GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR

ODIE DONALD II
ACTING DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 16-156

ARION P. JONES,
Claimant–Respondent,

v.

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

Appeal from a October 31, 2016 Compensation Order on Remand
by Administrative Law Judge Gregory P. Lambert
AHD No. 07-144B, OWC No. 633281

(Decided March 24, 2017)

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 ORDER

FACTS OF RECORD AND PROCEDURAL BACKGROUND

The Administrative Law Judge's ("ALJ") February 23, 2016 Compensation Order ("CO"), the Compensation Review Board's ("CRB") August 10, 2016 Decision and Remand Order ("DRO") and the ALJ's October 31, 2016 Compensation Order on Remand ("COR") now before the CRB pertain to 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 following lengthy procedural and factual background is taken from the CRB's August 10,

2016 DRO, *Arion Jones v. George Washington University*, CRB No. 16-036 (August 10, 2016)[1]:

PRELIMINARY MATTERS

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. *Sandoval*, at 12, n. 5.

> 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] Although this background recitation contains reference to matters previously decided and which are not presently before us, they are included so that a reader can understand the full context of the matters in contention in this case. However, in our analysis we will only address matters for which the matter was originally remanded.

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.]

DRO at 1-5. (brackets in original, footnotes omitted).

In response to this DRO, on October 31, 2016, the ALJ issued the COR now before the CRB, making additional findings of fact, and reaching the same conclusions of law as before. In the COR, the ALJ repeated the original CO in its entirety, explaining he was doing so in order to facilitate either party's preservation of issues for further appeal.

On November 30, 2016, Employer timely appealed the COR by filing Employer and Carrier's Application for Review and Employer and Carrier's Memorandum in Support of Their Application for Review ("Employer's Brief"), arguing again that the issues decided adversely to it in the COR were again unsupported by substantial evidence and contrary to law.

Claimant filed Claimant's Opposition to Application for Review ("Claimant's Brief") repeating Claimant's original arguments from the prior CRB proceeding, and arguing further that the COR addressed the issues raised by the CRB in the DRO adequately and correctly, and that it is in all respects in accordance with the law.

ANALYSIS

The remand mandate in the DRO was as follows:

> 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.

DRO, Conclusion and Order, at 7-8.

In response to this, the ALJ's COR contains the following additional Findings of Fact, which are found in the section of the COR titled "Resolution of the August 10, 2016 Decision and Remand" [sic]:

> For this Compensation Order on Remand, I make the following additional findings of fact:
>
> Mr. Jones's demeanor was calm and attentive; his behavior appropriately reflected the gravity of the proceedings.

COR at 2.

> Dr. Cohen saw Mr. Jones once, before Mr. Jones's May 21, 2007 right knee surgery. Their encounter occurred at Dr. Lopez's request, who wanted a second opinion on whether the knee surgery was necessary. Dr. Cohen's opinion that surgery was necessary was consistent with Dr. Lopez's opinion.
>
> Dr. Cohen was not a treating physician. Dr. Lopez, a treating physician, drew a medical-causal relationship, not Dr. Cohen.

COR at 2-3.

> At the time of his IME exam on December 6, 2006, Dr. Gordon opined that Mr. Jones should discontinue the use of his cast. If that happened, he would have been happy to examine Mr. Jones's wrist to determine whether Dr. Gordon thought that any further treatment was indicated or necessary and whether there were any limitations on Mr. Jones's physical capacity. Dr. Gordon opined that Mr. Jones had significant arthritic problems in his knee, but doubted that the changes in the corresponding MRI scan were related to the workplace accident. Dr. Gordon presumed that strains of Mr. Jones's knee and wrist occurred on the date of the accident. He opined that arthroscopic surgery might not be necessary, but he wanted the results of imaging studies before reaching a final conclusion.
>
> Dr. Gordon wrote an addendum on March 6, 2007. There, he offered a strong suspicion that Mr. Jones's knee complaints were related to arthritis, not gout. He opined that Mr. Jones's knee, back, and neck complaints were not related to the workplace accident.
>
> Dr. Callan saw Mr. Jones on March 19, 2007 and opined that Mr. Jones sustained a contusion of his hand and wrist from the workplace accident. Mr. Jones, opined Dr. Callan, had reached maximum medical improvement. The

back and knee complaints were not medically-causally related, according to Dr. Callan.

Dr. Danziger saw Mr. Jones on September 17, 2013. He opined that Mr. Jones sustained a right wrist contusion and sprain from the workplace accident. Mr. Jones, opined Dr. Danziger, had a case of traumatic carpal tunnel syndrome, which was uncommon. That was the only medically-causally related complaint, according to Dr. Danziger.

Dr. Fechter saw Mr. Jones on August 8, 2012. He opined that Mr. Jones sustained injuries to his neck, low back, left shoulder, right wrist, and right knee when Mr. Jones slipped and fell on a wet floor. Subsequent treatment, opined Dr. Fechter, necessitated surgical intervention.

COR at 3-4.

Mr. Jones complained about back and neck pain to Dr. Gupta and Yu.

Dr. Gupta saw Mr. Jones on February 25, 2010. Making an initial diagnosis of deep vein thrombosis, hyperlipidemia, impaired glucose tolerance, and gout with back pain and neck pain, Dr. Gupta referred Mr. Jones to Dr. Yu.

Dr. Yu first saw Mr. Jones on March 16, 2010. On June 15, 2010 Dr. Yu described Mr. Jones's complaints as "chronic back pain with underlying spondylosis exacerbated by [a] work-related injury." CE 1 at 19.

COR at 4.

The limitations were imposed because Dr. Yu, who treated Mr. Jones for his spinal complaints and who is a treating physician, thought they were medically appropriate.

* * *

Dr. Yu considered and discussed the possibility of treating Mr. Junes with injections. They were not administered because Mr. Jones was taking Coumadin.

* * *

A utilization review was conducted. Prepared by Dr. Rubenstein, an orthopedic surgeon in Georgia, the review concludes that the surgeries to Mr. Jones's right knee and left shoulder were reasonable and necessary, but not related to the workplace accident. Dr. Rubenstein opines that Mr. Jones had reached maximum medical improvement and offers conclusions about why work restrictions are not necessary. Dr. Rubinstein concludes that the physical therapy ordered by Mr. Jones's treating physicians was "far excessive". EE 6. Rather than addressing the question of whether the injections administered to Mr. Jones were reasonable or necessary, Dr. Rubenstein cites treatment guidelines before opining that "[c]ertainly from an industrial basis, there does not appear to be reasonable or necessary consideration for the blocks." EE 6.

COR at 5.

> Dr. Yu ordered a cervical spine MRI in 2014. The radiologist who read the MRI study identified multilevel degenerative changes. The radiologist identified mild to moderate central canal stenosis at C5-C6. He also identified a nonspecific 1.2 cm lesion within the posterior aspect of the left thyroid lobe. He recommended further assessment with a dedicated thyroid ultrasound exam. Although Dr. Yu discussed surgery with Mr. Jones after the 2014 MRI, the specifics of the procedure were not recorded in the medical notes.
>
> * * *
>
> Immediately after his injury, Mr. Jones felt pain in his right wrist, right knee, left shoulder, neck, and back.
>
> * * *
>
> All off-work slips were issued because of causally related medical complaints associated with the workplace injuries that Mr. Jones experienced on October 15, 2006.

COR at 7.

The ALJ then concluded this additional fact-finding portion of the COR:

> Finally, the CRB noted that Compensation Order "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." *Id.* In response, because the undersigned is not obligated to inventory the evidence, readers are respectfully referred to the hearing transcript and the relevant citations in this Compensation Order on Remand.

COR at 7.

Employer argues that COR 2 is not responsive to the DRO, and that the DRO fails to adequately identify where in the record certain factual findings find support. Employer's Brief at 10. Employer further complains that the ALJ failed to carry out the directives of the DRO and should therefore be vacated. We disagree.

The DRO listed approximately 20 areas where it was thought the CO lacked specificity, and the ALJ responded to each with the above additional factual findings. Employer does not challenge the accuracy of the ALJ's descriptions of the evidence, and while only 2 specific record citations (CE 1 and EE 6) are contained in the 18 paragraphs of additional factual findings, the COR either identified the record basis by exhibit number, or provided sufficient information (such as identifying authors and dates relating to specific findings) so that readers can, without great difficulty, locate where in the record the information can be found.

We note that almost every additional factual finding was preceded by quotations from the original CO, allowing them to be placed individually in the context needed to provide a reader with a fuller understanding of the ALJ's factual findings and legal conclusions.

Of the 18 additional paragraphs, only the first was, unintentionally we are certain, not responsive to the DRO's concern, that being the failure to specify what credible testimony the ALJ was referring to for specific findings. The CRB's concern was not that the credibility finding was insufficiently well-founded, but that it was not apparent at what point or points Claimant's credibility was a decisive matter.

This single lack of directly responsive additional information is of no significant concern, in light of the remaining additional findings being sufficiently specific to be traced to record evidence.

The only other shortcoming in the additional findings is the following italicized portion discussing the utilization review report:

> *Rather than addressing the question of whether the injections administered to Mr. Jones were reasonable or necessary*, Dr. Rubenstein cites treatment guidelines before opining that "[c]ertainly from an industrial basis, there does not appear to be reasonable or necessary consideration for the blocks." EE 6.

COR at 5 (emphasis added).

The CRB finds that the portion of the utilization review report the ALJ quoted does "address[...] the question of whether the injections administered to Mr. Jones were reasonable or necessary", by citing "guidelines", meaning the Official Diagnostic Guidelines, or ODG, to which the reviewer was referring. We do not find this apparent inconsistency to be of sufficient significance to warrant an additional remand.

While Employer complains that the ALJ gave insufficient weight to the utilization review report, it is evident that he weighed the treating physician opinion against the utilization review opinion and, premised partly on Claimant's credibility, elected to accept treating physician opinion. There is no indication that the ALJ favored the treating physician opinion more favorably than the utilization review reports based upon any improper basis, such as the treating physician preference. Further, the utilization reviewer's reference to "an industrial basis" is improper. Utilization review requires consideration on a medical basis.

Employer also argues that, at one point, a treating physician (Dr. Lopez) only placed Claimant in an off-work status for November 8 through December 16, 2006. However, Employer then concedes that Dr. Lopez later returned Claimant to that status, without knowing anything about what Claimant's occupation required, according to his deposition testimony. Employer's Brief at 19.

This appears to us to be an instance of Employer seeking to have us substitute our judgment for that of the ALJ, which of course is beyond our authority, limited as we are to assessing whether the facts found are supported by substantial evidence in the record. *See Marriott Int'l. v. DOES*, 834 A.2d 882 (D.C. 2003);

Employer argues further that the medical evidence does not support a finding of medical causation. The substance of the argument is that the initial emergency room records do not contain references to neck, back, right knee or left shoulder complaints and that they and the follow up records from the hospital focused on Claimant's right hand. Employer complains that

the ALJ should have given greater weight to the absence of neck, arm, back and knee complaints in the medical reports than to Claimant's testimony that he injured those parts and experienced symptoms immediately. Employer's Brief at 12-13.

We disagree with Employer. Employer's argument recognizes that the ALJ's decision was based partly upon Claimant's credibility, a determination about which we may not substitute our judgment.

CONCLUSION AND ORDER

The Compensation Order on Remand of October 31, 2016 followed the mandate and directives contained in the Decision and Remand Order issued August 10, 2016, is supported by substantial evidence, and is AFFIRMED.

So ordered.