

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
Department of Employment Services

VINCENT C. GRAY  
MAYOR



LISA M. MALLORY  
DIRECTOR

CRB No. 12-112

ARION P. JONES,  
Claimant-Petitioner,

v.

GEORGE WASHINGTON UNIVERSITY and FRANK GATES SERVICE COMPANY,  
Employer/Insurer-Respondent

DEPT. OF EMPLOYMENT  
SERVICES  
COMPENSATION REVIEW  
BOARD  
2012 OCT 23 PM 1:45

Appeal from a Compensation Order on Remand by  
Administrative Law Judge Belva D. Newsome  
AHD No. 07-144B, OWC No. 633281

Michael J. Kitzman, Esquire, for the Claimant/Petitioner  
Todd S. Sapiro, Esquire, for the Employer-Insurer/Respondent

Before: JEFFREY P. RUSSELL,<sup>1</sup> HENRY W. MCCOY, and MELISSA LIN JONES, *Administrative Appeals Judges*.

JEFFREY P. RUSSELL, *Administrative Appeals Judge*, for the Compensation Review Board; HENRY W. MCCOY *Administrative Appeals Judge, dissenting*.

## DECISION AND REMAND ORDER

### JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board (CRB) pursuant to D.C. Code §§ 32-1521.01 and 32-1522 (2004), 7 DCMR § 230, *et seq.*, and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005).

### BACKGROUND FACTS OF RECORD AND PROCEDURAL HISTORY

On October 15, 2006, Claimant injured himself when he slipped and fell at work. Claimant filed a claim for temporary total disability (TTD) benefits from the date of the accident and continuing, and causally related medical expenses. In a December 10, 2007 Compensation Order (CO), Claimant

<sup>1</sup> Judge Russell has been appointed by the Director of the DOES as an interim CRB member pursuant to DOES Administrative Policy Issuance No. 12-01 (June 20, 2012).

was awarded TTD from October 15, 2006 through November 29, 2006 and causally related medical expenses already incurred.<sup>2</sup> On December 13, 2007, the presiding Administrative Law Judge (ALJ) issued an Amended Compensation Order (ACO) where the award of causally related medical expenses was clarified and restricted to “already incurred through November 29, 2006.”<sup>3</sup> Claimant timely appealed, referencing and attaching both the initial CO and the ACO, citing as errors the denial of TTD after November 29, 2006 and failure to address the requested authorization for medical treatment.

In a March 13, 2008 Decision and Remand Order (DRO), the CRB reversed and remanded the December 10, 2007 CO after determining the ALJ had not considered the complete evidentiary record with regard to the claim for TTD and medical care. It is worthy to note that the DRO makes no reference to the Amended CO issued on December 13, 2007 and specifically stated “[T]he ALJ neither granted nor denied the claim for causally related medical care [after November 29, 2006].”<sup>4</sup>

On March 31, 2008, the ALJ issued a Compensation Order on Remand (COR) where he again concluded that Claimant had not proven he continued to be totally disabled from returning to work beyond November 29, 2006. Accordingly, Claimant was only awarded TTD benefits from the date of injury through November 29, 2006 and causally related medical benefits incurred also through that date.<sup>5</sup> Claimant again timely appealed arguing again that the ALJ erred in denying TTD benefits after November 29, 2006 and for failing to defer to the opinion of the treating physician.

In an August 8, 2008 Decision and Order (DO), the CRB affirmed the March 31, 2008 COR. The CRB determined that the ALJ properly evaluated the medical evidence as to Claimant’s disability and that the reasons for rejecting the treating physicians’ opinions were supported by substantial evidence in the record.<sup>6</sup> There is no record of Claimant pursuing an appeal of this DO.

On January 12, 2010, Employer filed an Application for Formal Hearing (AFH) raising the issues of medical causal relationship, reasonableness and necessity of medical treatment, and asserting that further claims by Claimant were barred by *res judicata*.<sup>7</sup> After reviewing the argument by Claimant requesting payment for ongoing medical benefits and Employer’s assertion the ACO released if from any obligation to pay medical expenses incurred after November 29, 2006, the ALJ determined that she was without authority to alter the decision of the December 13, 2007 ACO. Accordingly, the AFH was dismissed without prejudice on May 13, 2010.

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<sup>2</sup> *Jones v. George Washington University*, AHD No. 07-144, OWC No. 633281 (December 10, 2007) (CO).

<sup>3</sup> *Jones v. George Washington University*, AHD No. 07-144, OWC No. 633281 (December 13, 2007) (ACO).

<sup>4</sup> *Jones v. George Washington University*, CRB No. 08-072, AHD No. 07-144, OWC No. 633281 (March 13, 2008) (DRO).

<sup>5</sup> *Jones v. George Washington University*, AHD No. 07-144, OWC No. 633281 (March 31, 2008) (COR).

<sup>6</sup> *Jones v. George Washington University*, CRB No. 08-140, AHD No. 07-144, OWC No. 633281 (August 8, 2008) (DO).

<sup>7</sup> In a brief procedural history, the ALJ misstated in the May 13, 2010 Order that the December 13, 2007 ACO was not appealed by either party.

On September 28, 2011, Claimant filed an AFH and a formal hearing was convened on February 1, 2012 where the contested issues were medical causal relationship and *res judicata* and the claim for relief was causally related medical expenses.<sup>8</sup> Claimant asserted that he was entitled to the requested benefits because *res judicata* did not apply in this case because his medical expenses were incurred after the March 31, 2008 COR and the May 13, 2010 Order did not finally resolved this issue. On June 25, 2012, a Compensation Order on Remand<sup>9</sup> was issued denying Claimant's claim for medical expenses after November 29, 2006 as they were precluded by the March 31, 2008 COR. Claimant filed a timely appeal with Employer filing in opposition.

Claimant asserts on appeal that his claim for relief is not precluded by *res judicata*. In opposition, Employer argues that Claimant's claim for medical expenses after November 29, 2006 was barred by the March 31, 2008 COR under the doctrine of collateral estoppel.

#### STANDARD OF REVIEW

The scope of review by the CRB, as established by the Act and as contained in the governing regulations is 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.<sup>10</sup> *See* D.C. Workers' Compensation Act of 1979, as amended, D.C. Code. §§ 32-1501 to 32-1545 (2005), at § 32-1521.01(d)(2)(A). Consistent with this standard of review, the CRB and this Review Panel are constrained to uphold 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 the reviewing authority might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

Claimant argues on appeal that the Compensation Order [on Remand] issued on June 25, 2012 erred as a matter of law in concluding that his claim for payment of medical expenses was barred by either *res judicata* or collateral estoppel. It is Claimant's position that as the medical expenses for which he is seeking payment were incurred after the May 1, 2007 evidentiary hearing, they are not precluded by either doctrine. In addition, Claimant asserts there have been no prior findings of fact or final determination that his present ongoing complaints are medically causally related to his work injury.

It is generally accepted that *res judicata* operates to preclude relitigation of the same claim by the same parties when a final judgment on the merits has been reached previously. Similarly, collateral

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<sup>8</sup> The ALJ ordered the parties to submit briefs on the issues of *res judicata*, modification, and the type of order that can be appealed to the CRB. Hearing Transcript at p. 30.

<sup>9</sup> Although denominated as a "Compensation Order on Remand", the June 25, 2012 Compensation Order was not issued pursuant to a remand from either the CRB or the D.C. Court of Appeals.

<sup>10</sup> "Substantial evidence," as defined by the District of Columbia Court of Appeals, is such evidence as a reasonable person might accept to support a particular conclusion. *Marriott International v. D.C. Dept. of Employment Services*, 834 A.2d 882 (D.C. 2003).

estoppel operates to preclude relitigation of the same set of facts or law which were inherent in reaching a prior final judgment.<sup>11</sup> Although judicial in origin, these principles are applicable to administrative hearings.<sup>12</sup> The humanitarian purposes of the Act, however, create exceptions to these principles and provide an opportunity for injured workers to revisit workers' compensation awards.<sup>13</sup> Neither *res judicata* nor collateral estoppel applies to a request for a modification and, neither applies to a request for additional benefits when a claimant's original injury worsens manifesting new symptoms which cause the claimant to stop working.<sup>14</sup>

The ALJ was correct when she identifies the central issue: "The real issue is whether the March 30, 2008 Compensation Order on Remand determined whether Jones' medical treatment after November 29, 2006 was medically causally related to his October 15, 2006 work-related injury." However, she was in error when she determined that it did, writing "The only findings of fact in the March 31, 2008 Compensation Order on Remand are that Jones' knee, back and neck pains were not causally related to his work injury of October 15, 2006."

While the March 31, 2008 COR contains several references to the record suggesting a lack of a medical causal relationship (mostly based upon the lack of contemporaneous reports of any symptoms to those body parts) no such *finding* is ever enunciated. The decision to deny the claimed temporary total disability benefits was based upon a lack of specificity regarding the physical requirements of the pre-injury job as compared to any physical restrictions that the alleged injuries were causing.

There has never been a finding in any of the prior compensation orders of a lack of a causal relationship between Mr. Jones' neck and back complaints to the work injury. As our colleague in dissent points out, there have been numerous contrary findings, that is, that there is such a causal relationship. How this fact can then lead to a conclusion that the claims are barred by *res judicata* or collateral estoppel, however, escapes our understanding.

There not having been any prior determination that the injuries complained of are either not medically causally related to the work injury, or that they have resolved without residuals, the denial of the claimed medical care on the basis of *res judicata* is not in accordance with the law. Similarly, since none of the prior orders in this case made or denied any claim for relief for reasons that depended upon the necessary implication that medical causal relationship is lacking or that the injuries sustained had resolved without residuals, the issue of medical causal relationship is not precluded by collateral estoppel.

Accordingly, the denial of the claim for medical care reversed. The matter is remanded for further consideration of the claims. On remand, the ALJ is to identify with specificity what medical care is being sought to what body part, and is to consider the claim in light of the fact that there are as yet

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<sup>11</sup> *Short v. DOES*, 723 A.2d 845 (D.C. 1998).

<sup>12</sup> *WMATA v. DOES*, 770 A.2d 965 (D.C. 2001).

<sup>13</sup> See D.C. Code § 32-1524; *WMATA v. DOES*, 981 A.2d 1216 (D.C. 2009) ("Millhouse").

<sup>14</sup> *Millhouse, supra*.

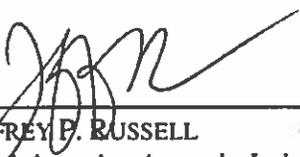
no findings of fact concerning the lack of a medical causal relationship between the conditions for which medical care is being sought and the work injury.

While it is true that the reasons for the manner in which the prior award of medical benefits was phrased remain shrouded in mystery, and we have no explanation why the award was made through the specific date but not thereafter, there were no findings of fact or legal conclusions that would preclude later claims from being brought.

#### CONCLUSION AND ORDER

The Compensation Order [on Remand] of June 25, 2012 erroneously concluded that Claimant's claim for medical expenses after November 29, 2006 is precluded by *res judicata* as there has never been any prior finding that the complained of conditions have resolved or are not causally related to the work injury. The matter is remanded for further consideration of the claims.

FOR THE COMPENSATION REVIEW BOARD:

  
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JEFFREY P. RUSSELL  
*Administrative Appeals Judge*

\_\_\_\_\_  
October 23, 2012  
DATE

Henry W. McCoy, *dissenting*:

The majority in this matter has concluded that the ALJ erred in her conclusion that Claimant's claim for ongoing medical expenses after November 29, 2006 was precluded by *res judicata* and has remanded for further consideration. This conclusion is predicated on their determination that "there has never been any prior finding that the complained of conditions have resolved or are not causally related to the work injury." As I believe the ALJ was correct, I am compelled to dissent.

I agree with the majority that the ALJ correctly framed the issue when she stated: "The real issue is whether the March 30, 2008 Compensation Order on Remand determined whether Jones' medical treatment after November 29, 2006 was medically causally related to his October 15, 2006 work-related injury." However, I disagree with the majority's statement that "[There has never been a finding in any of the prior compensation orders on the issue of the causal relationship of Mr. Jones' neck and back complaints to the work injury."

The initial compensation order in this matter was issued on December 10, 2007. The first issue listed for resolution was "whether claimant's neck, back and right knee symptoms are medically causally related to the October 15, 2006 injury." After according the claimant the presumption and

determining that it was rebutted, the ALJ weighed the medical evidence with the presumption and applied the treating physician preference. The ALJ proceeded to the determination:

...that [claimant's] right wrist and right knee conditions were causally related to the October 15, 2006 work injury. (Citations omitted.) Accordingly, claimant's evidence does establish that his right knee symptoms are medically causally related to the October 15, 2006 work injury.<sup>15</sup>

In his conclusion however, the ALJ stated: "I find and conclude claimant has established with substantial evidence that his neck and back symptoms are causally related to the October 15, 2006 work injury."<sup>16</sup> And, the ALJ proceeded to grant "causally related medical expenses, already incurred."<sup>17</sup>

On December 13, 2007, the ALJ issued an Amended Compensation Order. With regard to medical causal relationship, the ALJ revised his determination to state:

"...that [claimant's] right wrist, right knee, as well as neck and back symptoms were causally related to the October 15, 2006 work injury. (Citations omitted.) Accordingly, claimant's evidence does establish that the symptoms, at issue, are medically causally related to the October 15, 2006 work injury."<sup>18</sup>

In his conclusion of law, while the ALJ now stated: "...I find and conclude claimant's neck, back and right knee symptoms are causally related to the October 15, 2006 work injury", he only granted "causally related medical expenses, already incurred through November 29, 2006."<sup>19</sup>

Claimant timely appealed, referencing and attaching both the initial Compensation Order (CO) and the Amended Compensation Order (ACO). The issues he raised were the denial of disability benefits after November 29, 2006 and the failure to address the requested authorization for medical treatment.<sup>20</sup>

In a March 13, 2008 Decision and Remand Order (DRO), the CRB reversed and remanded the December 10, 2007 CO after determining the ALJ had not considered the complete evidentiary record with regard to the claim for disability benefits and medical care.<sup>21</sup> As already noted by the

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<sup>15</sup> *Jones v. George Washington University*, AHD No. 07-144, OWC No. 633281, p. 5. (December 10, 2007).

<sup>16</sup> *Id.*, at 8.

<sup>17</sup> *Id.*, at 9.

<sup>18</sup> *Jones v. George Washington University*, AHD No. 07-144, OWC No. 633281, p. 5 (December 13, 2007)(ACO).

<sup>19</sup> *Id.*, at p. 8.

<sup>20</sup> In both compensation orders, the ALJ listed this as a claim for causally related medical expenses.

<sup>21</sup> *Jones v. George Washington University*, CRB No. 08-072, AHD No. 07-144, OWC No. 633281 (March 13, 2008).

majority, this DRO made no reference to the ACO issued on December 13, 2007, but specifically stated “[T]he ALJ neither granted nor denied the claim for causally related medical care [after November 29, 2006].”<sup>22</sup> It is also worthy to note that the CRB did not *sua sponte* address the limitation on causally related medical expenses.

In a March 31, 2008 Compensation Order on Remand (COR), the ALJ provided a more detailed assessment of the medical evidence such that this COR was affirmed by the CRB on August 8, 2008. The COR awarded disability from the date of injury through November 29, 2006 and causally related medical benefits incurred also through that date.<sup>23</sup> When Claimant appealed, he did not raise the issue of the restriction on his medical benefits and after the CRB affirmed the COR, no further appeal was taken.

In filing a September 28, 2011 application for formal hearing seeking causally related medical benefits, claimant asserted that *res judicata* did not apply because his medical expenses were incurred after the March 31, 2008 COR. In a June 25, 2012 Compensation Order [on Remand], the ALJ denied the claim as being precluded by *res judicata*. Contrary to the majority, I agree and would affirm.

Contrary to the position taken by the majority, the issue of medical causal relationship has been litigated and decided, albeit one could argue, erroneously. Regardless, claimant had the opportunity to appeal the findings and the decision restricting his causally related medical expenses, but failed to do so.

First and most importantly, I take the position that the ALJ did make findings on the issue of the causal relationship between claimant’s neck and back complaints and the work injury. In the December 10, 2007 CO, the ALJ made the causal connection between claimant neck and back symptoms to the work injury. Then, in the December 13, 2007 ACO, the ALJ revised his findings and concluded that claimant’s neck, back, and right knee symptoms were causally related to the work injury. However, in awarding benefits, the ALJ limited causally related medical expenses to those incurred up to November 29, 2006. Through the course of his many appeals, claimant’s has failed to raise as error the specific issue of limiting his causally related medical expenses to a date certain, without first finding that his symptoms had resolved.

As to the issue of causally related medical expenses, it has been litigated and decided. While I read the CO and the ACO as making findings on the causal relationship between claimant’s complained of symptoms and the work injury, the ALJ has provided no reasoned explanation for limiting the medical expenses and there are no findings that those symptoms have resolved. However, when the ALJ made this ostensibly erroneous decision on December 13, 2007, and repeated this limitation in the March 31, 2008 COR, claimant did not raise the issue as error on appeal.

The majority asserts that “there not having been any prior determination that the injuries complained of are either not medically causally related to the work injury, or that they have resolved without residuals, the denial of the claimed medical care on the basis of *res judicata* is not in accordance

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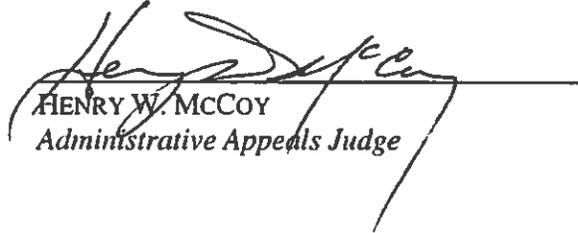
<sup>22</sup> *Id.*, p. 2.

<sup>23</sup> *Jones v. George Washington University*, AHD No. 07-144, OWC No. 633281 (March 31, 2008) (COR).

with the law." I respectfully take issue with this assertion. The determinative factor for the application of *res judicata* is whether the issue, in this case medical causal relationship, has been litigated and a final judgment on the merits reached. Such is the case here and reformulating the issue should not allow the claimant another opportunity to re-litigate an issue he has allowed to knowingly expire for failure to timely appeal.

As demonstrated above, there have been prior determinations that the injuries and resulting symptoms complained of are causally related to the work injury. What has not been determined is whether or not these symptoms have resolved without residuals. Despite this omission, the ALJ restricted claimant's medical benefits to a date certain. Claimant appealed the ALJ's decisions continuing this limitation, but did not raise this as error. Claimant had the means and opportunity to raise this issue in those appeals, but failed to do. I take the position that the issue of medical causal relationship is now precluded by collateral estoppel.

It has previously been found and decided that claimant's complaints of neck, back, and knee symptoms are causally related to the work injury with an award limiting causally related medical expenses to November 29, 2006. Although this limiting award was made without a finding that these symptoms had resolved, claimant failed to timely appeal. Thus the issue of medical causal relationship has been litigated and decided on the merits. As claimant failed to challenge this decision timely on appeal, he is now estopped from raising that same issue again.



HENRY W. MCCOY  
Administrative Appeals Judge