

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**  
**Department of Employment Services**

**VINCENT C. GRAY**  
**MAYOR**



**LISA M. MALLORY**  
**DIRECTOR**

**COMPENSATION REVIEW BOARD**

**CRB No. 12-060**

**NOEL TIONGSON,<sup>1</sup>**  
**Claimant–Petitioner,**

**v.**

**GEORGETOWN UNIVERSITY,**  
**Employer-Respondent.**

Appeal from a Compensation Order on Remand by  
The Honorable Belva D. Newsome  
AHD No. 10-547, OWC No. 654478

Matthew Peffer, Esquire for the Petitioner  
Jeffrey W. Ochsman, Esquire for the Respondent

Before MELISSA LIN JONES, LAWRENCE D. TARR, and JEFFREY P. RUSSELL,<sup>2</sup> *Administrative Appeals Judges*.

MELISSA LIN JONES, *Administrative Appeals Judge*, for the Compensation Review Board.

**DECISION AND REMAND ORDER**

**JURISDICTION**

Jurisdiction is conferred upon the Compensation Review Board (“CRB”) pursuant to §§32-1521.01 and 32-1522 of the District of Columbia Workers’ Compensation Act of 1979, D.C. Code, as amended, §32-1501 *et seq.*, (“Act”), 7 DCMR §250, *et seq.*, and the Department of Employment Services Director’s Administrative Policy Issuance 05-01 (February 5, 2005).

**FACTS OF RECORD AND PROCEDURAL HISTORY**

On September 30, 2008 while working for Georgetown University as a bus driver, Mr. Noel Tionson was involved in a bus accident. Mr. Tionson contends his current right shoulder condition is causally related to that accident.

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<sup>1</sup> It appears Petitioner’s name is misspelled in the April 19, 2011 Compensation Order and the March 19, 2011 Compensation Order on Remand. The CRB relies on the spelling throughout Claimant’s Application for Review.

<sup>2</sup> Judge Russell has been appointed by the Director of the Department of Employment Services as a temporary CRB member pursuant to Administrative Policy Issuance No. 11-03 (October 5, 2011).

Following a formal hearing, an administrative law judge (“ALJ”) denied Mr. Tionson’s request for an award for permanent partial disability to his right arm. In an April 19, 2011 Compensation Order, the ALJ ruled Mr. Tionson’s right shoulder complaints are not related to his on-the-job accident.<sup>3</sup>

On appeal in 2011, neither party contended the presumption of compensability improperly had been invoked or rebutted. The issues focused on the treating physician preference and the credibility determination regarding Mr. Tionson’s testimony.

In the April 19, 2011 Compensation Order, the ALJ inventoried the shortcomings of Dr. Michael A. Franchetti’s medical reports; however, the ALJ failed to acknowledge or apply the treating physician preference to Dr. Franchetti’s opinions:

Where the Compensation Order does not mention the existence of the treating physician preference, we can not be certain that the fact finder was aware that, all things being equal, the treating physician preference would require that the treating physician’s opinion be accepted over that of an IME physician. In this case, we do not know whether the ALJ felt that the IME opinion suffered from infirmities equal to or greater than those that we infer she found in the opinion of Dr. Franchetti. It may be that she does not, but we can not tell.<sup>[4]</sup>

In addition, the CRB was unable to assess the credibility determination because “[t]he ALJ has based her determination solely on comparing the Claimant’s testimony with the evidence in the record but has not provided any of those inconsistencies in record to allow us to defer to her judgment.”<sup>5</sup> Thus, the CRB reversed and remanded the case for an explanation of the reasons for rejecting Dr. Franchetti’s opinions and for an explanation of the inconsistencies in the record that support finding Mr. Tionson’s testimony is not credible.

In response, the ALJ issued a Compensation Order on Remand dated March 19, 2012. The ALJ, again, denied Mr. Tionson’s claim for relief.

Now, on appeal to the CRB for the second time, Mr. Tionson argues that the reasons the ALJ cites for rejecting Dr. Franchetti’s opinions do not have any relevance to the issue of causal relationship and that there is no explanation as to why those disability-based reasons lead to the conclusion that Mr. Tionson’s current condition is not related to his compensable accident.<sup>6</sup> Mr. Tionson also

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<sup>3</sup> Disability experienced in a schedule member may be compensable even if the anatomical situs of the injury is in a non-schedule body part. *Washington Metropolitan Area Transit Authority v. DOES*, 683 A.2d 470 (D.C. 1996).

<sup>4</sup> *Tionson v. Georgetown University*, CRB No. 11-046, AHD No. 10-547, OWC No. 654478 (January 18, 2012).

<sup>5</sup> *Tionson v. Georgetown University*, CRB No. 11-046, AHD No. 10-547, OWC No. 654478 (January 18, 2012).

<sup>6</sup> Mr. Tionson asserts the ALJ cites to a non-existent medical report in support of her rejection of Dr. Franchetti’s opinions. This issue was addressed in the January 18, 2012 Decision and Remand Order: “In the CO, the ALJ mistakenly records the full duty release date as January 19, 2011. However, CE 3 at p. 31 clearly shows that on January

argues the ALJ did not analyze his testimony when she determined it is not credible. Mr. Tionsgon requests we reverse the Compensation Order on Remand.

On the other hand, Georgetown University contends the Compensation Order on Remand is supported by substantial evidence because the ALJ properly rejected Dr. Franchetti's opinions and accurately assessed Mr. Tionsgon's credibility. Consequently, Georgetown University requests we affirm the Compensation Order on Remand.

#### ISSUES ON APPEAL

1. Does substantial evidence in the record support that the ALJ properly considered the directives in the January 18, 2012 Decision and Remand Order?
2. Is the March 19, 2012 Compensation Order on Remand supported by substantial evidence and in accordance with the law?

#### ANALYSIS<sup>7</sup>

On remand, the ALJ was to explain why she had rejected Dr. Franchetti's opinion on causal relationship. In the March 19, 2012 Compensation Order on Remand, the ALJ acknowledges the treating physician preference but rejects Dr. Franchetti's opinion regarding the nature and extent of Mr. Tionsgon's permanent partial disability: "Dr. Franchetti's December 8, 2009 medical opinion that Claimant had reached maximum medical improvement with a 33% permanent disability to his right upper extremity is rejected."<sup>8</sup> The ALJ's misunderstanding of the prior directive on remand requires we vacate the Compensation Order on Remand on the issue of causal relationship and remand the matter for the proper consideration of the application of the treating physician preference to the issue of causal relationship.

Regarding the ALJ's credibility determination, the ALJ stated Mr. Tionsgon's testimony was not credible because it was "inconsistent with the medical records and Claimant's continued employment,"<sup>9</sup> but the ALJ failed to identify any inconsistencies between Mr. Tionsgon's testimony and any medical record and failed to state why Mr. Tionsgon's continued employment rendered his testimony not believable. Thus, although an ALJ's credibility determinations often are entitled to

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6, 2009 Dr. Franchetti had Claimant in an off work status 'until 1/19/09 then full duty.'" *Tionsgon v. Georgetown University*, CRB No. 11-046, AHD No. 10-547, OWC No. 654478 (January 18, 2012), nt. 3.

<sup>7</sup> The scope of review by the CRB is limited to making a determination as to whether the factual findings of the appealed Compensation Order on Remand are based upon substantial evidence in the record and whether the legal conclusions drawn from those facts are in accordance with applicable law. Section 32-1521.01(d)(2)(A) of the Act. Consistent with this standard of review, the CRB is constrained to uphold a Compensation Order on Remand that is supported by substantial evidence, even if there also is contained within the record under review substantial evidence to support a contrary conclusion and even if the CRB might have reached a contrary conclusion. *Marriott International v. DOES*, 834 A.2d 882, 885 (D.C. 2003).

<sup>8</sup> *Tionsgon v. Georgetown University*, AHD No. 10-547, OWC No. 654478 (March 19, 2012), p. 3.

<sup>9</sup> *Id.*

deference,<sup>10</sup> credibility determinations, like all other findings of fact, must be supported by substantial evidence in the record when reviewed as a whole,<sup>11</sup> and without an explanation of the analysis of the credibility issue, the CRB is unable to perform an appellate review properly.<sup>12</sup>

CONCLUSION AND ORDER

The March 19, 2012 Compensation Order on Remand is not supported by substantial evidence and is not in accordance with the law. The Compensation Order on Remand is VACATED, and this matter is remanded for further proceedings consistent with this Decision and Remand Order as well as the January 18, 2012 Decision and Remand Order.

FOR THE COMPENSATION REVIEW BOARD:

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MELISSA LIN JONES  
Administrative Appeals Judge

June 7, 2012

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DATE

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<sup>10</sup> *Dell v. DOES*, 499 A.2d 102, 106 (D.C. 1985).

<sup>11</sup> See *Davis v. Western Union Telegraph*, Dir. Dkt. 88-84, H&AS No. 87-751, OWC No. 098216 (March 4, 1992).

<sup>12</sup> *Jones v. DOES*, No. 10-AA-628, (D.C. April 26, 2012)