GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR

LISA M. MALLORY
DIRECTOR

Compensation Review Board

CRB No. 12-178

XIOMARA RAMIREZ,
Claimant–Petitioner,

v.

SECURITAS SECURITY and INDEMNITY INSURANCE COMPANY OF AMERICA,
Employer/Insurer-Respondent

Appeal from a Compensation Order on Remand by
The Honorable Karen R. Calmeise
AHD No. 10-608A, OWC No. 672756

Matthew J. Peffer, Esquire, for the Claimant/Petitioner
Barry D. Bernstein, Esquire, for the Employer-Insurer/Respondent

Before: JEFFREY P. RUSSELL,[1] HENRY W. MCCOY, and HEATHER C. LESLIE,[2] *Administrative Appeals Judges*.

JEFFREY P. RUSSELL, *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. 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. 12-01 (June 20, 2012).

[2] Judge Leslie has been appointed by the Director of the DOES as an interim CRB member pursuant to DOES Administrative Policy Issuance No. 12-02 (June 20, 2012).

OVERVIEW

Xiomara Ramirez injured herself on April 23, 2010 when she slipped and fell while working as a security guard for Securitas Security (Securitas). In a Formal Hearing before an Administrative Law Judge (ALJ) in the Department of Employment Services (DOES), Ms. Ramirez sought an award for permanent partial disability to the left arm under the schedule, claiming that the cervical injuries sustained in the fall resulted in a permanent impairment to the left arm.

In a Compensation Order issued October 1, 2012 (the CO), the ALJ denied the claim, finding that the claimed disability to the left arm was not causally related to the stipulated work injury. Ms. Ramirez appealed the CO to the CRB, to which appeal Securitas has filed an opposition.

We vacate the denial and remand for further consideration.

STANDARD OF REVIEW

The scope of review by the CRB, as established by the Act and as contained in the governing regulations, is limited to making a determination as to whether the factual findings of the 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.[3] *See* D.C. Workers' Compensation Act of 1979, as amended, D.C. Code §§ 32-1501 to 32-1545 (2005), at § 32-1521.01(d)(2)(A). 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 where the reviewing authority might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

ANALYSIS

The ALJ found that, by virtue of Securitas's stipulation to Ms. Ramirez's having sustained a workplace injury on April 23, 2010, Ms. Ramirez was entitled to the presumption that the claimed left arm disability is causally related to that injury, pursuant to *Whitaker v. DOES,* 531 A.2d 844 (D.C. 1995).[4] She also determined that Securitas had adduced sufficient evidence, in the form of the

[3] "Substantial evidence," as defined by the District of Columbia Court of 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).

[4] D.C. Code §32-1521 provides that "in any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of evidence to the contrary:

(1) That the claim comes within the provisions of this chapter;
(2) That sufficient notice of such claim has been given;
(3) That the injury was not occasioned solely by the intoxication of the injured employee; and
(4) That the injury was not occasioned by the willful intention of the injured employee to injure or kill himself or another."

In order to benefit from the presumption, a claimant needs to make some "initial demonstration" of the employment-connection of the disability. The initial demonstration consists in providing some evidence of the existence of two "basic facts": a death or disability and a work-related event, activity, or requirement which has the *potential* of resulting in or

independent medical evaluation (IME) report by Dr. Stuart Gordon, to overcome the presumed medical causal relationship between the work injury and the claimed left arm disability. Neither party challenges the ALJ's determination in this regard.

Ms. Ramirez challenges the manner in which the ALJ proceeded after determining that the presumption had been rebutted, arguing that the ALJ improperly rejected the opinion of the treating physician, Dr. Joel Fechter, to the effect that the claimed left arm disability is causally related to the work injury. She argues that the reasons given by the ALJ for that rejection are inadequate for such rejection in light of the treating physician preference rule.[5]

Further, she argues that the ALJ's rejection of the treating physician's opinion was made without reference to any of the evidence offered by Securitas. In essence, she argues that the ALJ did not in fact reweigh the evidence, but rather determined that Ms. Ramirez's evidence was inadequate to sustain a finding of medical causal relationship.

Review of the CO confirms that there is no reference to Dr. Gordon's IME or deposition testimony in the portion of the CO following the finding that the presumption had been rebutted. Thus, although the ALJ properly noted that following such rebuttal the record evidence is to be "reviewed without reference to any presumption in order to determine whether the Claimant has shown, by a preponderance of the evidence, her condition is causally related to her employment", she does not appear to have actually undertaken such an analysis.

"Preponderance of the evidence" means "The greater weight of the evidence; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still

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contributing to the death or disability. The presumption then operates to establish a causal connection between the disability and the work-related event, activity, or requirement. *Ferreira v. DOES*, 531 A.2d 651 (DC 1987).

To raise the presumption, a claimant must make an initial showing that he or she sustained injuries and a work-related event that has the potential of causing or contributing to the injuries. *Id*. Once this minimal initial showing is made, the presumption establishes a causal connection between the claimant's injury and the work-related event, and the employer must present specific evidence in order to sever the presumed causal relationship between claimant's injury and his or her employment. "Absent employer evidence specific and comprehensive enough to sever the potential connection between a particular injury and a job-related event,' the compensation claim will be deemed to fall within the purview of the statute." *Parodi v. DOES,* 560 A.2d 524, 526 (D.C. 1989) (quoting *Ferreira,* at 655)). Once the employer presents such evidence, the presumption falls away, and the task of the ALJ then becomes to weigh the evidence anew without reference to any presumptions and with the claimant bearing the burden of proving the claim by a preponderance of the evidence.

[5] It is well established that the opinions of a treating physician are accorded great weight, and are generally to be preferred over a conflicting opinion by an IME physician. *See*, *Butler v. Boatman & Magnani*, OWC No. 044699, H&AS No. 84-348 (December 31, 1986), *Short v. DOES*, 723 A.2d 845 (D.C. 1998), and *Stewart v. DOES*, 606 A.2d 1350 (D.C. 1992). The rule is not absolute, and where there are persuasive reasons to do so, IME opinion can be accepted over that of treating physician opinion, with sketchiness, vagueness, and imprecision in the treating physician's reports having been cited as legitimate grounds for their rejection, and personal examination by the IME physician, as well as review of pertinent medical records and diagnostic studies, and superior relevant professional credentialing as reasons to support acceptance of IME opinion instead of treating physician opinion. *Erickson v. Washington Metropolitan Area Transit Authority*, OWC No. 181489, H&AS No. 92-63, Dir. Dkt. No. 93-82 (June 5, 1997).

sufficient to incline a fair and impartial mind to one side of the issue rather than the other. This is the burden in a civil trial, in which a jury is instructed to find for the party that, on the whole, has the stronger evidence, however slight the edge may be." BLACK'S LAW DICTIONARY, SEVENTH EDITION, Bryan A. Gardner, Editor in Chief, *West Group*, 1999, page 1201.

Proper application of the standard requires that the evidence be compared and weighed against competing evidence. What the ALJ's discussion in this case amounts to is closer to a summary judgment analysis, in which the ALJ has determined that Ms. Ramirez's evidence is, as a matter of law, insufficient to support a finding that her left arm complaints are medically causally related to the work injury. This is not the type of analysis the law contemplates under the preponderance standard.

This is error. And it is compounded by the final sentence in the penultimate paragraph of the Discussion: "However, after careful review I find the physician [Dr. Fechter] does not state that the left arm complaints were caused by the April 2010 slip and fall at work."

This erroneous statement as to the contents of the record reinforces the notion that the ALJ has deemed Ms. Ramirez's evidence inadequate as a matter of law, in part because the ALJ believes the record does not contain a medical opinion supporting causation.

No fair reading of the record in this case supports any conclusion other than that Dr. Fechter is of the opinion that Ms. Ramirez's current left arm complaints result from the slip and fall. CE 1, the report entitled "Progress Note" dated October 17, 2011, in the "History of Present Illness", states:

> The patient … sustained injury to her neck and low back at work on 4-23-10. MRI of the cervical spine 11-17-10 was noted to reveal no occult fracture or disc herniation. There was bilateral spondylosis with stenosis at the C5-6 and C6-7 levels. […] She has continued difficulties with pain radiating into the left upper extremity. She has increased difficulties with pain in the neck radiating into the left upper extremity with activities including grasping, pushing, pulling, an lifting activities. She has increased pain here with overhead activities and notes fatigue type discomfort with motion here. She notes she can't lift as much as she used to be able to due the pain in her neck radiating into the left upper extremity. She has had no new injury. She notes she can't carry a back pack on the left side due to her pain into the left upper extremity.

Under "Review of Systems", the only positive mention is "There is continued pain into the left upper extremity", and under "Assessment and Plan", he writes:

> The patient has reached maximum medical improvement. […] In accordance with the AMA Guide to the Evaluation of Permanent Impairment, as well as taking into account pain, weakness, loss of endurance, and loss of function, the patient is entitled to 16% impairment of the left upper extremity.

And, in CE 3, Dr. Fechter's deposition, at page 23, he states clearly that it is his opinion, to a reasonable degree of medical certainty, that the care that he has rendered to Ms. Ramirez has a

causal relationship to the April 23, 2010 accident. The record evidence shows that that care included examination and treatments for the left arm. See, e.g.,CE 2, page 31.

The ALJ identified reasons why she has doubts regarding causation, centered primarily upon a lack of credibility on Ms. Ramirez's part, and the late onset of left arm complaints *vis a vis* the date of injury. While the ALJ is not bound to ultimately accept Dr. Fechter's opinion, it is imperative that she at least recognize what that opinion is, and that that recognition be expressed in the CO. While an opinion that is on its face equivocal may be challenged on that basis, there is nothing equivocal about Dr. Fechter's opinion.

We are not unmindful of the fact that the ALJ did consider Dr. Gordon's IME report, and possibly the contents of his deposition, when she determined that the presumption had been rebutted. Had there been a full discussion of Dr. Gordon's opinion and its reasoning (including the late onset of complaints as discussed in EE 2, page 19) and its relative merits in that portion of the CO, and if it were apparent that the ALJ accepted that Dr. Fechter is of the opinion that the left arm complaints are causally related to the work injury, it is possible that we might be able to find the failure to reweigh the evidence directly, that is, to repeat in the second part of the analysis that which had been stated in the first, to be harmless error. But there is no discussion of the contents of that report or Dr. Gordon's deposition testimony, or of the merits of his opinion relative to the reports or opinions of Dr. Fechter anywhere in the CO. All the ALJ stated in connection with the IME was that Dr. Gordon examined Ms. Ramirez, noted the lack of diagnostic test results of the left arm, and opined that "Claimant has no permanent impairment to the left arm relating to the April 23, 2010 trauma."

We conclude by noting that we do not want our decision in this case to be taken as standing for the proposition that an ALJ may not deny a claim even where the claimant's evidence is uncontradicted. Where a claimant's case rests totally and completely upon non-credible evidence it can be said that the claimant has failed to meet his or her burden of proof. However, that does not appear to be the case here, or at least, that is not what the ALJ ruled.

CONCLUSION AND ORDER

The finding by the ALJ that Dr. Fechter did not express the opinion that Ms. Ramirez's left arm impairment is causally related to the work injury is clearly erroneous and unsupported by substantial evidence, rendering the conclusion that there is no such causal relationship similarly unsupported by substantial evidence. The ALJ's failure to reweigh the evidence after determining that the presumption of compensability had been rebutted is not in accordance with the law. The denial of the claim is vacated and the matter is remanded for further consideration of the claim, with instructions that the ALJ consider and review the record as a whole in weighing the evidence.

FOR THE COMPENSATION REVIEW BOARD:

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JEFFREY P. RUSSELL
Administrative Appeals Judge

December 17, 2012
DATE