. Dent's argument that the ALJ was bound to make a disability award under *Smith v. DOES*, 548 A.2d 95 (D.C. 1988) is unavailing. The language she points to in *Smith* is where the court wrote "Although impaired earning capacity need not be proved to receive schedule benefits, this is not … to be interpreted as an erratic deviation from the underlying principle of compensation law—that benefits relate to loss of earning capacity and not to physical injury as such. The basic theory remains the same; the only difference is that the effect on earning capacity is a conclusively presumed one, instead of a specifically proved one based upon the individual's actual wage loss experience." Petitioner's Memorandum, page 6.

What Ms. Dent is missing in this argument is the fact that the court in *Smith* was talking about the lack of a need for a proven actual wage loss experience to recover under the schedule, and that awards are predictive in nature, with such a prediction being subject the possibility of error when, in hindsight, an award may turn out to be "overly generous in some cases, and grievously inadequate in others". What is "conclusively presumed" under *Smith* is that whatever the award is that is made is correct, assuming that it is based upon substantial evidence. The discussion in *Smith* is a discussion of the theoretical underpinnings of schedule awards and how once such an award is made, what actually happens in the future is irrelevant to whether a claimant has been over or undercompensated by the award that was made, because it is "conclusively presumed"

that the statutory schedule represents the industrial effect of the injury. *Smith* does not say that a claimant's actual wage loss experience *prior* to receiving an award under the schedule is irrelevant to the making of the prediction regarding *future* wage loss.

As the CRB has held, the absolute prohibition upon consideration of the existence and amount of a specific, identifiable loss of wages in a particular case is no longer the law in this jurisdiction, and hasn't been since the District of Columbia Court of Appeals (DCCA) held that such a prohibition is not consistent with the law with regard to schedule awards, in *Jones v. DOES*, 41 A.3d 1219, 1224 to 1226 and footnote 7 (D.C. 2012); See also, *Hill v. Howard University*, CRB No. 12-016, AHD No. 117A, OWC No. 657973 (September 5, 2012), AAJ Jones dissenting in part; see also, *Al Robaie v. Fort Myer Construction Co.*, CRB No. 10-014, AHD No. 09-383, OWC No. 642015 (June 6, 2012), AAJ Jones, Chair, in which the following language appears:

> Furthermore, the ALJ's ruling that Mr. Al-Robaie is not entitled to permanent partial disability benefits because he "has not returned to any type of gainful employment" also constitutes error. Upon remand, the ALJ is directed to reconsider the Claimant's request for permanent partial disability benefits without any consideration of wage loss *except to the extent that such wage loss correlates with or is indicative of loss of wage earning capacity or economic impairment.*

Al Robaie, supra, page 5 (emphasis added).

The *Jones* court's footnote 7 reads as follows:

> Although neither the ALJ nor the parties have referred to the relative amounts petitioner received from her full-time and part-time employment, we note there are documents in the record (one from employer's counsel) that petitioner's part-time work comprised approximately 20% of her overall earnings.

Jones, *supra*, at 1222.

Thus, consistent with the court's writing in *Jones* and the CRB holding in *Al Robaie*, "to the extent that such wage loss correlates with or is indicative of loss of wage earning capacity or economic impairment", actual wage loss history (its presence or absence) may be considered as a factor by an ALJ in making a prediction about the future impact a schedule injury will cause.

Beyond this, Ms. Dent argues that "lack of ongoing medical treatment" is "not legally relevant to the issue in dispute", and thus the ALJ's inclusion of this factor in considering this claim is error. Again, we disagree. How frequently a claimant seeks medical care, or takes pain medication, or takes any number of actions can certainly shed light on the degree to which that claimant suffers from a medical condition and how severe that injury or condition is. While it is true that schedule awards are made for loss of industrial use, the severity of an injury is a primary factor in reaching a reasoned conclusion regarding the degree of disability.

Ms. Dent's also assigns error to the ALJ's handling of the medical opinion evidence. She complains that the ALJ accorded Dr. Hughes's opinion the weight of a treating physician, being a preference over that of independent medical opinion, and argues that Dr. Hughes's connection with this case is not one entitling him to such a preference.

The simple answer to this complaint is that the ALJ did not do as Ms. Dent suggests. Indeed, he did exactly the opposite, writing:

> While recognizing the "treating physician preference", I find it is not applicable under the facts of this case, due to the substantial gap in time from the last examination by Dr. Hughes of the Claimant, in August 2001, and the next IME he performed at the request of the Employer in December 2012. Under those facts and circumstances the role of Dr. Hughes may best be characterized as the Claimant's "former treating physician".

CO, at page 7.

This is a case in which the ALJ viewed all the medical evidence on an equal footing with respect to initial weight. We need not address whether the ALJ was wrong in denying Dr. Hughes's views the status of treating physician opinion, beyond saying that as far as the documentary evidence is concerned, Dr. Hughes, who agreed to take Ms. Dent on as a patient after first seeing her in an IME setting, did provide treatment to Ms. Dent and, as the ALJ noted, he has the benefit of having seen Ms. Dent more closely to the time of the injury, and Dr. Fechter only saw Ms. Dent on one occasion while Dr. Hughes saw her multiple times.

In weighing the competing opinions that he viewed as IMEs, the ALJ gave cogent, specific reasons why he preferred the opinion of Dr. Hughes to that of Dr. Fechter. While we fail to see any great relevance to one reason given (that Dr. Fechter's report fails mention that the injuries referred to in the "Past Medical History" section of the report are intervening rather pre-injury injuries), it was certainly not reversible error to include reference to that fact.

CONCLUSION AND ORDER

The findings of fact contained in the Compensation Order are supported by substantial evidence, and the denial of the claim for a schedule award to the right arm is in accordance with the law, and is affirmed.

FOR THE COMPENSATION REVIEW BOARD:

JEFFREY P. RUSSELL
Administrative Appeals Judge

May 7, 2014
DATE