GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

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DIRECTOR

COMPENSATION REVIEW BOARD

DEPT. OF EMPLOYMENT SERVICES
COMPENSATION REVIEW BOARD
2015 JUL 28 PM 1 19

CRB No. 15-056

ANGELA ASHTON,
Claimant–Petitioner,

v.

DISTRICT OF COLUMBIA DEPARTMENT OF MOTOR VEHICLES
Employer-Respondent.

Appeal from a March 21, 2015 Compensation Order
By Administrative Law Judge Fred D. Carney, Jr.
AHD No. PBL 13-045, DCP No. 30081122563-0001

(Decided July 28, 2015)

Harold L. Levi for Claimant
Lindsay M. Neinast for Employer

Before JEFFREY P. RUSSELL, LINDA F. JORY, and HEATHER C. LESLIE, *Administrative Appeals Judges*

JEFFREY P. RUSSELL for the Compensation Review Board.

DECISION AND REMAND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

The following factual and procedural information are taken from two prior Decisions and Remand Orders, one dated December 2, 2014 (DRO 1), and a second dated May 21, 2014 (DRO 2). Footnotes included in the body of the following text are in the original DRO. The indented paragraphs are from DRO 2; the double indented paragraphs are from DRO 1 as quoted in DRO 2, or from the Compensation Order under review in the respective DROs.

> Claimant was employed by Employer as a legal instruments examiner. Her duties primarily involved processing customer transactions, such as vehicle registrations, learners' and drivers' permits, title transactions, and residential parking permits. On October 20, 2008 Claimant sustained an accident at work when she was exposed to propone gas. She was transported by ambulance to Washington Hospital Center and missed time from work as a result of this accident.

The record established that Claimant suffered from several medical conditions that pre-existed the October 20, 2008 accident at work. In 2007, Dr. Jeffrey Wetstone diagnosed Claimant with high blood pressure. In May 2008, Dr. Wetstone diagnosed anxiety and stress disorder.

Two other doctors, Dr. Sita Krishnamoorthy and Dr. Samuel Semegn also treated Claimant for hypertension in 2008, prior to the exposure at work. Dr. Krishnamoorthy opined that Claimant was disabled from working for four days in May 2008 because of hypertension. Dr. Semegn's reports show Claimant had elevated blood pressure readings between June and October 2008. On October 16, 2008, six days before the event at work, he diagnosed hypertension and headaches.

[[1]] After the work exposure, Dr. Wetstone prescribed medication for stress and his notes in 2010 indicate Claimant was diagnosed by a psychiatrist with having a bipolar disorder.

Employer's workers' compensation program is administered by the D.C. Public Sector Workers' Compensation Program ("PSWCP"). PSWCP accepted Claimant's claim for what it termed in the Notice of Determination, as the "temporary aggravation of your preexisting hypertension."

[[2]] On January 9, 2009, Employer issued another Notice of Determination using the same claim number for "respiratory complications due to exposure to fumes."

Claimant received benefits until PSWCP notified her on May 13, 2013, that she no longer was eligible for additional benefits. Claimant filed a request for formal hearing with AHD and one was held on September 3, 2013.

The ALJ issued his Compensation Order ("CO") on December 18, 2013. In the CO, the ALJ did not accept Claimant's testimony, finding it internally inconsistent and contradictory. However, the ALJ, relying on the documentary evidence held at page 8-9:

> It has been repeatedly held that the workplace aggravation or exacerbation of a pre-existing condition is compensable, even to the extent the pre-existing injury is not work related.
>
> * * *
>
> Thus medical conditions which are the natural progression of a workplace injury may be compensable even if non-employment factors contributed to or aggravated it.
>
> Therefore the weight of the evidence is in favor of Claimant that there has been no change in her work restrictions of medical treatment since October 2008. Dr. Myerson has not examined Claimant and Employer

> has introduced no evidence that it tried to accommodate Claimant's working restrictions.

Employer appealed. On May 21, 2014 the CRB issued a Decision and Remand Order ("DRO [DRO 1]") that vacated the ALJ's award, finding that it was not in accordance with the law. The CRB held

> In this case, there has been no claim that the environmental conditions that have prevented Ms. Ashton from returning to work have caused a worsening of her admittedly pre-existing hypertension, and we have seen nothing in the record that any physician has expressed the opinion that her reactions to these environmental factors are anything more than temporary exacerbations which are transient in nature...Ms. Ashton is entitled to such temporary total disability benefits as are the result of these work related exposures which disable her, and for medical care to treat the acute event.

The CRB noted that Employer had not accepted a claim for work-related hypertension but only the "Temporary aggravation of pre-existing hypertension" caused by the inhalation of the noxious fumes in October 2008." Therefore, the CRB reasoned:

> Ms. Ashton is only entitled to benefits if the aggravation continues, and is no longer entitled to compensation once the aggravation has subsided. Employer's doctor says it does not; Claimant's doctors do not say the aggravation continues, only the pre-existing hypertension continues. The employer met its burden, but the claimant offers a red herring—her hypertension is not better. She did not prove her claim of an ongoing aggravation by a preponderance of the evidence.

The CRB's DRO [DRO 1] criticized the CO for not making specific findings concerning Claimant's baseline pre-existing impairments and limitations and those caused by the accepted work injury. Moreover, since the ALJ made internally inconsistent findings and because there was no claim and no NOD concerning any emotional or psychological injury, the CRB held:

> [W]e vacate the ALJ's finding that "Claimant's emotional condition including her prior stroke were caused by conditions at her work place, failure to adhere to the restrictions on Claimant's working in elevated heat and highly stressful environment as well as her anxiety and depression."
>
> Beyond this, the fact that Ms. Ashton has not returned to work for uncontrolled hypertension does not make the ongoing award supportable. Claimant suffered from hypertension before the work event, and she still has it after the work event. The Employer is only responsible for the

> exacerbation; once Claimant returned to her pre-injury baseline, ongoing uncontrolled hypertension is irrelevant. Furthermore, the limitations and restrictions are not based upon the aggravation but for Ms. Ashton's pre-existing hypertension. The limitations and restrictions are irrelevant to the workers' compensation claim because they are not a result of the work exposures. This relationship is bolstered by her doctor's reiteration that restricted Ms. Ashton regarding stress and heat before she the date of her alleged aggravation.

DRO [DRO 1] at 3.

The CRB's May 21, 2014 DRO [DRO 1] vacated the award reinstating benefits and remanded this matter to the ALJ with specific instructions regarding what the ALJ should do on remand:

> The award is vacated and the matter remanded with instructions to make further findings of fact concerning the duration of Ms. Ashton's disabling exacerbation of her pre-existing hypertension and enter a Compensation Order on Remand awarding only such benefits as are related to the temporary aggravation of Ms. Ashton's hypertension.

On September 24, 2014, the ALJ issued a Compensation Order on Remand ("COR") that again reinstated Claimant's benefits. Employer timely filed for review of the COR, challenging the findings of fact and conclusions of law in the COR, challenging the ALJ's exclusion at the formal hearing of Exhibit 10 (Dr. Myerson's August 27, 2013 AME report) and Exhibit 11 (Dr. Myerson's curriculum vitae) and his decision to limit Dr. Myerson's testimony.

In a Decision and Remand Order [DRO 2] issued December 2, 2014, the CRB ruled:

> In the COR the ALJ held "Employer has produced substantial evidence that Claimant's work related injury *i.e.* aggravation of her pre-existing hypertension, resolved years ago." Claimant has not appealed this determination.

The ALJ noted that Claimant relied on 4 items of evidence:

> The Claimant now has the burden of proving by a preponderance of the evidence that she does in fact continue with a disability that she sustained in the performance of her duty to Employer. Claimant relies on her testimony, the claims records for aggravation of her hypertension, the notice from WC, and medical reports of her treating physician at Kaiser."

COR at 7 (citation omitted).

The ALJ rejected Claimant's testimony with respect to 3 of the 4 items; As to Claimant's testimony, the ALJ found Claimant was not a reliable witness because of the many inconsistencies and contradictions between her testimony and the other evidence in the record. In the Discussion section of the COR, other than identifying that Claimant relied on them, the ALJ did not discuss either the "claims records for aggravation of her hypertension" or "the notice from WC" nor did the ALJ state how these documents influenced his decision to award benefits.

With respect to the fourth item, "medical reports of her treating physician at Kaiser", the ALJ considered the medical reports from her doctors at Kaiser Permanente (Drs. Jensvold, Wetstone, and Dukta) as well as the reports from Holy Cross Hospital to conclude:

> The weight of the evidence indicates Claimant's blood pressure level has been up and down since her original work injury. However, her work related medical condition has never resolved. The record indicates that Claimant has consistently complained that her Employer has failed to make the necessary accommodations to bring her work in line with the work restrictions imposed by her treating physician. Eventually she stopped working on advice of her treating physician.

COR at 8.

The ALJ compared this medical evidence to the testimony at the formal hearing from Dr. Myerson. Dr. Myerson testified that Claimant's exposure at work would not cause an exacerbation of her pre-existing hypertension. The ALJ gave greater evidentiary weight to Claimant's treating doctors:

> In KRALICK v. DOES, 842 A. 2d 705, 712-713 [D.C. 2004], the Court upheld the applicability of the treating physician preference to disability benefit cases. In this matter I see no reason to reject the report of Claimant's treating physician.

COR at 9.

We find the ALJ's reliance on the *Kralick* decision which was immediately followed by his accepting Claimant's treating physician's opinion, shows the ALJ relied on the treating physician preference. In doing so, the ALJ committed reversible error because in a decision issued before the COR, the DCCA held:

> The legislative history manifests a clear and unmistakable intent on the part of Council to accord equal weight to the testimonies of both treating and non-treating physicians in public-sector cases brought under the (District of Columbia Comprehensive Merit Personnel Act).

D.C. Public Schools v. DOES and Proctor, Intervenor, 95 A.3d 1284 (D.C. 2014).

Additionally, the CRB further finds the ALJ erred by not permitting Employer to admit into evidence Exhibits 10 and 11.

At the hearing, Employer attempted to introduce 11 exhibits. Exhibit 10 was an August 27, 2013 AME medical report from Dr. Ross Myerson in which he reviewed Claimant's medical records and answered twelve questions concerning her treatment and condition. Exhibit 11 was a copy of Dr. Myerson's curriculum vitae. Dr. Myerson also attended the formal hearing as a potential witness for Employer.

Claimant objected to Exhibit 10 and Exhibit 11 because Dr. Myerson did not examine Claimant but only reviewed her medical records. Claimant objected to Dr. Myerson testifying at the hearing because Employer had not advised Claimant that Dr. Myerson would be a witness at the hearing.

The ALJ granted Claimant's objections to the documentary evidence and the testimony. The ALJ explained his rulings:

> Just so everybody knows why I think that it is relevant [sic] because it's a doctor's assessment of this lady's condition and how—its etiology, but that doctor never examined Claimant, the Claimant through either fault of her own or no fault of her own did not know that he would be here today. And therefore she is prejudiced and I think that prejudice outweighs its probative value.

HT at 40.

Although the ALJ did not permit Employer to call Dr. Myerson during its case in chief, the ALJ later changed his ruling with respect to Dr. Myerson's testimony and permitted him to testify, albeit limited, as a rebuttal witness.

We first note that although the ALJ announced at the hearing that he would not let Employer introduce Exhibit 10, the ALJ's September 24, 2014 COR inconsistently says "Employer Exhibit (hereinafter, EE) Nos. 1-11, described in the Hearings [sic] Transcript (hereinafter HT), were admitted into evidence." Moreover, despite ruling that it was inadmissible, the ALJ relied on Exhibit 10 in his decision. COR at 7.

The ALJ's stated reason for not admitting the exhibits was that Dr. Myerson did not examine Claimant. While the fact that a doctor did not examine a claimant is a valid reason for not giving that doctor's opinion full evidentiary weight, it is not a legitimate reason for excluding that doctor's medical report. Therefore, on remand the ALJ shall consider the excluded exhibits.

With respect to limiting Dr. Myerson's testimony, since Dr. Myerson's written opinion and curriculum vitae must be considered by the ALJ, we will not disturb the ALJ's ruling with respect to Dr. Myerson's testimony.

In addition to making all findings of fact and conclusions of law that the ALJ deems necessary on remand, in the furtherance of judicial economy, we should point out several other matters in the COR that the ALJ needs to explain, clarify, or correct in the event he relies on them in the next COR.

The ALJ should explain his apparent reliance on the procedural history of the Claimant's previous claim for another accident that the ALJ denied (AHD No. PBL 10-065), and he should explain his decision not to identify the early procedural history of this claim and then, without any clarification, referring to a "second Decision and Remand Order" in the present claim. There was no first Decision and Remand Order in this case and the ALJ's recitation makes it seem that the ALJ's September 24, 2014 COR resulted from the CRB's decision in Claimant's other case.

In the COR at page 7-8, the ALJ, without referring to any exhibit, stated that Dr. Jensvold and Dr. Wetstone unequivocally opined that Employers' "failure to provide Claimant adequate accommodations lead [sic] to her uncontrollable hypertension, and her other listed disabling conditions, included [sic] headaches, and stroke."

The ALJ's failure to identify the exhibit or exhibits is more than an insignificant oversight. As Employer points out, several of Dr. Wetstone's reports (EE 6, CE4) were less definitive in connecting Claimant's problems with the restrictions since that doctor stated the failure to comply with the restrictions "could cause somatic symptoms... and could cause an increase in blood pressure..." On remand, the ALJ should identify in which exhibit or exhibits the unequivocal opinions of these doctors appear.

The ALJ should explain the relevance of including any reference to Claimant's headaches and stroke since neither of those conditions was accepted by Employer.

The ALJ should clarify the apparent inconsistency between his stating that "Prior to the March 18, 2010 episode I find Claimant's hypertension was managed by medication" and his awarding benefits for the aggravation of Claimant's hypertension from the date of accident, October 20, 2008.

The ALJ should identify which medical reports or evidence supports his finding of fact that Claimant's hypertension was controlled before the October 20, 2008 accident at work, since none are identified in the COR.

In light of his finding that the aggravation of Claimant's hypertension resolved "years ago" (COR at 9), the ALJ should identify which medical reports or

> evidence supports his awarding continuing temporary total disability benefits for the aggravation of her hypertension.
>
> The ALJ should explain his awarding continuing temporary total disability benefits from October 20, 2008, since he found that Claimant continued to perform her regular work "sporadically" from October 2008 until March 2010 and received benefits until May 13, 2013.

DRO 2, p. 5.

In response to the CRB's May 21, 2014 DRO 2, on March 21, 2015, the ALJ issued another Compensation Order on Remand (COR 2). In COR 2, the ALJ incorporated many of the findings of fact included in the prior Compensation Orders, and made several new additional, specific findings of fact. Of greatest significance, the ALJ ultimately rejected the medical opinion of Dr. Myerson concerning the duration of the "temporary exacerbation", as well as the testimony of Claimant. The ALJ reviewed the medical records and created two charts outlining by date most of the blood pressure readings contained in those records. The first chart contained blood pressure readings from before the injury, the second contained blood pressure readings from after the injury.

Based upon these readings, the ALJ denied Claimant's claim for reinstatement. Claimant appealed COR 2 to the CRB by filing an Application for Review and Memorandum in support thereof (Claimant's Brief). In it, Claimant argues that the denial of the reinstatement was not supported by substantial evidence, inasmuch as "based on the same medical evidence, the same burdens of proof and the same absence of any disqualifying physician preferences", the ALJ reversed his two prior findings that Employer had failed to meet its burden proof to show that Claimant's condition had changed such that termination of benefits was warranted. Claimant suggests that re-opening the record was the proper procedure to be employed in order to carry out the CRB's mandate, and that the ALJ's finding that Claimant's blood pressure return to baseline on December 16, 2008 and was asymptomatic (or stable) for over a year thereafter is also unsupported by the record and does not flow rationally from the facts as found.

Employer filed an Opposition to the Application for Review and a Memorandum in support thereof (Employer's Brief). In it, Employer argues that the ALJ employed the proper analytic procedure, reviewed the medical records which corroborated Employer's physician's opinions, and it should be affirmed.

ANALYSIS

The scope of review by the CRB is limited to making a determination as to whether the factual findings of the appealed 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. Code § 32-1521.01(d)(1)(A). Consistent with this standard of review, the CRB is constrained to uphold a Compensation Order 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 different conclusion. *Marriott International v. DOES*, 834 A.2d 882, 885 (D.C. 2003).

The ALJ properly began the analysis by describing the process enunciated in *Mahoney v. District of Columbia Public Schools*, CRB No. 14-067, PBL 14-004, ORM/PSWCP No. 76000500012005-004 (November 12, 2014)(en banc), which is the process for determining how terminations or reduction of benefits being paid to an injured employee are to be judged. We will repeat it here for clarity:

> The employer first has the burden of producing current and probative evidence that claimant's condition has sufficiently changed to warrant a modification or termination of benefits. If the employer fails to present this evidence then the claim fails and the injured worker's benefits continue unmodified or terminated.
>
> If the employer meets its initial burden, then the claimant has the burden of producing reliable and relevant evidence that conditions have not changed to warrant a modification or termination of benefits. If this burden is met, then the evidence is weighed to determine whether employer met its burden of proving by a preponderance of the evidence that claimant's benefits should be modified or terminated.

Mahoney, supra, p. 7.

The ALJ then determined, properly, that the earlier finding in the prior Compensation Order that Employer had adduced sufficient evidence to satisfy the initial burden had not been appealed in the context of the case, it remains undisturbed. Compensation Order on Remand, pp. 9 – 10.

The ALJ then proceeded to consider whether Claimant had adduced "reliable and relevant evidence that conditions have not changed to warrant as modification". The ALJ cited Claimant's testimony that she has never returned to full duty, and that was at least in part because she remained under medical restrictions, that her blood pressure continued to fluctuate to dangerous levels, and remains unstable as of the time of the formal hearing. This testimony was found by the ALJ to be corroborated by the records of her physician and a series of medical records demonstrating the level of fluctuations. This evidence was found to satisfy the second step delineated in *Mahoney*, and we see no reason to disturb that finding.

Thus, the ALJ properly proceeded to the third step, reviewing all the evidence presented in order to decide whether Employer has demonstrated, by a preponderance of the evidence, when Claimant's overall medical condition had returned to the pre-injury "baseline" condition, and was no longer disabling Claimant. In other words, it was Employer's burden to establish either that Claimant could return to work, and or to establish when her disabling resolved or abated leaving Claimant at her "baseline" pre-existing condition.

It is in the weighing of the evidence that the ALJ committed an error fatal to the validity of the Compensation Order on Remand before us.

Employer's evidence consisted primarily on the medical opinion of Dr. Myerson, the AME physician, to the effect that the fumes to which Claimant alleges she was exposed would only have a "transient" effect on a person such as Claimant, lasting only "hours". Compensation Order on Remand, p. 10, citing HT 107–108. The ALJ stated further that Claimant's current inability to work is due to "significant mental issues", and that any sequalae to exposure to fumes would have been temporary. *Id.*

However, although this testimony underpinned the first step analysis and finding of Employer's having made a sufficient "initial showing", contrary to Employer's argument in this appeal, the ALJ at *this*, the third stage, ultimately rejected Dr. Myerson's testimony as being insufficiently reliable to support Employer's burden as to when the exacerbation ceased. This rejection was premised upon the ALJ's consideration of the fact that Dr. Myerson had never examined Claimant personally, and perhaps more importantly, the doctor acknowledged he did not have the reports of her treatment immediately during her October 2008 hospitalization and thus:

> Dr. Myerson did not have the benefit of Claimant's complete medical history and was unsure of the type of fumes to which Claimant was exposed and the number of hours of exposure. *I accorded little weight to Dr. Myerson's conclusion that Claimant's condition would have resolved within hours.* His presumption about the nature of the exposure and extent of Claimant's initial work injury his [sic] based on speculation rather than facts, therefore, *his conclusion about lack of causal relation to her current condition is far from persuasive.*

Compensation Order on Remand, p. 11(emphasis added).

The reasons for rejecting Dr. Myerson's opinion as to when the aggravation ceased are supported by the record and are sufficient to support that rejection.

The ALJ then proceeded to analyze Claimant's evidence. He started by finding that Claimant was not a credible witness, due in part to her testimony being "internally and externally inconsistent", citing conflicts in her testimony at various points in the hearing concerning when she was first diagnosed with hypertension, and discrepancies between her testimony concerning the onset of "headaches and other symptoms", and the contents emergency personnel reports. Based upon these considerations, the ALJ determined that "I cannot credit Claimant as being a reliable witness and therefore I did not rely on Claimant's testimony in reaching this decision about what is Claimant's baseline and did Claimant return to baseline." Compensation Order on Remand, p. 12.

Having rejected both the opinion of Dr. Myerson and the testimony of Claimant, the ALJ turned to the contents of the medical records before him to reach his conclusion. After discussing the contents of Kaiser Permanente treatment notes and reports, the ALJ determined that the record evidence "indicates that Claimant has been hospitalized three times since 2008 for low and high blood pressure" and that in two such notes, a Dr. Dukta "referred to Claimant's condition as uncontrolled hypertension. The weight of the evidence indicates Claimant's blood pressure has been up and down since her original work injury. (CE 4)". Compensation Order on Remand, pp. 12 - 13.

The ALJ continued "Therefore it is determined that Claimant has produced reliable and relevant evidence that she continues to suffer with elevated blood pressure that fluctuates up and down causing her headaches and episodes of passing out which symptoms were once controlled by medication and therapy." Compensation Order on Remand, p. 13. The ALJ then repeats that he has rejected Claimant's testimony on credibility grounds, stressing that "the only evidence left that supports Claimant's position are the reports from her treating physician at Kaiser Permanente. (CE 1 & 4)." *Id.*

It is here that the problem in the Compensation Order on Remand becomes acute: the ALJ has essentially decided to independently *medically* evaluate the contents of those records to decide that issue.[1] The ALJ then proceeds to create two charts reflecting Claimant's blood pressure readings[2], first, six readings taken on five pre-injury occasions and second, ten readings taken on nine dates post injury.

After comparing the charts, the ALJ found and concluded:

> Prior to the October 20, 2008 [sic] Claimant's blood pressure ranged from 116-160/74-112. After October 20, 2008, Claimant's blood pressure ranged from 104-158/82-104. Based on these records, it appears Claimant's blood pressure return [sic] to baseline around December 16, 2008, and Claimant did not have blood pressure symptoms for about a year. Prior to the March 18, 2010 episode, which resulted in a stroke, I find Claimant's hypertension was managed by medication.
>
> **CONCLUSIONS OF LAW**
>
> Based upon a review of the record evidence as a whole, I find and conclude Employer has proven that Claimant had a change of condition that supports a termination of her benefits.

COR 2, p. 14.

December 16, 2008 is shown, in the second chart, to reflect a blood pressure reading of 104/92.[3]

We must reject the manner in which the ALJ reached the conclusion and decision to terminate benefits when he did. With all due respect to the ALJ, he has ventured from the proper role of a finder of facts, and come to an independent medical conclusion, which is beyond the competence of this Agency. Deciding whether to agree with one doctor or another is hard enough, but it is a

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[1] Contrary to Employer's assertion in its Brief that "the ALJ deemed Employer's physicians more credible" (Employer's Brief, p. 11), the ALJ ultimately rejected Dr. Myerson's conclusion as to when the aggravation abated.

[2] As Claimant correctly points out in her Brief, the charts are missing at least one reading which would have, under the ALJ's logic, been in conflict with the ultimate conclusion as to the date the condition returned to "baseline".

[3] We surmise that the ALJ chose that date because it is the first post-injury date that the record reflects a blood pressure reading below that of October 20, 2008, the date of injury, which reading was 175/33, as shown in EE 2.

task within the ambit of an ALJ's reasonable discretion. But reaching a medical conclusion and opinion based solely upon an independent review of a series of dual variant, fluctuating blood pressure readings by the ALJ cannot be said to be a legal conclusion based upon substantial evidence. Accordingly, we have no choice but to vacate the above noted conclusion of law regarding when the aggravation abated.

As the case now stands, given (1) the un-appealed prior finding that Employer had made its initial showing, (2) that the finding that Claimant met her burden to overcome that showing is supported by substantial evidence and thus is affirmed, and (3) the ALJ's ultimate rejection of Dr. Myerson's opinion as to when the condition abated is also supported by substantial evidence and is affirmed, there is no other evidence sufficient to establish how long Claimant's work related aggravation continued.

As we have said, it is beyond the competence of this Agency to reach what is at root a medical determination based solely upon an ALJ's reading of the medical record. While such a reading and analysis of the medical records is not only useful, but is often essential to an ALJ's consideration of the merits of medical opinions contained in the record, and particularly in the absence of any presumptions under the public sector Act, the absence of an opinion upon which a judgment can be made requires a ruling adverse to the party bearing the burden of proof, which in this case is Employer.

However, we must also recognize a fourth factual finding that remains the law of the case, and that is the un-appealed finding the Claimant's work related aggravation of her pre-exiting condition "resolved years ago."

At this point, the record contains no additional information which the ALJ credits that sheds adequate light on the question of when the aggravation "resolved". The most straightforward and rational resolution that we can undertake is to assign the day prior to the date of the hearing which led to the un-appealed finding of the aggravation having "resolved" as being the absolute latest date which is consistent with the existing record which Claimant could have been to some extent still been suffering from the resolved aggravation. Since the formal hearing occurred September 3, 2013, that date is September 2, 2013. May 13, 2013 is the date the benefits were terminated, and September 2, 2013 is the date prior to the finding that remains the law of this case that Claimant's condition resolved prior to the formal hearing.

Because the District of Columbia Court of Appeals has held that we are without power to make substantive amendments to compensation orders and awards we must remand this matter to the ALJ for entry of an award consistent with this Decision and Remand Order. *Washington Metropolitan Area Transit Authority v. DOES* (Juni Browne, *Intervenor*), 926 A.2d 140 (D.C. 2007).

Accordingly, we vacate the denial of reinstatement of benefits and remand with instructions to issue an order re-instating Claimant's benefits from the date of termination until September 2, 2013.

CONCLUSION AND ORDER

The finding that Employer met its initial burden under *Mahoney*, and that Claimant successfully rebutted Employer's initial showing under *Mahoney*, are supported by substantial evidence and are affirmed. The Conclusion that Employer has met its burden of demonstrating a change of condition warranting termination of benefits is the law of the case as per the prior Decision of the CRB. The date that the condition resolved not being subject to evidence that the finder of fact accepts, the matter is remanded for entry of an order reinstating benefits from the date of termination to September 2, 2013.

So Ordered.