GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR

F. THOMAS LUPARELLO
INTERIM DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 13-118

JOSEPHINE BEMBRY,
Claimant–Petitioner,

v.

GOOD HOPE INSTITUTE AND GUARD INSURANCE GROUP,
Employer/Carrier-Respondents,

Appeal from an August 30, 2013 Compensation Order by
Administrative Law Judge Leslie A. Meek
AHD No. 08-377C, OWC No. 647887

Matthew J. Peffer, for the Petitioner
Todd S. Sapiro, for the Respondents

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

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

DECISION AND ORDER

BACKGROUND AND FACTS OF RECORD

This appeal follows the issuance on August 30, 2013 of a Compensation Order (CO) from the Hearings and Adjudication Section in the District of Columbia Department of Employment Services (DOES). In that CO, the Administrative Law Judge (ALJ) denied Claimant's request for an award authorizing medical treatment to surgically repair a left rotator cuff tear.[1]

Claimant injured her low back, neck, shoulder, and left leg on March 19, 2008 while working for Employer as an outpatient drug rehabilitation supervisor/counselor. In August 2008,

[1] *Bembry v. Good Hope Institute,* AHD No. 08-377C, OWC No. 647887 (August 30, 2013)(CO).

Claimant started treating with orthopedic surgeon Dr. John Byrne and has continued under treatment to the present. Claimant filed a claim for medical and wage loss benefits from May 6, 2008 to the present and continuing, which was awarded in a Compensation Order issued on March 13, 2009.

In a subsequent cause of action between these parties, Employer's request to terminate Claimant's wage loss benefits was denied because even though it was determined there was a reason to believe a change of condition had taken place, Employer failed to demonstrate the availability of suitable alternative employment.[2] This determination was affirmed on appeal.[3]

In August 2010, after the conservative treatments consisting of physical therapy and medication failed to significantly improve her condition, Dr. Byrne recommended that Claimant be referred to pain management. Employer challenged the recommendation as not being reasonable and necessary. Following a formal hearing, the recommended treatment was authorized.[4] On appeal, the decision authorizing pain management was affirmed.[5]

With Claimant continuing to complain of persistent left shoulder pain, Dr. Byrne ordered an MRI which was performed on May 21, 2012. The MRI showed a tear in the rotator cuff. Dr. Byrne recommended surgical repair of the left rotator cuff and Claimant filed a claim seeking authorization. In an August 30, 2013 CO, the presiding ALJ denied the claim for the requested medical treatment. Claimant timely appealed with Employer filing in opposition.

On appeal, Claimant argues the ALJ erred in not giving proper deference to the opinions of the treating physician, by mischaracterizing the opinions of the treating physician, and by not giving specific reasons for rejecting the opinions of the treating physician. In addition, Claimant argues that as the ALJ failed to address the issue of whether Employer timely controverted the claim, reversal is required. Employer counters the CO should be affirmed.

ANALYSIS

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 CO are based upon substantial evidence in the record, and whether the legal conclusions drawn from those facts are in accordance with applicable law.[6] *See* D.C. Workers' Compensation Act of 1979, as amended, D.C. Code §§ 32-1501 to 32-1545 (Act), at § 32-1521.01(d)(2)(A).

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[2] *Bembry v. Good Hope Institute,* AHD No. 08-377A, OWC No. 647887 (February 16, 2010).

[3] *Bembry v. Good Hope Institute,* CRB No. 10-083, AHD No. 08-377A, OWC No. 647887 (April 13, 2012). A separate issue under review, that Claimant did not fail to cooperate with vocational rehabilitation, was vacated and remanded for further consideration.

[4] *Bembry v. Good Hope Institute,* AHD No. 08-377B, OWC No. 647887 (October 28, 2011).

[5] *Bembry v. Good Hope Institute,* CRB No. 11-133, AHD No. 08-377B, OWC No. 647887 (May 16, 2012).

[6] "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. DOES*, 834 A.2d 882 (D.C. 2003).

Consistent with this standard of review, the CRB and this Review Panel are constrained to uphold a CO 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.

The initial issue below was whether Claimant's left rotator cuff tear revealed in a May 12, 2012 MRI was medically causally related to the March 19, 2008 work-related injury. After Claimant's treating orthopedist, Dr. Byrne, rendered an opinion that it was causally related, the ALJ determined that the presumption of compensability had been invoked.[7]

With the presumption invoked, the ALJ shifted the burden to Employer to come forth with evidence specific and comprehensive enough to sever the connection between the injury and the job-related event[8], which the ALJ determined was accomplished by the medical opinion of Dr. Riederman. Neither party has challenged the ALJ's determinations that the presumption was invoked and rebutted.

With the presumption rebutted, the evidence must be weighed without the benefit of the presumption and Claimant has the burden of showing by a preponderance of the evidence that her rotator cuff tear is medically causally related to the work injury.[9] And, in weighing the medical evidence, the medical opinions of the treating physician are generally accorded a preference over that of a doctor who has examined the claimant solely for purposes of litigation[10], and a decision to credit the opinions of a non-treating physician must be explained.[11]

In the CO, the ALJ acknowledged the preference usually accorded the medical opinion of the treating physician and the concomitant requirement under existing case law in this jurisdiction of the need to provide reasons when rejecting that opinion.[12] After weighing the competing medical opinions, the ALJ reasoned:

> In determining the medical causal relation of Claimant's rotator cuff tear to the work incident, I accord greater weight to the medical opinion of Dr. Riederman. Dr. Riederman's analysis is more thorough and complete than Dr. Byrne's.
>
> Dr. Byrne states Claimant's left shoulder rotator cuff tear was caused by a lack of treatment but fails to explain how the lack of treatment affected the

[7] Section 32-1521(1) of the Act states: "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."

[8] See *Waugh v. DOES*, 786 A.2d 595, 600 (D.C. 2001).

[9] *Washington Hospital Center v. DOES*, 821 A.2d 898 (D.C. 2003).

[10] *Short v. DOES*, 723 A.2d 845 (D.C. 1998); *Stewart v. DOES*, 606 A.2d 1350, 1353 (D.C. 1992).

[11] *Canalas v. DOES*, 723 A.2d 1210 (D.C. 1999).

[12] CO, pp. 7-8.

> structure of Claimant's body and caused it to deteriorate and cause the tear. Further, Dr. Byrne's assertion that Claimant lacked treatment is not substantiated by the medical records. Dr. Byrne's own medical reports show Claimant was being treated on a regular and consistent basis. There is no indication in the reports submitted into evidence, that Claimant required, or could have required medical treatment for a left rotator cuff tear until November 22, 2011 when Claimant complained of new pain in her left shoulder. Further, Dr. Byrne's reports do not mention any denial of treatment for claimant's [sic] left shoulder.
>
> In his June 10, 2011 report, Dr. Byrne mentions Claimant's problems with her back pain, states her left shoulder is without problem and notes, "…no major change, awaiting court solution." (CE 3, p. 51). While the doctor's statement that he is "awaiting court solution," could be interpreted to infer there was a pending dispute or determination concerning Claimant's medical treatment, the doctor's report does not indicate said court solution involved treatment for Claimant's left shoulder. Further, this statement does not indicate Claimant was denied treatment for her left shoulder as, at that time, Claimant's left shoulder was deemed by Dr. Byrne to be problem free.[13]

In addressing the arguments Claimant puts forth as constituting error, we first look at the assertion that the ALJ did not give initial deference to the treating physician's opinion while also not giving specific reasons for rejecting that opinion in accordance with the recent D.C. Court of Appeals decision in *Jones v. DOES*.[14] We find no merit in this argument.

It is clear from the cases cited by the ALJ that she understands that Dr. Byrne's opinions are entitled to the treating physician preference and that in order to cast those opinions aside, reasons must be given. With this introduction, the ALJ then proceeded to outline the reasons why she found fault with Dr. Byrne's assessment that the left shoulder rotator cuff tear was causally related to the 2008 work incident. Primary among those reasons is the determination that Dr. Riederman's analysis is more thorough and complete than Dr. Byrne's. This assessment is borne out by a review of the respective reports.

The ALJ takes into account the treatment over the years by Dr. Byrne, particularly as it regards the left shoulder and notes that it was not until the follow-up exam on November 22, 2011 that Claimant complained of renewed shoulder pain. This pain complaint became part of Claimant's request for pain management that was ultimately granted. However, it was not until an MRI revealed the torn rotator cuff that Dr. Byrne made the singular statement that the tear was secondary to Claimant's fall at work. No further analysis was given.

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[13] CO, p. 8.

[14] *Jones v. DOES*, 41 A.3d 1219 (D.C. 2012). In *Jones*, a case regarding a permanent partial schedule award, the Court remanded with instructions for the ALJ to explain the reasons for the percentage impairment awarded. As the Court stated: "How the ALJ determined that the disability award should be 7% — and not, for example, 1%, 10% or 30% — is a complete mystery, however." 41 A.3d, 1226.

In contrast, the ALJ deemed Dr. Rierderman's analysis more "thorough and complete". Contrary to Claimant's assertion, Dr. Rierderman in no way denied the existence of the torn rotator cuff as shown on the MRI, but specifically stated that it was not causally related to the work injury of March 19, 2008. In addition, he stated:

> If Ms. Bembry had indeed torn her rotator cuff on March 19, 2008, one would have expected atrophy of the supraspinatus muscle by the time an MRI scan was obtained four years later. The findings of the intrasubstance tearing associated with the full thickness tear would indicate that Ms. Bembry's supraspinatus tendon tear identified in the MRI on May 21, 2012, was degenerative in nature and a natural consequence of aging.[15]

Thus, while Dr. Riederman does not dispute the torn left rotator cuff, he is of the opinion that it could not be causally related to the work incident due to the lack of any muscle atrophy after four years, and therefore is more likely degenerative, due to age.

In weighing the competing medical opinions and after according Dr. Byrne's opinion due deference, the ALJ deemed Dr. Riederman's opinion more persuasive. After his many years of treating Claimant, Dr. Byrne does not account for the later onset of Claimant's disabling left shoulder pain other than to say it is causally related to the work incident. Dr. Riederman, on the other hand, gives a detailed medical explanation for his opinion of no causal relation based on what the MRI did not reveal.

While we question the applicability of the *Jones* specificity test when looking at the reasons given for rejecting a treating physician opinion, we find the ALJ's reasons here are supported by evidence in the record and they will not be disturbed. While the ALJ did erroneously characterize Dr. Byrne's opinion as stating the lack of treatment caused the torn rotator cuff, we find it to be harmless error.

Claimant's final assignment of error is the ALJ failed to address the contested issue of whether Employer failed to controvert timely the claim for medical benefits. Employer counters that there is no requirement under the Act to controvert a claim for medical benefits and Claimant presented no evidence to meet its burden on the issue. We agree and even though the ALJ failed to address the issue, the error is deemed harmless.

Under the Act, § 32-1515, "Payment of compensation", applies to and provides a penalty for the failure to controvert or pay indemnity benefits, not medical benefits. Under the posture of the instant case, Claimant, as the result of prior proceedings for benefits owing to her work injury, has been receiving medical benefits as evidenced by her ongoing treatment from Dr. Byrne. The claim presented was for additional benefits, which did not require the controversion of "a right to benefits" as contemplated under § 32-1515. As no controversion was needed for a claim for medical benefits and compensability had previously been established by prior order for medical treatment of the work-related injuries, there in essence was no issue to be decided.

[15] Bench Exhibit (BE) 2.

CONCLUSION AND ORDER

The ALJ's determination that Claimant's left shoulder rotator cuff tear is not medically causally related to the March 19, 2008 work-related accident is supported by substantial evidence in the record and is in accordance with the law and therefore is AFFIRMED. The ALJ's failure to address the issue of failure to controvert timely the claim for medical benefits is deemed to be harmless error.

FOR THE COMPENSATION REVIEW BOARD:

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HENRY W. MCCOY
Administrative Appeals Judge

January 14, 2014
DATE