

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA M. MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 11-046

NOEL TIONGSON,
Claimant-Petitioner,

v.

GEORGETOWN UNIVERSITY,
Self-Insured Employer—Respondent

Appeal from a Compensation Order by
Administrative Law Judge Belva D. Newsome
AHD No. 10-547, OWC No. 654478

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2012 JUN 18 PM 2 58

Matthew J. Pepper, Esquire, for the Petitioner
Jeffrey W. Ochsman, Esquire, for the Respondent

Before: HENRY W. MCCOY, JEFFREY P. RUSSELL,¹ and LAWRENCE D. TARR, *Administrative Appeals Judges*.

HENRY W. MCCOY, *Administrative Appeals Judge*, for the Compensation Review Board.

DECISION AND REMAND ORDER

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board (CRB) pursuant to D.C. Official Code §§ 32-1521.01 and 32-1522 (2004), 7 DCMR § 230, *et seq.*, and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005).

¹ Judge Russell has been appointed by the Director of the DOES as an interim CRB member pursuant to DOES Administrative Policy Issuance No. 11-01 (June 23, 2011).

OVERVIEW

This case is before the CRB on the request for review filed by the Claimant of the April 19, 2011 Compensation Order (CO) issued by an Administrative Law Judge (ALJ) in the Hearings and Adjudication section of the Office of Hearings and Adjudication (OHA) of the Department of Employment Services (DOES). In that CO, the ALJ denied Claimant's request for permanent partial disability by finding his current right upper extremity complaints are not medically causally related to the work injury of September 30, 2008.

BACKGROUND FACTS OF RECORD

Claimant sustained injury to his neck, back, right shoulder, left toes and right foot in an accidental work related injury on September 30, 2008. The following day, Claimant received initial treatment at the university hospital emergency room and then came under the care of Dr. Michael Franchetti.² Claimant was diagnosed with cervical and lumbar strain, lumbar radiculopathy and sprain of the right shoulder. Claimant continued regular treatment for his complaints of pain and was released to return to full duty as of January 19, 2009.³

Claimant first complained of right elbow pain on February 3, 2009. Dr. Franchetti diagnosed right elbow lateral epicondylitis and related it to the September 30, 2008 work injuries. Dr. Franchetti continued to find right shoulder and right lateral elbow pain upon subsequent examinations culminating in an impairment rating of 33% permanent partial impairment to the right upper extremity as a result of the September 30, 2008 work injury.

At the ensuing formal hearing, the ALJ determined that Claimant had not shown by a preponderance of the evidence that his right upper extremity complaints were medically causally related to the work injury and denied the request for a schedule award. *Tiongson v. Georgetown University*, AHD No. 10-057, OWC No. 654478 (April 19, 2011). Claimant timely appealed with Employer filing in opposition.

On appeal, Claimant seeks reversal of the CO arguing that the manner in which the ALJ rejected the treating physician's opinions constitutes an error in law and fact. Employer argues to the contrary and that the CO should be affirmed.

DISCUSSION AND ANALYSIS

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. *See* D.C. Workers' Compensation Act of 1979, as amended, § 32-1501 *et seq.*, at § 32-1521.01 (d)(2)(A). "Substantial evidence", as defined by the District of Columbia Court of

² Claimant was initially seen by Dr. Kevin E. McGovern on October 6, 2008. According to the medical reports in CE 2, he did not come under the care of Dr. Franchetti until his third office visit to Maryland Orthopedics on October 29, 2008.

³ In the CO, the ALJ mistakenly records the full duty release date as January 19, 2011. However, CE 3 at p. 31 clearly shows that on January 6, 2009 Dr. Franchetti had Claimant in an off work status "until 1/19/09 then full duty."

Appeals, is such evidence as a reasonable person might accept to support a particular conclusion. *Marriott International v. D.C. Dept. of Employment Services*, 834 A.2d 882 (D.C. 2003). Consistent with this standard of review, the CRB and this Review Panel are constrained to uphold 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, and even if the CRB might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

Turning to the case under review, we note that at the formal hearing, the ALJ framed the initial issue for resolution as whether "Claimant's injury to his right arm and elbow of September 30, 2008 [was] medically causally related?" CO at 2. And, after reviewing the medical evidence, the ALJ resolved this issue by concluding that "Claimant has not shown by a preponderance of the evidence that his right upper extremity complaints are medically causally related to his injury of September 30, 2008." *Id.* at 4.

In the parties' respective briefs on appeal, neither contests that the presumption of compensability was invoked by Claimant as the accidental work-related injury was stipulated to and Claimant, in his brief, specifically concedes the presumption was rebutted by Employer with the submission of the independent medical evaluations (IME) of Dr. Kenneth Spence.

However, Claimant takes issue with the manner in which the ALJ then weighed the medical evidence without benefit of the presumption and argues that she committed error in doing so. Specifically, Claimant argues the ALJ, in determining whether he had met his burden by a preponderance of the evidence, failed to reference the competing medical evidence and only noted the deficiencies of the treating physician's opinions, and also substituted her judgment of the causal relationship in place of the medical evidence.

The portion of the Compensation Order addressing the opinion of Dr. Franchetti reads as follows:

Claimant relies upon his medical records from Dr. Franchetti, Dr. Franchetti's rating, and his testimony. Dr. Franchetti treated Claimant from October 6, 2008 until May 5, 2009. Dr. Franchetti rendered his opinion concerning Claimant's impairment status on December 8, 2009, after an examination of Claimant. Dr. Franchetti opined that Claimant had reached maximum medical improvement and rated Claimant's permanent disability for his right upper extremity of 33%. *Dr. Franchetti did not diagnose Claimant with right elbow lateral epicondylitis until February 3, 2009. Dr. Franchetti's medical records do not reflect any complaints by Claimant concerning right elbow pain prior to February 3, 2009.* On February 3, 2009, Claimant informed Dr. Franchetti that that his elbow pain was a result of the September 30, 2008 work injury. *Claimant's medical records do not reflect any objective findings with respect to Claimant's upper extremity complaints. Dr. Franchetti only finds tenderness in Claimant's right shoulder and elbow without any objective testing.*

Compensation Order, page 4 (emphasis added).

From this passage one can see that the ALJ was inventorying the shortcomings of Dr. Franchetti. The italicized portions of this quotation demonstrate that the ALJ may have considered the following four issues: A four month delay from the date of injury until a diagnosis of right arm involvement; A four month delay from the date of injury until any record of right arm complaints; the completely subjective nature of the symptoms; and the complete absence of any objective testing to corroborate the existence of any pathology.

What is missing is (1) any acknowledgement by the ALJ that Dr. Franchetti's opinion is entitled to an initial preference in comparison to that of an IME physician, and (2) any specific statement to the effect that she is in fact rejecting Dr. Franchetti's opinion with the recognition of this preference, and (3) any analysis as to why these four points are of significance to her.

It is well settled in this jurisdiction that the opinion of the treating physician is accorded great weight and is generally to be preferred over that of a physician retained solely for litigation purposes.⁴ This rule is not absolute, however, as an ALJ may reject the opinion of the treating physician and credit the opinion of another doctor when there is conflicting evidence. In doing so, the fact-finder must give reasons for rejecting the testimony of the treating physician.⁵

This leads us to the following problem: while the ALJ appears to have identified sufficient reasons to reject the treating physician's opinion even in light of the preference for treating physician opinion, because of the lack of analysis we must infer from the inclusion of these points in the Compensation Order that they are in fact the reasons that she rejected his opinion.

While we do not wish to establish a rule that an ALJ must in every instance set forth a statutory or decisional basis for every analytic step in a Compensation Order, there are some areas in which, by practice and for reasons of insuring the parties and any reviewing authority that certain established concepts are recognized by the ALJ, need to be specifically acknowledged. Among the most notable are the existence of the various presumptions, the "burden shifting" wage loss/employability schematic established in *Logan v. DOES*, 805 A.2d 237 (D.C. App. 2002), and the treating physician preference in evaluating medical opinion.⁶

Where the Compensation Order does not mention the existence of the treating physician preference, we can not be certain that the fact finder was aware that, all things being equal, the treating physician preference would require that the treating physician's opinion be accepted over that of an IME physician. In this case, we do not know whether the ALJ felt that the IME opinion suffered from infirmities equal to or greater than those that we infer she found in the opinion of Dr. Franchetti. It may be that she does not, but we can not tell.

⁴ *Kralick v. Dept. of Employment Services*, 842 A.2d 705, 712 (D.C. 2004), also see, *Short v. Dept. of Employment Services*, 723 A.2d 845 (D.C. 1998), *Stewart v. Dept. of Employment Services*, 606 A.2d 1350 (D.C. 1992).

⁵ *Canlus v. Dept. of Employment Services*, 723 A.2d 1210, 1211-12 (D.C. 1995).

⁶ This is not meant as an exhaustive list, merely an illustrative one.

For this reason, we must remand the matter for further analysis in which the ALJ acknowledges the existence of the treating physician preference and sets forth her reasons for rejecting that opinion.

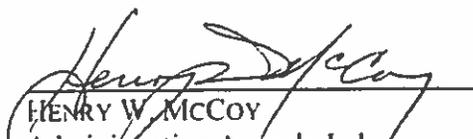
We also take issue with the ALJ's determination that "Claimant's testimony was not credible since it was supported by the evidence in the record." CO at 2. It is left to conjecture whether this is a case of typographical omission and the ALJ meant that Claimant was not credible since his testimony was "not" supported by evidence in the record. Since it is generally accepted that the ALJ is in the best position to determine credibility and that the CRB will only reverse such a determination if it is clearly wrong⁷, we are not at liberty to fill in the gap on such crucial a determination.⁸ The ALJ has based her determination solely on comparing the Claimant's testimony with the evidence in the record but has not provided any of those inconsistencies in record to allow us to defer to her judgment. On remand, the ALJ shall correct the omissions as to determination of Claimant's credibility and the inconsistencies in the record that support that determination.

CONCLUSION AND ORDER

The ALJ's rejection of the opinion of the treating physician without analyzing that opinion in light of the treating physician preference is not in accordance with the law, and the finding that Claimant lacked credibility is not substantiated by reference to specific inaccuracies or inconsistencies identifiable in the record, rendering it unsupported by substantial evidence.

The Compensation Order of April 19, 2011 is REVERSED and REMANDED for further findings of fact that are consistent with the record evidence and to draw conclusions of law that rationally flow from those findings.

FOR THE COMPENSATION REVIEW BOARD:


HENRY W. MCCOY
Administrative Appeals Judge

January 18, 2012

DATE

⁷ *Dell v. Dept. of Employment Services*, 499 A.2d 102, 106 (D.C. 1985)

⁸ *King v. Dept. of Employment Services*, 742 A.2d 460 (D.C. 1999).