GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR

LISA M. MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 12-168

NOEL TIONGSON,

Claimant–Petitioner,

v.

GEORGETOWN UNIVERSITY AND ZURICH AMERICAN INSURANCE COMPANY,

Employer/Insurer-Respondent.

Appeal from a Compensation Order of
Administrative Law Judge Belva Newsome
AHD No. 10-547, OWC No. 654487

Matthew Peffer, Esquire, for the Petitioner

Jeffrey W. Ochsman, Esquire, for the Respondent

Before JEFFREY P. RUSSELL,[1] LAWRENCE D. TARR, AND HENRY W. MCCOY, *Administrative Appeals Judges*.

JEFFREY P. RUSSELL, for the Compensation Review Board.

DECISION AND REMAND ORDER

BACKGROUND

Petitioner Noel Tiongson was a bus driver for Georgetown University (GU) who sustained injuries on September 30, 2008 when the bus that he was operating was struck in the rear by another vehicle. GU made voluntary payments of temporary total disability from October 30, 2008 through January 18, 2009, the date upon which Mr. Tiongson's treating physician authorized him to return to work at full duty.

Subsequently, Mr. Tiongson sought to obtain a schedule award to his right arm. For that purpose, Mr. Tiongson was evaluated by his treating physician for permanency, and the doctor issued a report finding that Mr. Tiongson's right arm had sustained a permanent partial impairment of 33%.

[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).

GU had Mr. Tiongson evaluated by an independent medical evaluator (IME), who concluded that Mr. Tiongson's work related injuries had all resolved without residual impairment.

To resolve the dispute concerning the nature and extent of disability to the right arm, a formal hearing was conducted by an ALJ in the Department of Employment Services (DOES) on February 22, 2011.

Following that hearing, on April 29, 2011, the ALJ issued a Compensation Order (CO 1) denying the claim. Mr. Tiongson appealed CO 1 to the Compensation Review Board (CRB) which issued a Decision and Remand Order (DRO 1), which vacated CO 1 and remanded the matter for further consideration with instructions that the ALJ acknowledge the existence of the "treating physician preference" in this jurisdiction, and consider the claim in light of that preference.

On March 19, 2012, the ALJ issued a Compensation Order on Remand (CO 2), again denying the claim. Mr. Tiongson again appealed to the CRB, which again remanded the matter in a Decision and Remand Order (DRO 2), in which the CRB directed that the ALJ identify certain unspecified "inconsistencies" between Mr. Tiongson's testimony and the medical records that the ALJ based her denial upon, and directed that the ALJ explain the basis for rejecting the treating physician's opinion that the claimed disability was causally related to the stipulated work injury.

On September 28, 2012, the ALJ issued a third compensation order, styled again "Compensation Order on Remand" (CO 3), and again she denied the claim. Mr. Tiongson appealed CO 3 to the CRB, to which appeal GU has filed an opposition. It is this compensation order, CO 3, that we presently consider.

We vacate the Compensation Order on Remand issued September 28, 2012, and remand for further consideration of the claim.

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 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

In DRO 2, the CRB identified two deficiencies in CO 2: (1) the lack of an explanation as to why the treating physician's opinion on medical causal relationship was rejected; and (2) the failure to identify any of the "inconsistencies" between Mr. Tiongson's testimony and the medical records or otherwise explain why she found his testimony to lack credibility.

In considering this appeal, we note preliminarily that the CRB vacated CO 2 as part of its remand order, and we note further that the ALJ did not incorporate any of the findings or analysis of CO 2 into CO 3. Thus, the compensation order that we review here stands alone, and will be considered solely based upon what is contained therein.

We start our analysis of CO 2 with the final paragraph of the Analysis portion thereof, which reads as follows:

> Based on the foregoing discussion, including all the evidence and Claimant's testimony, it appears that inconsistencies do exist. Thus a determination that Claimant's evidence does not meet the preponderance of the evidence standard is appropriate. Consequently, on these facts and this evidence, the Claimant should not be granted 33% permanent partial disability for his right upper extremity.

CO 2, page 9.

We can not discern from this whether the denial of the schedule award is based upon a finding that there is a lack of any disability to the arm whatsoever, or a finding that that there is some disability but it is in some amount other than 33%, or a determination that any disability that exists is not medically causally related to the work injury.

In the discussion leading up to this paragraph, the ALJ alludes to the fact that the medical evidence presented by the parties is in conflict. She recites that the treating physician, Dr. Michael Franchetti, opined that Mr. Tiongson has sustained a 33% permanent partial disability to his right arm, based upon complaints and limitations to the right shoulder and right elbow, and that IME physician, Dr. Kenneth Spence, opined that Mr. Tiongson suffers from no permanent partial impairment to the right arm at all. In that discussion, the ALJ refers to the fact that the right elbow complaints upon which Dr. Franchetti based part of his assessment were not voiced to Dr. Franchetti until February 2009, which the ALJ noted was four months after Dr. Franchetti released him from care without restrictions and authorized a return to full duty work.

The fact that she denied the claim makes obvious that the ALJ rejected Dr. Franchetti's opinion. Sshe acknowledged the existence of the treating physician's preference and its requirement that a rejection of that opinion be accompanied by an explanation for the rejection, which explanation supplies "persuasive reasons" for that rejection.

Oddly, though, this acknowledgement of the treating physician's preference is the penultimate paragraph of CO 3, immediately preceding the concluding paragraph quoted above.

Nowhere in the discussion does the ALJ explicitly reject Dr. Franchetti's opinion. From that discussion, though, we can discern several possible scenarios.

In addition to pointing out that Dr. Franchetti's opinion was based in part upon elbow complaints that were first voiced four months after Mr. Tiongson's release from treatment (and, we note, eight

months following the injury), the ALJ also suggests that she might find Mr. Tiongson's credibility to be questionable, writing

> Despite Claimant's contention that he could not do the work of a bus driver, even after Claimant was involved in another accident in March 2010, Claimant was working as a driver of a tourist bus by April 2010. Claimant then went on to work as a limousine driver until January 2011. He then drove three (3) to four (4) passenger limousine and a 23 to 25 passenger bus, all after his March 2010 accident. HT at 49 – 50.

CO 3, page 8. Although the discussion in the cited HT is a bit confusing, it consists of Mr. Tiongson admitting on cross examination that while he was receiving temporary total disability benefits (apparently but not clearly) from GU in connection with a subsequent work related accident that occurred in March 2010, he was also working as a bus driver for a tour company, then as a limousine driver, and that during that time he passed a physical that was required when he re-certified his bus drivers license with the U.S. Department of Transportation.

Yet nowhere does the ALJ make an explicit finding concerning Mr. Tiongson's credibility. Thus, we don't know whether the denial of the claim was premised upon a determination that Mr. Tiongson is fabricating his right elbow complaints, rendering Dr. Franchetti's opinion as to the degree of impairment invalid, or that the complaints are real but unrelated to the work injury, rendering it invalid with respect to causal relationship. It is likewise possible, as suggested by GU's counsel in the HT exchange, that these facts cast doubt upon the extent to which the injury impairs his functional capacity. It is possible that some combination of these thought processes were at work in the ALJ's consideration of the claim.

In a contested case, in order to conform to the requirements of the District of Columbia Administrative Procedure Act, D.C. Code § 2-501 *et seq.*, (DCAPA), an agency's decision must (1) state findings of fact on each material issue in contest, (2) those factual findings must be supported by substantial evidence, and (3) the conclusions of law must flow rationally from those factual findings. The failure to satisfy these requirements renders an agency decision unsupported by substantial evidence. *Perkins v. DOES*, 482 A.2d 401 (D.C. 1984).

While we can discern some general outlines of what the ALJ's thought processes might have been, and while any number scenarios that she might have considered could be supported on appeal by the record, in order for an appeal to be properly considered, and in order to assure that the case be handled in a manner that the parties' rights be established so that any further appeals or claims in the future can be considered in accordance with the law, it is necessary that the basis for the denial of the claim be established clearly. A compensation order in which ultimate findings of fact on the disputed relevant issues are made, and conclusions of law are reached based upon application of the proper legal standards, is necessary. This compensation order lacks findings and legal conclusions concerning whether the claimed disability to the right arm is medically causally related to the work injury. Further, it lacks findings and conclusions regarding the nature and extent of that disability in the event that it is causally related to the work injury. And, as we often point out, we are not empowered to fill in the gaps in fact finding in a compensation order that comes before us on appeal. See, *King v. DOES*, 742 A.2d 460 (D.C. 1999).

We are aware that the ALJ who authored the three compensation orders that have all been found to be legally deficient in this claim 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[2]. We regret the delay that this will undoubtedly cause. However, we see no alternative, given the inadequacy of the compensation order presently under review.

CONCLUSION

The Compensation Order on Remand of September 28, 2012 fails to make necessary findings of fact and conclusions of law concerning whether the alleged disability to the right arm is medically causally related to the stipulated work injury of September 30, 2008, and if so, what the extent of that disability is under the schedule.

ORDER

The Compensation Order on Remand of September 28, 2012 is VACATED. The matter is remanded to AHD for further consideration in a manner consistent with the aforegoing Decision and Remand Order. 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:

____
JEFFREY P. RUSSELL
Administrative Appeals Judge

November 29, 2012______________
DATE

[2] 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).