GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR

LISA M. MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 12-150

STAR FOWLER,

Claimant–Respondent,

v.

HOWARD UNIVERSITY,

Self-Insured Employer-Petitioner.

Appeal from a Compensation Order of
Administrative Law Judge Belva Newsome
AHD No. 12-212, OWC No. 644656

William H. Schladt, Esquire, for the Petitioner

Benjamin T. Boscolo, Esquire, for the Respondent

Before JEFFREY P. RUSSELL,[1] HENRY W. MCCOY, and MELISSA LIN JONES, *Administrative Appeals Judges*.

JEFFREY P. RUSSELL, for the Compensation Review Board.

DECISION AND REMAND ORDER

BACKGROUND

Star Fowler was employed by Howard University (Howard) as a facilities maintenance engineer. Among her duties were repairing heating and air conditioning system components, as well as plumbing maintenance and repair.

On October 12, 2007[2], she sustained an injury while working on the roof, repairing an exhaust fan. The injury occurred when a latch intended to keep a hatch cover open failed, causing the hatch to

[1] Judge Russell was appointed by the Director of DOES as a Board member pursuant to DOES Administrative Policy Issuance No. 12-01 (June 20, 2012).

[2] While sometimes getting the date correct, the Compensation Order frequently misstates the date of injury as being October 7, 2007 (e.g., page 2, "Summary Disposition of Issues", page 3, "Findings of Fact" 1, 2 and 4).

fall closed on her right hand. The injury caused her to miss an unspecified period of time from work, but she ultimately returned to her regular job.

On March 6, 2009, Ms. Fowler sustained additional injuries while working in a mechanical room, performing plumbing repairs. The injury occurred when a ladder upon which she was standing fell from under her, leaving her hanging from a pipe for a period of time, after which her strength gave out and she fell to the floor.

Ms. Fowler filed claims for both injuries. On June 27, 2012, she presented her claim for schedule awards to her right hand and right arm to an Administrative Law Judge (ALJ) in the Department of Employment Services (DOES). Her claim was that she had sustained permanent partial disabilities to her right hand and right arm as a result of the October 12, 2007 incident. She sought an award of 25% permanent partial disability under the schedule to the right hand and "no less than 12%"[3] permanent partial disability to the right arm. For reasons not apparent on the record, she did not bring any such claim in this proceeding for any award based upon the incident of March 6, 2009.

Howard opposed the claim, arguing that Ms. Fowler was entitled to only a 2% permanent partial disability award to the right hand. Howard opposed any award for the right arm, arguing that the claimed arm disability stemmed from problems with Ms. Fowler's right shoulder, which problems it asserted resulted not from the October 12, 2007 incident, but from the March 6, 2009 incident.

On August 20, 2012, the ALJ issued a Compensation Order awarding Ms. Fowler 25% permanent partial disability to the right hand, and 20% permanent partial disability "to the right shoulder".

Howard appealed the awards to the Compensation Review Board (CRB), arguing that (1) the ALJ impermissibly ignored its evidence contesting the causal relationship between the right arm and shoulder injury and the October 12, 2007 incident, (2) the ALJ improperly accorded the opinion of Dr. Robert Macht the status of treating physician opinion, while Dr. Macht was not, in fact, a treating physician, and (3) the award for disability to "the shoulder" is improper, in that the shoulder is not a schedule member or body part under the Act.

Ms. Fowler opposed the appeal, arguing that the award to the shoulder should be affirmed as an award to the arm, because that was what Ms. Fowler claimed in her claim for relief at the time of the hearing, and the Compensation Order granted her claim for relief, and because the finding that the right shoulder and arm complaints were causally related to the October 12, 2007 incident is supported by substantial evidence. Ms. Fowler did not address the treating physician issue in her opposition filings.

STANDARD OF REVIEW

The scope of review by the CRB is generally 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. *See*, D.C. Workers' Compensation Act of 1979, as amended, D.C. Code § 32-1501, *et seq.*, (the Act) at § 32-1521.01 (d)(2)(A), and *Marriott International v. DOES*, 834 A.2d 882 (D.C. 2003). Consistent

[3] The Compensation Order misstates the claim as being for "20% for right shoulder".

with this standard of review, the CRB and this review panel must affirm 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 this panel might have reached a contrary conclusion. *Id.*, at 885.

DISCUSSION AND ANALYSIS

This case and claim involves an injury sustained by Ms. Fowler on October 12, 2007. Because Ms. Fowler also sustained a subsequent injury on March 26, 2009, which injury is not the subject of this claim, and because there were questions raised concerning causal relationship of her shoulder injury to the October 12, 2007 injury, we will set forth the hearing transcript (HT) testimony covering both these incidents prior to our analysis.

Ms. Fowler testified as follows, on direct examination by her counsel, Benjamin Boscolo.

> [HT 28]
> Q: Were you having any problems with your right hand immediately proceeding [sic] the accident of October 12, 2007?
> A: Are you saying before, sir?
> Q: Yes.
> A: No.
> Q: Were you having any problems with your right shoulder immediately before the accident of 2007?
> A: No.
> Q: All right. Tell Judge Newsome what happened on October 12th of 2007.
> A: I was up on the roof working on an exhaust system and the way they is, they have latches that when you open it up the latch is supposed to pull back and hold it open so you can work inside the exhaust. And the latches gave out, like the top is so big. It's heavy when it [HT 29] slammed me it caused so much pain I snatched back, you know, to get out.
> Q: You're demonstrating and that doesn't show on the record. What were you getting out?
> A: My hand.
> Q: All right. So when the latch fell down, what happened? The latch fell down. What did it do to your hand?
> A: It caused—I don't know. It just started swelling and it started hurting.
> […]
> Q: So the door fell down on your hand. Was your hand resting on something?
> A: My hand was inside trying to get the motor out.
> Q: Okay.
> A: And then when I had the motor [HT 30] halfway out and then I say, the way I had to get it out, I had to let one hand go and then lift it up with one hand. Try to pull it like this and wham, I dropped the motor and I snatched my hand back.
> […]
> Q: Okay. How much did the motor you were trying to remove weigh?
> A: Approximately 10 maybe 12 pounds.

Q: Did you actually have it in your hand when the door fell down? Yes?
A: Yes.
[…]
Q: And how much did the door that fell on your hand weight [sic]? If you know?
[HT 31]
A: I don't know.
[…]
Q: And what, if any, physical pain did you feel immediately after the incident?
A: I felt pain to my hand that radiated all the way up and pain right in this area right—
Q: And for the record, can you say what area you're pointing to?
A: Shoulder area, front of the shoulder.
Q: What was the biggest problem?
A: The hand.
[…]
[HT 32]
[…]
Q: After this incident did you get medical attention for your hand?
A: Yes.
Q: Did you get any medical attention for your shoulder?
A: No, because it was like—it felt like, you know, like a sprain, you know. It was just sore. But the problem is the pain never went away.
Q: But you never got any treatment for it? You have to answer.
A: No.
Q: You just dealt with it?
[HT 33]
A: Yes.
Q: Okay. You then had a second on-the-job accident in March of 2009, correct?
A: Yes.
Q: All right. And you hurt your shoulder is that, right?
A: Yes.
Q: All right. Were you having problems with your shoulder before the accident of March of 2009?
A: Yes.
Q: So, now tell Judge Newsome about the incident that happened in March of 2009.
A: I was on the ladder trying to open up a six-inch valve and the ladder collapsed. One [sic] the ladder out, I was stuck up—way up and I held onto the pipe as long as I could. I was the only one in the mechanical room so I couldn't holler for help. I held onto the pipe as long as I could. And then I just couldn't hold on no more. So, once I let go, I hit a hot water tank. I hit a burner, [HT 34] I hit a gas line, I hit concrete.
Q: Okay. What parts of your body did you injure in that incident in March of 2009?
A: I injured my hand, my shoulder, my back and my leg.
[…]
Q: What kind of treatment did you get? Did you get any treatment for the hand after that?

A: I went to Dr. Mott [sic- Macht] and he said something like a bone had moved or something like that had to heal.
Q: Okay.
A: Okay. And it would go back into place.
[HT 35]
Q: All right. How about your shoulder. Did you get any treatment for your shoulder after that incident?
A: He looked at it and he just gave me an injection in the shoulder. I don't know what you call those injections, but he gave an injection.
[…]
[HT 43]
[By counsel for Howard University, William H. Schladt] Q: Ms. Fowler, I just want to understand the incident in October of 2007.
A; Yes sir.
Q: You were trying to remove a motor from inside the HVAC system, is that what it was?
A: Yes. It had been on top of the roof like this and this. There's a motor inside. It's actually smaller than the unit.[…]
[HT 44]
[…]
Q: So it's a roof unit?
A; Yes.
Q: Okay. So, you're up on the roof standing next to it.
A: Right in front of it.
Q: Right in front of it on the roof, right?
A: Yes.
[HT 45]
Q: Not on a ladder or anything like that?
A: No.
[…]
Q: Okay, and you're not on a ladder at the time, is that correct?
A: No.
Q: And you didn't fall from the ladder. You didn't fall to the ground when you pulled it out, is that correct?
A: No.

We set forth this extended portion of HT because each of the issues on appeal is addressed in some manner in this testimony.

Turning first to Howard's contention that the ALJ erroneously accorded the opinion of Dr. Macht the preference to which treating physician opinion is entitled under the Act, we note that Ms. Fowler does not contest Howard's contention that Dr. Macht was not in fact her treating physician, and that it was error for the ALJ to have accorded his opinion the preference such opinions are entitled to in this jurisdiction[4]. The issue is nowhere addressed in her opposition brief.

[4] It is well established that, under the law of this jurisdiction, the opinions of a treating physician are accorded great weight, and are generally to be preferred over a conflicting opinion by an IME physician. *Short v. District of Columbia*

Review of the Compensation Order reveals that at "Finding of Fact" number 7, the ALJ found that "Dr. Robert Macht, Fowler's treating physician, injected Fowler's right shoulder after the March 26, 2009 injury. HT at 35." That is the entire discussion of Dr. Macht's status in the Compensation Order.

The reference to the transcript by the ALJ was to this exchange:

> [HT 35]
> Q: All right. How about your shoulder. Did you get any treatment for your shoulder after that incident?
> A: He looked at it and he just gave me an injection in the shoulder. I don't know what you call those injections, but he gave an injection.

As can be seen from the context of HT above, Ms. Fowler appears to have claimed that Dr. Macht gave her an injection. However, the records and reports submitted by Ms. Fowler at the formal hearing contain no records from any physician who purported to have provided any medical care to her. The only documents that purport to identify any doctor as being a treating physician are "Employee's Notice of Accidental Injury or Occupational Disease" and "Employee's Claim Application", being CE 5. They both identify Dr. Mustafa Haque as the physician who was treating her for injuries occurring on October 12, 2007, and they describe the injury as having been sustained "While lifting a range hood the latch gave out injuring her right hand". And, when calling for a "Description of Injury", they both state "right hand".

Ms. Fowler's documentary exhibits also contain three reports by Dr. Macht, all addressed to Ms. Fowler's attorney and none appearing to be medical treatment records. The first is dated August 26, 2011 concerning the results of an examination performed August 19, 2011, and the other two are subsequent letters clarifying or supplementing the August 26, 2011 letter. In that initial document, in the "History" portion, Dr. Macht writes

> While working, climbing up a ladder, Ms. Fowler states she struck her right arm on a fan that was hooked to the wall causing injury to her right arm and shoulder. She went to her doctor for injection and physical therapy treatments. X-rays were obtained. She had surgery to her hand region. She was started on physical therapy treatments. At this time she complains of severe constant pain about the right shoulder.

We must agree with Howard that the record before us, and particularly the portion thereof that the ALJ relied upon, does not constitute substantial evidence to support a determination that Dr. Macht was a treating physician within the meaning of that phrase under the Act. Dr. Macht's own report attributes the only injection referenced in the documentary record to another physician, and he makes no reference whatsoever to having rendered any treatment to Ms. Fowler.

Department of Employment Services, 723 A.2d 845 (D.C. 1998); *Stewart v. District of Columbia Department of Employment Services*, 606 A.2d 1350 (D.C. 1992).

In the Compensation Order, the ALJ wrote, as the final sentence of her "Nature and Extent" discussion, "Applying the treating physician preference, Fowler suffers from a 25% permanent partial disability to her right hand and a 20% permanent partial disability to her right shoulder." Compensation Order, page 7.

This is error. The record does not support the finding that Dr. Macht was a treating physician, so the application of the treating physician preference renders the awards not in accordance with the law. We have no choice but to vacate the awards on that ground.

Further, Howard argues that the award to the shoulder must be vacated because the shoulder is not a schedule member. Ms. Fowler argues that, because the claim for relief that counsel articulated at the time of the formal hearing was for "20% permanent partial disability to the right arm based upon the injury to the right shoulder", the award should stand, presumably with the word "shoulder" standing in for "arm".

We must disagree with Ms. Fowler on this point. Regardless of how precisely and accurately Ms. Fowler's counsel set forth the claim for relief, the ALJ got it wrong. In setting forth her understanding of the claim for relief, the ALJ wrote "Fowler seeks an award for a schedule award of permanent partial disability benefits of 25% for her right hand and 20% for her right shoulder from August 19, 2011 to the present and continuing"[5]. Compensation Order, "Claims for Relief, A." at page 2. Further, as noted above, the ALJ concluded her discussion by determining that Ms. Fowler had sustained a 20% permanent partial disability "to her right shoulder". Finally, in the "Decision" portion of the Compensation Order, the ALJ wrote "Fowler's claim for permanent partial disability benefits of 25% permanent partial disability to her right hand and 20% permanent partial disability to her right shoulder from August 19, 2011 to the present and continuing is GRANTED".

The shoulder is not a schedule member, and thus no award for its permanent partial disability is recognized under the Act. The award must therefore be vacated for the additional reason that it is not in accordance with the Act insofar as the Act lacks any provision for such an award.

We now turn to Howard's contention that the ALJ's determination that Howard had failed to adduce sufficient evidence to overcome the presumption that the right shoulder injury was medically causally related to the work injury is erroneous.[6] Howard argues that the Compensation Order runs

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[5] The ALJ appears to have completely misunderstood Ms. Fowler's counsel. At HT 17, counsel made clear that Ms. Fowler was claiming an award of "no less than 12%" to the right arm. This is obviously premised upon the contents of Dr. Macht's March 8, 2012 letter to counsel, stating that, in response to counsel's inquiry, "a 20% permanent partial impairment of the right shoulder would translate to a 12% permanent partial impairment to the right upper extremity". CE 1.

[6] 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."

afoul of the principle, enunciated by the District of Columbia Court of Appeals (DCCA) in *Darden v. DOES*, 911 A.2d 410 (D.C. 2006), that "An agency fails to base its decision on substantial evidence in the record when it ignores material evidence in the record."

The material evidence that Howard identifies which it contends the ALJ failed to consider are that "the conflicting versions of the mechanism of injury told by the Claimant to both rating physicians and the different version described at the hearing. Further, the ALJ does not consider the Claimant's complete failure to obtain treatment to her shoulder due to the 2007 accident until after the 2009 accident." Howard's "Memorandum in Support of Application for Review", unnumbered page 4, "Argument A".

This argument can be broken down to several constituent parts: (1) Ms. Fowler has told conflicting stories to each IME physician, and a different version at the formal hearing; (2) Ms. Fowler's "ladder" story, told to Dr. Macht and again in variant to Dr. Robert Collins, Howard's IME physician, is not consistent with the events of October 2007 as described at the formal hearing, which events had nothing to do with a fall or a ladder; (3) (i) the length of time between the October 2007 incident and the first treatment Ms. Fowler obtained for her right shoulder, (ii) the fact that Ms. Fowler admittedly sustained an unrelated, intervening injury to her right shoulder in 2009, and (iii) the fact that Ms. Fowler never obtained medical care for the shoulder until after the admitted subsequent intervening incident in which she admits her right shoulder was injured all suggest that there was no shoulder injury from the 2007 incident.

Review of the Compensation Order confirms that the only evidence in the record that the ALJ considered in connection with whether the presumption and been overcome were the two documents contained in CE 5, described above, in which the only injury identified was to the right hand. She dismissed these documents as being insufficiently "specific and comprehensive" to sever the presumed causal relationship, deeming Ms. Fowler's inability to sign those documents due to her right hand injury adequate to explain their incompleteness.

Review of Howard's counsel's opening statement indicates that he raised not only the issues related to the lack of reference to a shoulder injury in the CE 5 documents, but also made the point that the evidence shows that Ms. Fowler did injure the shoulder in March 2009. And, in his closing argument, counsel points to the discrepancies between the history in Dr. Macht's report and the accident as described at the hearing, noting that Dr. Macht, despite attributing the shoulder problem to an October 2007 incident, is actually describing the 2009 incident in the history. HT 54 – 55. He repeats the same argument in connection with the history related to Howard's IME physician. In essence, Howard's main argument is that the physicians were both given a history that is compatible

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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 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).

Once raised, the presumption shifts to the employer the burden to produce evidence that is substantial, specific and comprehensive enough to sever the potential connection. "Substantial evidence" is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion". *Stewart v. District of Columbia Department of Employment Services,*606 A.2d 1350 (D.C. App. 1992).

only with the 2009 incident, neither was given a history compatible with the 2007 incident, but both were told by Ms. Fowler that the incident that she described occurred in 2007, when by her own admission at the formal hearing (and as is demonstrated by EE 7) the "ladder incident" occurred in 2009.

The ALJ never addresses these arguments, and as such, the decision is insufficient to meet the requirement, established by the DCCA in *Darden*, that a party is entitled to have all the material evidence considered. In this instance, the ALJ failed to consider the evidence and arguments put forward by Howard which tend to militate against a finding that the shoulder injury occurred in the 2007 incident which is the only incident for which a claim was raised in this proceeding.

On this record, it is undisputed: (1) that Ms. Fowler's notice of injury and claim form identify but a single injury, that being to the right hand; (2) according to her formal hearing testimony, the mechanism of the 2007 injury was a blow to the right hand caused when a hatch cover fell upon the hand; (3) according to that testimony, Ms. Fowler sought no medical care for her right shoulder following that injury; (4) Ms. Fowler sustained a work injury in March 2009 when a ladder fell from under her, and according to her testimony, she injured her right shoulder when she fell to the floor after hanging onto a pipe for as long as she was able; (5) both of the medical reports that assign medical causal relationship of the current shoulder injury to the October 2007, one from Ms. Fowler and one from Howard, refer to injuries sustained in a ladder mishap; and (6) Ms. Fowler admitted in cross examination that the October 2007 incident did not involve a ladder in any way.

An employer's burden in overcoming the statutory presumption is to adduce substantial evidence that the condition did not arise out of the work injury in question. Substantial evidence is such evidence as a reasonable person might accept as sufficient to prove a material fact. This evidence is clearly sufficient to overcome the presumed relationship between the incident of October 12, 2007 and her current shoulder complaints, as a matter of law. Accordingly, we must vacate and reverse the finding that Howard has failed to overcome the presumption that the current shoulder injury, if any, is medically causally related to the October 12, 2007 work injury. That being the case, the presumption has fallen from the case and on remand the record evidence must be reconsidered as a whole, with Ms. Fowler bearing the burden of proving such a causal relationship, by a preponderance of the evidence.

We are aware that the ALJ who authored the compensation order has retired. Thus, on remand, it will be necessary that the parties agree to a reassignment of the matter to a new ALJ with a new compensation order to be issued based upon the record, or that new formal hearing be convened before a new ALJ[7]. We regret the delay that this will undoubtedly cause. However, we see no alternative, given the inadequacy of the compensation order presently under review.

[7] It has long been established that the one who decides the case must hear the case unless the parties are given an opportunity to elect between having a new hearing or having a different agency hearing official decide the case. See, *Simmons v. District Unemployment Compensation Board*, 292 A.2d 797 (D.C. 1972); *Andrews v. District of Columbia Public Schools*, ECAB No. 94-23 (August 12, 1997), and *Swanson v. D.C. Department of Corrections,* CRB No. 12-011, AHD No. PBL 11-024, DCP No. 761032-0001-20000-005 (May 3, 2012).

CONCLUSION AND ORDER

We vacate both awards because they were premised upon the improper application of the treating physician preference rule under circumstances where the rule is not applicable. The award of disability "to the shoulder" is vacated for the additional reason that the Act has no provision for any such award. We reverse the ALJ's determination that Howard failed to adduce sufficient evidence to overcome the presumption that the shoulder injury underpinning the arm disability claim is causally related to the October 12, 2007 incident. We remand the matter for further consideration of the claims. On remand, the parties are to be afforded the opportunity to consent to having the matter decided on the record by a new ALJ, or to have the matter decided following a new formal hearing.

FOR THE COMPENSATION REVIEW BOARD:

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JEFFREY P. RUSSELL
Administrative Appeals Judge

___December 5, 2012_____
DATE