GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR

ODIE DONALD II
ACTING DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 16-158

CIKEITHIA SELLERS,
Claimant–Petitioner,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
Employer-Respondent.

Appeal from a November 14, 2016 Compensation Order on Remand
by Administrative Law Judge Mark W. Bertram
AHD No. 12-522A, OWC Nos. 703835, 692386, 689318, 671590 and 658231

(Decided March 24, 2017)

Krista N. DeSmyter for Claimant
Mark H. Dho for Employer

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 REMAND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

This appeal is from a Compensation Order on Remand issued November 14, 2016 ("COR 2"), and is a consolidation of multiple claims brought by Cikeithia Sellers ("Claimant") in a single formal hearing for injuries alleged to have been sustained while she was employed as a bus driver for 11 years, and a rail station manager for 3 years. In each case Claimant sought awards for permanent partial disability under the schedule to various parts of her body.

A formal hearing on these claims was conducted on June 11, 2015 before an administrative law judge ("ALJ") in the Administrative Hearings Division ("AHD") of the Department of Employment

Services ("DOES"). The parties stipulated concerning the claims heard by the ALJ on that date as follows:

Date of Injury	OWC No.	Body Part(s)	Average Weekly Wage
1. 3/03/2009	658231	low back, both legs, both shoulder, left wrist	$1,269.93
2. 5/28/2010	671590	neck, back, left wrist/hand, right wrist, right knee	$1,427.67
3. 2/09/2012	689318	low back	$1,624.77
4. 4/12/2012	692386	low back, left leg, left foot	$1,624.77
5. 4/19/2013	703835	back, right leg, left leg	$1,193.44

Stipulation Form and Joint Prehearing Statement.

In a Compensation Order issued August 17, 2015 ("CO"), the ALJ concluded "Claimant's accidental injuries arose out of and in the course of her employment and are medically causally related to her work place accidents/injuries" and made awards of 0% permanent partial disability for the arms, 15% permanent partial disability to the left leg, and 5% permanent partial disability to the right leg. CO at 12.

On September 16, 2015, Claimant filed an Application for Review ("Claimant's Brief 1") with the Compensation Review Board ("CRB") seeking a remand to AHD with instructions to the ALJ to further consider all the awards.

On October 2, 2015, Employer filed an Opposition to Claimant's Application for Review (Employer's Brief 1") seeking an affirmance of the CO by the CRB. Employer did not file a cross-appeal contesting the awards that were made or the findings and conclusions that all the complained-of injuries arose out of and occurred in the course of Claimant's employment or that they are medically causally related to the stipulated work injuries.

Claimant's first argument was framed as follows:

> The Compensation Order erred as a matter of law in denying Ms. Sellers' claim for permanent partial disability for her Right and Left Arms for reasons that do not rationally flow from its determination on causal relationship of the arms.

Claimant's Brief 1 at 3, "ARGUMENT A."

The basis of that argument was:

> Specifically, the Compensation Order rejects Dr. Michael Franchetti's[1] opinion as to the nature and extent of Ms. Sellers' impairment based on issues pertinent to causal relationship. Specifically, the Compensation Order states, "I do note that with regards to the EMG studies, the study results with regards to the cervical area were at a time Claimant was suffering from chronic cervical issues unrelated to her work place

[1] Dr. Franchetti performed an independent medical evaluation (IME) of Claimant at Claimant's request, and opined that Claimant suffers from a 30% permanent partial impairment to the right arm and 25% to the left arm. CE 1.

injuries." CO at 10. Further, it rejects Dr. Franchetti's rating for not addressing "Claimant's pre-existing cervical issues." *Id.* These do not serve as valid bases for rejecting the opinion of Dr. Franchetti or in wholly discounting Ms. Sellers' demonstration of disability to the arms because its reasoning conflicts with the determination that her arm conditions are legally and medically causally related to her work injuries.

Claimant's Brief 1 at 4.

Employer responded by arguing that the ALJ's decision was supported by substantial evidence, because:

> The ALJ noted that given the complexity of the multiple work related and non-work related incident [sic] and accidents in the record, Dr. Franchetti's opinion lacks sufficient reasoning and detail. The ALJ candidly notes that,
>
> > The problem with Dr. Franchetti's upper extremity ratings is they occur in a vacuum.
> >
> > * * *
> >
> > The medical evidence available to award any disability for Claimant's upper extremities is lacking and confused. Claimant testified that while working she functions and her neck tightens up. Her right hand swells up and she gets a frozen arm. I do not doubt this occurs. I also do not doubt the objective EMG findings or to a certain extent Dr. Dawson's physical examination findings. When Claimant was examined numerous times by Dr. Levitt she was found not to have cervical deficits. What is missing is sufficient credible, supporting evidence that the current upper extremity conditions/symptoms affecting Claimant have caused a disability within the Act. Even Dr. Dawson's medical reports do not address previous non-work related cervical issues affecting her upper extremities and how they related or do not relate to any work limitations. While Claimant undoubtedly has some form of cervical and therefore upper extremity symptomatology—she has not proven she has a disability within the meaning of the Act.

Employer's Brief 1 at 5, quoting the CO at 10.

On February 12, 2016, the CRB issued a Decision and Remand Order affirming the awards to Claimant's legs, but vacating the zero percent arm awards and remanding the matter for further consideration. The CRB wrote:

> While we do not dispute (nor do we hold) that the record contains substantial evidence to support a finding of no causal relationship regarding the arm complaints and Claimant's employment, the ALJ is wrong to state that the medical opinions cited "occur in a vacuum". To the contrary, they occur in the context of (1) the presumption under *Whittaker v. DOES*, 668 A.2d 844 (D.C. 1995) that the complained-of conditions are medically causally related to the employment; and (2)

the long established "aggravation rule" in this jurisdiction, which is aptly described by the DCCA:

> It is well settled that "'an aggravation of a preexisting condition may constitute a compensable accidental injury under the Act.'" *Ferreira [v. DOES]*, 531 A.2d at 660 (quoting *Wheatley [v. Adler]*, 132 U.S. App. D.C. at 182, 407 F.2d at 312). "The fact that other, nonemployment related factors may also have contributed to, or additionally aggravated [claimant's] malady, does not affect his right to compensation under the 'aggravation rule.'" *Hensley v. Washington Metro. Area Transit Auth.*, 210 U.S. App. D.C. 151, 155, 655 F.2d 264, 268 (1981), *cert. denied*, 456 U.S. 904, 72 L. Ed. 2d 160, 102 S. Ct. 1749 (1982). "'The cases almost invariably decide that the fact that the injury would not have resulted but for the pre-existing disease, or might just as well have been caused by a similar strain at home or at recreation, are both immaterial.'" *Id.* (quoting *Wheatley*, 132 U.S. App. D.C. at 182 n. 11, 407 F.2d at 312 n. 11). The aggravation rule is embodied in D.C. Code § 36-308 (6)(A) [now §32-1508], which provides that "if an employee receives an injury, which combined with a previous occupational or nonoccupational disability or physical impairment causes substantially greater disability or death, the liability of the employer shall be as if the subsequent injury alone caused the subsequent amount of disability . . ."; *see also Washington Metro. Area Transit Auth. v. District of Columbia Dep't of Employment Servs.*, 704 A.2d 295, 297-99 (D.C. 1997) (discussing the policies underlying § 36-308 (6)); *Daniel v. District of Columbia Dep't of Employment Servs.*, 673 A.2d 205, 207-08 (D.C. 1996).

King v. DOES, 742 A.2d 460 (D.C. 1999) at 468.

The ALJ twice qualified the denial of an award to the arms with the phrase "disability within the Act" or "under the meaning of the Act". Given that the ALJ also found that he "does not doubt" that Claimant's right hand swells and right arm "freezes up" and "undoubtedly has some form of cervical and therefore upper extremity symptomatology", we can reach no other conclusion than that the denial of an award on the grounds stated by the ALJ was improperly in conflict with the factual finding of causal relationship, unchallenged in this appeal, and to which Claimant was entitled to a presumption in her favor.

We agree with Claimant that the award of 0% to the arms under the schedule does not flow rationally from the findings as set forth in the above quoted passage from the CO, and thus we reverse the implied finding of a lack of causal relationship, vacate the awards of 0%, and remand for further findings of fact and conclusions of law regarding the nature and extent of the arm disabilities, if any, under the schedule.

Sellers v. Washington Metropolitan Area Transit Authority, CRB No. 15-149 (February 12, 2016) ("DRO 1") at 3-5.

DRO 1 concluded:

> The basis of the award of 0% disability under the schedule to the arms is in conflict with the un-appealed findings concerning medical and legal causal relationship and the principles established in *King v. DOES,*[742 A.2d 460 (D.C. 1999) *supra,* and *Whittaker v. DOES,* [668 A.2d 844 (D.C. 1995)] *supra.* The 0% awards to the arms are vacated and the implied determination that any disability to the arms is unrelated to the work injury is reversed. The matter is remanded to AHD for further findings of fact and conclusions of law concerning the nature and extent of disability, if any, Claimant has sustained to either or both her arms.

DRO 1 at 6.

On April 4, 2016, the ALJ issued a Compensation Order on Remand ("COR 1"). In the COR 1, the ALJ wrote:

CONCLUSION OF LAW

> Claimant's accidental injury arose out of and in the course of her employment and her symptoms are medically causally related to her workplace accidents/injuries. Claimant has zero percent (0%) permanent partial disability to her upper extremities.
>
> **ORDER**
>
> It is **ORDERED** Claimant has zero percent (0%) permanent partial disability to her upper extremities.

COR 1 at 12, 13.

Claimant filed a second Claimant's Application for Review and a memorandum in support thereof ("Claimant's Brief 2") with the CRB, arguing that COR 1 failed to carry out the directive in the DRO 1 to make conclusions of law that flow rationally from the findings that Claimant suffers from causally related cervical and upper extremity symptoms that result in her arms "freezing up" and her hands to swell, and also that the ALJ's rejection of Dr. Franchetti's views on medical impairment was premised in part at least upon the doctor failing to apportion the current complaints between the subject work injuries and pre-existing impairments related to prior injuries. Claimant's Second Brief at 4–8.[2]

Employer filed Employer's Opposition to Claimant's Application for Review ("Employer's Brief 2"), in which it argued, in various ways, that the ALJ's finding that Claimant proved no disability from the work injury is supported by substantial evidence, primarily because, in Employer's view, the only evidence relating to Claimant's upper extremity impairments are unrelated to the work injury. *See* Employer's Brief 2 at 6, 7.

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[2] Claimant also argues that the awards to Claimant's legs were also insufficient, an argument that was rejected in the DRO and which we will not address again in this DRO [DRO 1], other than reaffirming the prior determination.

Employer also argued that "the ALJ did not base the denial of benefits on considerations of whether Dr. Franchetti failed to apportion his prior ratings", instead arguing that the ALJ found that Dr. Franchetti's opinion "lacked sufficient details of claimant's condition and pre-existing medical history" and "clearly did not rely on the laws of apportionment to formulate the final conclusion of law". Employer's Brief 2 at 8.

On September 14, 2016, the CRB issued a Decision and Remand Order. The CRB determined that COR 1 repeated the errors of the CO, and because the District of Columbia Court of Appeals ("DCCA") has issued a decision during the pendency of that appeal that required additional analysis by the fact finder, COR 1's zero percent arm awards were vacated. The CRB wrote:

> If there was any question at the time of the CRB's initial consideration of the first appeal as to whether the ALJ intended to find that Claimant's current medical impairments as described in the CO were causally related to the subject work injury, the COR [COR 1] dispels any doubts. It could not be more explicit. We repeat the concluding portion of the COR [COR 1]:
>
> **CONCLUSION OF LAW**
>
> Claimant's accidental injury arose out of and in the course of her employment and her symptoms are medically causally related to her workplace accidents/injuries. Claimant has zero percent (0%) permanent partial disability to her upper extremities.
>
> **ORDER**
>
> It is **ORDERED** Claimant has zero percent (0%) permanent partial disability to her upper extremities.
>
> COR [COR 1] at 12, 13.

The ALJ determined that a 0% award is appropriate, based upon the failure of Claimant to "prove by a preponderance of the evidence, the nature and extent of her disability without the benefit of any presumption. In other words, Claimant must establish the percentage of disability or scheduled award once a medical causal relationship has been established. She has not done so." COR at 11.

The ALJ's reasoning is that the medical evidence supporting the degree of medical impairment presented by Claimant in the form of an independent medical evaluation (IME) performed by Dr. Michael Franchetti is not reliable for a number of reasons, the first being "the problem with Dr. Franchetti's upper extremity ratings is they occur in a vacuum, *that is, without any correlation to Claimant's current medical condition*" and "Dr. Franchetti does not address *Claimant's pre-existing chronic cervical issues*." COR at 10, 11 (emphasis added).

To the extent that this language has any legal significance, it can only mean one thing: Dr. Franchetti's opinion concerning the extent of Claimant's current medical impairment is rejected because the ALJ can't tell what proportion of the expressed opinion of impairment is related to the work injury, and what percentage is related to the pre-existing medical impairments.

The COR contains numerous statements of law and fact which are not in dispute. The COR also suggests that the CRB misunderstood either the CO or the law by overlooking certain other findings in the CO that would be, in the ALJ's view, supportive of the CO's final conclusion, such as the fact that the record contains medical evidence that Claimant suffers from no current medical impairment and the declaration that "What the DRO overlooked was the fact that Dr. Dawson's own medical record dated October 18, 2012 wherein he noted 'Claimant does not have any upper extremity impairment'. For the record, Claimant's 2013 accidental injury did not involve her upper extremities. Lastly, and also apparently overlooked [by the CRB in the DRO] was the finding of fact that Claimant passed physical examinations that allowed her to become a station manager." COR at 12.

We cannot overlook the fact that the ALJ's reasons listed above are irrelevant, because despite Dr. Dawson's 2012 opinion, the ALJ found otherwise, and despite the fact that Claimant passed a physical to qualify for a different job than she held when some of the injuries were sustained, the ALJ still found that Claimant suffers from current, causally related upper extremity impairments.

It is this internal inconsistency of analysis that dooms the CO and COR. The CRB is required to determine whether the facts as found by the ALJ are supported by substantial evidence and the legal conclusions reached flow rationally from those facts. The CRB may not inventory the compensation order to see if there are findings that would support a given conclusion, where the compensation order also includes findings that are in direct conflict with the relevant conclusions reached. Thus, in this case, while the ALJ found that Claimant's current medical impairments (referred to variously as "freezing up" and "swelling", among other terms) are causally related to the subject work injury, his rejection of Dr. Franchetti's opinions concerning the degree of medical impairment is rejected on the irrelevant grounds that the doctor doesn't "apportion" the impairment ratings between pre-existing and work-related conditions, that Dr. Dawson doesn't think there is any medical impairment, and Claimant passed a physical for a different job than she held when some of the injuries were sustained.

We are also compelled to point out that the ALJ's conclusion that Claimant has sustained a specific percentage of disability, being zero percent (0%), does not flow rationally from any findings of fact contained in the CO or COR. That is, the ALJ never states that doctor "X" expressed the opinion that Claimant sustained a zero percent impairment and that he, the ALJ, accepts that opinion as fairly representing Claimant's medical impairment or disability. Although the ALJ alludes to Dr. Dawson's opinion to that effect, the ALJ never accepts that opinion in the CO or the

COR, and the ALJ's factual conclusions regarding Claimant's current physical impairments contradict the opinion of Dr. Dawson.

A claimant's burden is to prove entitlement to the benefits claimed by a preponderance of the evidence. The fact that a fact-finder has qualms about the quality of the medical evidence presented (qualms which in this case are based upon legally irrelevant factors) doesn't mean that the record establishes a zero percent impairment or disability. A failure of proof, even if such was the case here, is not proof of a zero percent impairment or disability.

More importantly though, the burden placed upon Claimant in this case is to establish entitlement to the claim by a preponderance of the evidence, which is:

> [T]he greater weight of the evidence; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to *one side of the issue or the other*. This is the burden of proof in a civil trial, in which the jury is instructed to find for the party that, *on the whole*, has the stronger evidence, *however slight* the edge may be.

Preponderance of the Evidence, Black's Law Dictionary, (7th ed. 1999) (emphasis added).

The record undoubtedly contains substantial evidence sufficient to establish a degree of medical impairment. "Substantial evidence" is such evidence as a reasonable person might accept to support a given proposition. *Marriott v. DOES*, 834 A.2d 882 (D.C. 2003). Under the preponderance standard, the question the ALJ must decide is whose evidence is superior.

The fact-finder's task in a case under the Act is not to assess whether the evidence is clear and convincing. There will be cases where an ALJ is dissatisfied to one degree or another with the evidence presented by both sides. In such a case, assuming there is some evidence in the record which a reasonable person might accept to support a finding concerning the degree of medical impairment and a disability, it is incumbent upon an ALJ to assess which party's evidence preponderates.

This principle is of great significance in schedule loss cases, because the DCCA has recently signaled its view that determining the degree of medical impairment in a schedule loss claim is a necessary first step in assessing schedule disability.

Under the recent case of *M.C. Dean, Inc., v. DOES and Anthony Lawson, Intervenor*, No. 14-AA-1141 (D.C. July 7, 2016) (*"Lawson"*) the court held:

> We agree that determining "occupational capacity is precisely what an ALJ is tasked to do," but it is not clear that occupational capacity should be an independent factor in a vacuum. Limitations of occupational activities are

> assessed under the statutory structure (with the Maryland factors of pain, weakness, atrophy, loss of endurance, and loss of function), and our recent decisions have emphasized that *variance from the physical impairment rating to the economic disability rating should be specifically explained. See Bowles* [*v. DOES,* 121 A.3d 1264 (D.C. 2015)] *supra*, at 1269–70 (remanding where disability award could not be derived from summation of the possible evidence: "No combination of 7%, 8%, and 5% add[s] up to just 10%"); *Jones*, [*v. DOES*, 41 A.3d 1219 (D.C. 2012)] *supra*, 41 A.3d at 1226 (remanding for further findings where the basis of a 7% disability award "and not, for example, 1%, 10% or 30% -- is a complete mystery.")

Lawson, at 24, 25 (emphasis added).

And the CRB has an established line of cases which highlight the singular importance of arriving at a determination of medical impairment as part of the process of considering schedule claims, as reviewed in *Mann v. Knight Networking*, CRB No. 16-001 (July 26, 2016), where the CRB wrote:

> The usage "variance from the physical impairment" suggests that the court views medical impairment as a baseline from which disability is to be assessed, and is consistent with a framework for analysis that has been applied in CRB decisions since *Jones* [*v. DOES*, 41 A.3d 1219 (D.C. 2012)].

Id., at 5, 6. *See also: Ulloa v. Hotel Harrington*, CRB No. 12-006 (August 7, 2012); *Green v. DOES*, CRB No. 12-156 (November 15, 2012); *Nickens v. Fort Myer Construction*, CRB No. 13-057 (August 6, 2013) (*Nickens I*); *Prescott v. Friendship Public Charter School*, CRB No. 13-072 (August 22, 2013); *Hawkins v. Washington Hospital Center*, CRB No. 13-063 (August 27, 2013); *Nickens v. Fort Myer Construction,* CRB No. 14-045 (August 19, 2014), (*Nickens* II); *and, Allen v. Corrections Corporation of America,* CRB No. 15-090 (October 5, 2015).

On the record before us and considering the contents of the CO and COR, while the evidence may be less than as compelling as the ALJ would prefer, it is error to hold that the record does not contain sufficient evidence from which a reasonable person could arrive at a conclusion as to in whose favor the evidence preponderates on the question of the degree of medical impairment that Claimant suffers to her arms. On remand, the ALJ is instructed to do so.

The ALJ is also instructed that it is error to discount a medical opinion regarding the degree of impairment a claimant suffers based upon considerations of causal relationship in this case, in light of the findings that Claimant's present "symptoms and complaints" are causally related to the work injury at issue.

Upon reaching a factual determination on this issue, if it is found that Claimant has sustained a medical impairment to the arms, the ALJ is to further consider the degree of disability to the arms Claimant has sustained under the schedule, taking into account the court's recent holding in *Lawson* as well as the other cases cited therein and above.

CONCLUSION AND ORDER

> The finding that Claimant sustained a zero percent disability to each arm is unsupported by substantial evidence and is vacated. The rejection of the medical opinions of Dr. Franchetti conflicts with the finding that Claimant suffers from ongoing medical impairments of the arms, and further includes within it impermissible considerations concerning causal relationship and apportionment, and is vacated. The matter is remanded for further consideration and findings of fact concerning the degree of medical impairment to the arms suffered by Claimant, and consideration of the extent of disability that Claimant has sustained under the schedule.

Sellers v. Washington Metropolitan Area Transit Authority, CRB No. 16-062, (September 14, 2016) ("DRO 2") at 6-9.

On November 11, 2016, the ALJ issued a second Compensation Order on Remand titled "Compensation Order on Remand (Second)" ("COR 2"). The ALJ again made awards of zero percent to the arms.

Claimant filed a third Application for Review and Memorandum of Points and Authorities in Support of Application for Review ("Claimant's Brief 3"), and Employer filed its third Opposition to Claimant's Application for Review ("Employer's Brief 3"). It is COR 2 that is presently before us for review.

ANALYSIS

As a preliminary matter, we address several misstatements or misunderstandings in COR 2. The first is the following:

> The second DRO appears to set out again that because I found Claimant's upper extremity symptoms medically causally related, Claimant is entitled to a presumption of a percentage disability.

COR 2 at 9.

The ALJ does not cite or quote from DRO 2, and after reviewing it, we can find no such reference or holding. The ALJ appears to equate the discussion in DRO 2 concerning the apparent inconsistency between finding that Claimant has real pain and physically abnormal symptoms which are causally related to her employment, but has a 0% disability.

The CRB cited *Mann v. Knight Networking*, CRB No. 16-001 (July 26, 2016) and numerous other cases for the proposition that the DCCA has mandated that disability analysis begin with a determination concerning the degree of medical impairment. This is not creating a presumption, it is a statement of the law as established by the court. If a fact-finder finds (1) that a claimant is medically impaired and (2) that the medical impairment is causally related to employment, the court has held that the level of impairment is a baseline from which disability is to be assessed, under *M.C. Dean v. DOES*, 146 A.3d 67 (D.C. 2016).

COR 2 continues:

> The CRB cites to a case, *Jones v. DOES*, 41 A.3d 1219 (D.C. 2019) as a basis for their holding for reasons unknown. The quote by the CRB of this case does not exist within the quoted case.

COR 2 at 9.

This statement also is wrong.

The CRB did not directly cite or quote from *Jones*. The ALJ misreads the only portion of DRO 2 that makes reference to *Jones*. That passage reads as follows:

> And the CRB has an established line of cases which highlight the singular importance of arriving at a determination of medical impairment as part of the process of considering schedule claims, as reviewed in *Mann v. Knight Networking*, CRB No. 16-001 (July 26, 2016), where the CRB wrote:
>
> > The usage "variance from the physical impairment" suggests that the court views medical impairment as a baseline from which disability is to be assessed, and is consistent with a framework for analysis that has been applied since *Jones* [*v. DOES,* 41 A.3d 1219 (D.C. 2012).]
>
> *Id.,* at 5, 6.

DRO 2 at 9 (bracketed material in original). The CRB then gave additional citations to 7 CRB decisions constituting the "line of cases" to which reference was being made.

This passage from DRO 2 is the CRB citing and quoting *Mann*, not *Jones*. The point being made by reference to the *Mann* case was that this approach to assessing disability by starting at medical impairment emanates from the court decision in *Jones* and has been consistently followed since that decision.

COR 2 then states:

> The CRB in its Second DRO stated *I never found that doctor "X" expressed the opinion that Claimant has suffered a zero percent* impairment. This is incorrect as in my statement of facts Dr. Levitt found Claimant had a zero percent impairment rating to her upper extremities. For further elaboration, Employer's Exhibit 1, page six is where Dr. Levitt opined, and *I adopted the fact that Claimant has a zero percent permanent impairment* to her upper extremities.

COR 2 at 9 (emphasis added).

This statement is also wrong.

First, it mischaracterizes what DRO 1 said concerning "doctor 'X'", which is this:

> We are also compelled to point out that the ALJ's conclusion that Claimant sustained a specific percentage of disability, being zero percent (0%), does not flow rationally from *any findings of fact in the CO or COR*. That is, the ALJ never states that doctor

> "X" expressed the opinion that Claimant sustained a zero percent impairment and that he, the ALJ, accepts that opinion as fairly representing Claimant's medical impairment or disability. Although the ALJ alludes to Dr. Dawson's opinion to that effect, the ALJ *never accepts that opinion* in the CO or the COR, and the ALJ's factual conclusions regarding Claimant's current physical impairments contradict the opinion of Dr. Dawson.

DRO at 7 (emphasis added).

The ALJ does not say where in COR 1 he "adopted" Dr. Levitt's (or any other doctor's) opinion on the degree of medical impairment. We have re-read COR 1 and cannot locate anywhere that the ALJ "adopted" the opinion of a specific doctor, whether it is Dr. Levitt or Dr. Dawson. It does indeed contain many references in the Findings of Fact section to the differing opinions of several of the doctors involved in the case, but the ALJ never states or finds that he found any impairment rating convincing.

Further, the ALJ left out the second and third parts of the CRB's sentence, which we will repeat and add bracketed numbers representing the three parts of the CRB's point: "[1] Although the ALJ alludes to Dr. Dawson's opinion to that effect, [2] the ALJ *never accepts that opinion* in the CO or the COR, and [3] the ALJ's factual conclusions regarding Claimant's current physical impairments contradict the opinion of Dr. Dawson."

As best we can discern, what the ALJ is suggesting is that since the ALJ found a zero percent impairment, and Dr. Levitt expressed the opinion that Claimant sustained a zero percent impairment, that the CRB should have inferred that the ALJ relied upon that opinion in reaching this conclusion.

A positive finding that a claimant has sustained a zero percent impairment is not the same as a determination that a claimant has failed to establish entitlement to an award by a preponderance of the evidence. An ALJ's finding of zero percent impairment, like any other factual finding, must be supported by substantial evidence. In this instance, the ALJ made a factual finding without identifying the evidence upon which it was based.

If an ALJ relies upon or "adopts" an opinion as a fact, it is incumbent upon the ALJ to say so. Indeed, we did infer from COR 1, incorrectly it now appears, that the ALJ *may* have been relying upon Dr. Dawson's opinion, not Dr. Levitt's. This underscores the importance of making clear in a compensation order upon what evidence an ALJ relies in reaching a factual and legal conclusion.

Turning to the appeal of COR 2, Claimant argues that once again the ALJ rejected Claimant's independent medical evaluator ("IME") Dr. Michael Franchetti's impairment ratings because of improper considerations relating to pre-existing, non-work-related conditions which in Claimant's view amounts to rejecting the opinion for failing to "apportion" Claimant's disability between the pre-existing conditions and the work injury, and is proscribed because medical causal relationship has been determined to have been demonstrated.

Claimant acknowledges that in COR 2, the ALJ included a "newfound reliance on Dr. Levitt's medical opinion", but argues that acceptance of that opinion "does not flow rationally from his findings of fact, since Dr. Levitt opined that Ms. Sellers did not suffer from any complaints yet the

findings of fact acknowledge that Ms. Sellers suffered as a result of her work injury." Claimant's Brief 3 at 7.

The "newfound reliance" referred to by Claimant is found on page 9 of COR 2:

> In the case at bar, I stated previously and will reiterate: *as Dr. Levitt's assessments are problematic, Dr. Franchetti's assessments are somewhat unreliable. Each will be accorded their proper weight.* (italics added for emphasis). **I give Dr. Levitt's assessment regarding Claimant's upper extremity impairment rating more weight as it is consistent with Claimant's testimony and the evidence in total.**

COR 2 at 9 (italics and parentheses in original, bold added). This is the first appearance in any of the 3 compensation orders of the ALJ actually stating that he ultimately accords more weight to a specific medical opinion than to another medical opinion.

Of relevance to this argument, COR 2 states:

> Claimant's testimony is credible. Her demeanor on the stand and answers to questions displayed truthfulness. However, Claimant was confused while attempting to explain each of the numerous work related and non-work related accidents she has been involved with over the years. Claimant had trouble recalling, without being prompted, certain accident dates and resulting injuries and symptoms for both work and non-work related injuries.
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> * * *
>
> As to the ratings themselves, Dr. Franchetti assigns Claimant a thirty percent (30%) right upper extremity and a twenty-five percent (25%) left upper extremity impairment. CE 1 p.2. Dr. Levitt, as previously noted, opined Claimant has zero percent impairment to all her extremities. The problem with Dr. Franchetti's upper extremity ratings is they occur in a vacuum, that is, without any correlation to Claimant's current medical condition. This sentence may be the cause of the CRB's confusion. I point out, that Dr. Franchetti fails to state whether or not his ratings are superimposed on her pre-existing physical symptoms or are treated separately. **I point out that this statement does not implicate "apportionment" as the CRB might reason. Claimant has to prove a percentage of disability. Further, I state for the record this statement does not implicate apportionment but the lack of a credible explanation for his rating.** Dr. Franchetti also does not address a previous IME in which he gave Claimant a fifty-five percent (55%) impairment to Claimant's right upper extremity wherein his impression was chronic cervical strain and right radiculopathy. EE 5. While I note for the record, pre-existing injuries in themselves are not a bar to receive a scheduled award, the burden is on the Claimant to establish evidence for a rating. Lastly, Dr. Franchetti notes one of Claimant's injuries was a result of an automobile accident which it was not. CE 1 p.1. In the case at bar, I stated previously and will reiterate: *as Dr. Levitt's assessments are problematic, Dr. Franchetti's assessments are somewhat unreliable. Each will be given their proper weight.*(italics added for emphasis). **I give Dr. Levitt's assessment regarding**

Claimant's upper extremity impairment rating more weight as it is consistent with Claimant's testimony and the evidence in total.

COR 2 at 9-10 (italics and parentheses in original, bold added).

This passage is identical to the analysis contained in COR 1 except for the 3 sentences in bold.

Despite the ALJ's protestations to the contrary, the earlier iterations of the discussion could only be interpreted as suffering from the defect complained of by Claimant. The fact that this new iteration actually comes to a conclusion concerning which opinion is entitled to greater weight remedies one aspect of the defective prior analysis.

However, merely asserting that he does not intend to commit the same error regarding apportionment that was fatal previously does not cure the error.

In the COR 1, starting at page 7, the ALJ considered the question "Is there a medical causal relationship between Claimant's current left upper and right upper extremity symptoms/conditions and her work accidents/injuries?" The ALJ then proceeded to acknowledge the presumption that there is such a relationship. The ALJ then proceeded to discuss Dr. Levitt's reports and opinions that Claimant had "essentially ... fully recovered from her injuries" and concluded that they were sufficient to overcome that presumption. COR 1 at 7-8. The ALJ added a footnote to this finding, which reads:

> A counter argument can be made that these reports do not "unambiguously" opine that no medical causal relationship exists between Claimant's current medical conditions and therefore do not rebut the presumption of medical causal relationship. Since the result is the same after weighing the evidence, any counter argument is moot.

The ALJ then wrote:

> In its remand [DRO 1], the CRB may have mistakenly held I did not find a medical causal relationship. What follows is unchanged from the Compensation Order [COR 1] and is in italics for emphasis [footnote omitted]. DRO p. 4. [3]
>
> *Based on Dr. Dawson's report (CE 2) and Claimant's testimony, I find by a preponderance of the evidence Claimant's left upper, right upper, left lower, and right lower extremity symptoms are medically causally related to her work accidents/injuries.*
>
> One additional piece of information is addressed to complete the record with regards to medical-causal relationship. Employer introduced evidence that Claimant has a pre-existing condition to her cervical spine which was chronic with pain going into Claimant's right arm HT 84:56-12.

[3] The CRB made no such holding. *See* DRO 1 at 2, 6. The CRB did note the apparent inconsistency between the outcome and the finding of a medical causal relationship.

> In this jurisdiction, an aggravation of a pre-existing injury by a work-related event is compensable under the Act. There is no evidence in the record to conclude that Claimant's chronic cervical spine condition was not aggravated by her employment. Claimant's preexisting cervical spine condition does not sever the medical-causal relationship established in this case.

COR 1 at 8.

As was noted in DRO 1, the medical causal relationship findings were not appealed, and are now the established law of the case. The ALJ unequivocally held that Claimant (1) has current medical symptoms and complaints and (2) they are causally related to the employment injuries.

In COR 2, the ALJ stated a number of reasons, quoted above, why he did not accept Dr. Franchetti's ratings. Included among them is that it didn't "state whether or not his ratings are superimposed on her pre-existing physical symptoms or are treated separately".

The ALJ insists that he does not intend to introduce "apportionment" into his weighing the value of Dr. Franchetti's opinion. And, there is a second interpretation one could assign to the ALJ's words. It could be that the ALJ was suggesting that it is not possible to tell from Dr. Franchetti's report, CE 1, whether his rating includes or excludes consideration of any pre-existing impairments.

Here is Dr. Franchetti's opinion:

> In accordance with the Fifth Edition of the AMA Guides for the Evaluation of Permanent Impairment Tables 15 and 17, due to her bilateral clinical and objectively documented cervical radiculopathies due to these work injuries and taking into consideration her persistent pain, loss of function, and loss of endurance, she attains a 30% right upper extremity impairment and a 25% left upper extremity impairment equally apportioned amongst these factors due to her work injuries of March 3, 2009 and May 28, 2010 equally apportioned between these work injuries as well.

CE 1 at 2.

This is clearly Dr. Franchetti's opinion regarding her current medical impairment under the AMA Guides. There is absolutely nothing to suggest that it is anything other than his assessment of her current level of impairment, and it is totally irrelevant that he doesn't refer to what if any portion of the rating is attributable to the work injuries and whether his rating would be different if Claimant did not have any pre-existent maladies. It has no bearing upon the extent of Claimant's current medical impairment if any.

The ALJ asserts that Claimant "hasn't met her burden", and has now added to that that he accepts the opinion of Dr. Levitt that she has no ratable impairment. Now that the ALJ has identified the evidence upon which his determination is based, such a finding is not necessarily contrary to law. Nonetheless, the ALJ's rejection of Dr. Franchetti's report because it failed to apportion the ratings in another sense that we will address later a remand for further consideration is required.

Employer argues that "The ALJ found that Dr. Dawson's medical report dated October 18, 2012 noted that claimant did not have upper extremity impairment. COR-2. This finding alone is sufficient as a basis to support the denial of permanent partial disability to the upper extremity." Employer's Brief 3 at 6.

The problems with this argument are that (1) Dr. Dawson's opinion is not the evidence upon which the ALJ relied in making the zero percent awards, and (2) the existence of such evidence in the record doesn't cure the impropriety of the manner in which the ALJ performed the analysis of the evidence that was relied upon.

The remainder of Employer's arguments consists of inventorying evidence, some of it which the ALJ considered and some of which there is no reference to in COR 2, which would support a zero percent award. We have no quarrel with the proposition that a zero percent award is one possible outcome, but that is not the issue before us.

But, as previously noted, this does not completely resolve the present standing and validity of COR 2. There has been a significant change in the law since this matter was presented at the formal hearing. The DCCA has held that social and personal limitations caused by a scheduled injury may only be taken into account if there is a demonstrated "nexus" between the limitations and a claimant's wage earning capacity. In that same case, *Mann, supra,* the court directed that the CRB further answer the question of whether the "Maryland Factors" can be included in considering a schedule award if there is no identifiable "nexus" between the factor or factors, and a claimant's wage earning capacity. The CRB felt that in light of the court's reasoning with respect to "social and personal" limitations and wage earning capacity, a similar conclusion was the most reasonable way to approach the Maryland Factors analysis as well.

Dr. Franchetti's reports contain no breakdown concerning how much of the overall percentages are for the Maryland Factors, and it is therefore impossible on this record to determine whether any wage earning capacity nexus exists between those Factors and hence to assess whether they are properly includable in assessing the impairments in order to then determine disability under the schedule. *See Lawson v. M.C. Dean, Inc.*, CRB No.14-056 (R) (January 11, 2017).

Since this is a fundamental and significant change in the law, Claimant was not on notice that such a breakdown is now required in order for the new analysis to be performed.

A further consideration that should also be taken into account is D.C. Code §32-1508 (6)(A), cited and quoted in Claimant's Brief 3, states:

> If an employee receives an injury, which combined with a previous occupational or nonoccupational disability or physical impairment causes substantially greater disability or death, the liability of the employer shall be as if the subsequent injury alone caused the subsequent amount of disability....

On remand, the record must be re-opened to permit Claimant the opportunity to supplement Dr. Franchetti's report to address the *Lawson* case's new requirements. As a matter of administrative economy, and since the record must be re-opened for this purpose, the ALJ may also direct that Dr. Franchetti address the degree of the current impairments that pre-existed, for the purpose of

addressing the statutory requirement that, in order for an employer to be responsible for the entire current disability, the work-injury's contribution must make the current disability substantially greater than the disability which pre-existed. In the additional analysis, the ALJ should keep in mind that although impairment assessment is the starting point, it is the disability, not the impairment, that must be "substantially greater" due to the work injuries, in order for an employer's liability to extend to the entire current disability as if it were the sole cause of the disability.

CONCLUSION AND ORDER

Given that medical causal relationship is no longer an issue in this case, consideration of whether an evaluation opinion includes consideration of the fact or degree of prior or pre-existing conditions when weighing competing medical opinion concerning the current extent of a schedule injury claim for disability is erroneous and not in accordance with the law. Accordingly, the awards of zero percent (0%) permanent partial disability to Claimant's right and left upper extremities are VACATED and the matter is REMANDED to AHD for further consideration of the claims in a manner consistent with the aforegoing Decision and Remand Order, including on remand, it will be necessary to re-open the record for an additional report to discern what percentage Dr. Franchetti's ratings are attributable to the Maryland Factors, and then for the ALJ to either review the existing record or re-open the record for receipt of additional testimony from Claimant concerning any claimed "nexus" between the Maryland Factors and Claimant's wage earning capacity and whether the subsequent injuries caused a "substantially greater disability". It is also necessary that upon receipt of any additional evidence from Claimant, Employer be given a reasonable opportunity to submit additional evidence relevant and material to the evidence provided by Claimant.

So ordered.