

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

COMPENSATION REVIEW BOARD

CRB No. 15-165

CARMEN M. POWELL,
Claimant-Respondent,

v.

D.C. OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION,¹
Employer-Petitioner.

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2016 MAR 21 PM 12 54

Appeal from a September 9, 2015 Compensation Order
by Administrative Law Judge Gwenlynn D'Souza
AHD No. PBL 09-047B, DCP No. 0468-WC-13-0501-084

(Decided March 21, 2016)

David M. Snyder for Claimant
Rahsaan J. Dickerson and Andrea G. Comentale for Employer

Before LINDA F. JORY, HEATHER C. LESLIE, *Administrative Appeals Judges* and LAWRENCE D. TARR, *Chief Administrative Appeals Judge*.

LINDA F. JORY for the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

Claimant worked for employer as a school bus attendant. On February 16, 2006, Claimant was assaulted by a student causing Claimant to land on her left shoulder. On June 6, 2006, the Office of Risk Management/Public Sector Workers' Compensation Program (PSWCP) issued a Notice of Determination Regarding Original Claim for Compensation (NOD) accepting Claimant's claim for the injury to his lower back and neck.

¹Employer's Application for Review of Compensation Order lists the District of Columbia Public Schools as the Employer, however, the Notice of Determination Terminating Workers' Compensation Benefits and the Compensation Order identifies the D.C. government agency as the Office of the State Superintendent of Education (OSSE).

As arranged by Employer, Claimant was examined by Dr. Louis Levitt on May 23, 2006. Dr. Levitt reported that Claimant's only claim of injury was to the left shoulder which according to Dr. Levitt corresponded "precisely to the mechanism of trauma reported by the patient".

Claimant subsequently came under the care of Dr. Easton Manderson, an orthopedic surgeon, on August 16, 2006. On November 21, 2006, Dr. Levitt was asked to provide an opinion on Claimant's post-operative course of management as it pertained to the rotator cuff surgery recommended by Dr. Manderson. Dr. Levitt opined that the need for surgery was causally related to the original injury. Dr. Manderson performed decompression surgery on the left shoulder on December 27, 2006. On September 11, 2007, Dr. John P. Byrne, an orthopedist noted Claimant's history of persistent left shoulder chronic pain, discomfort, weakness, and chronic left hip discomfort. Dr. Byrne diagnosed Claimant with chronic trochanteric bursitis of the left hip and left shoulder. On November 7, 2007, Dr. Byrne diagnosed an impingement of the left shoulder, partial tear of the labrum partial tear of the rotator cuff and a missing biceps tendon.

Claimant was involved in a non-work-related automobile accident in April 2008. Claimant complained of symptoms in her shoulder, hand, upper back, and lower back. Claimant returned to light duty work for employer from July 24, 2008 to approximately February 20, 2009. Dr. Byrnes provided Claimant with physical restrictions of no lifting over 10 pounds, no pushing and pulling greater than 20 pounds and no overhead lifting. Claimant was restricted from all work from February 20, 2009 to April 3, 2009 because of left hip and left shoulder pain. Claimant completed physical therapy and a work hardening program in October 2009. Claimant was restricted from lifting more than 10 pounds and overhead lifting on October 21, 2009.

Claimant returned to a light duty clerical position on or around May 18, 2010. On April 5, 2011, Dr. Byrne medically restricted Claimant from occasionally pushing, pulling, or carrying more than 10 pounds.

Claimant saw Dr. Reza Ghorbani on January 31, 2012, who noted another physician was prescribing Oxycodone and restricted Claimant from working from April 4, 2012 until an unspecified time. Dr. Ghorbani noted severe left cervical radiculopathy and that Claimant's left upper extremity had numbness and was cold to touch.

As arranged by Employer, Claimant was examined by Dr. Robert Gordon on May 15, 2012. Dr. Gordon reported that Claimant was recovering extremely well from her second surgical procedure of her shoulder until, as noted by Dr. Byrne, she was involved in a motor vehicle accident that produced symptoms in her hand, upper and lower back and shoulder. Dr. Gordon opined however that Claimant had no restrictions on her physical capacity unless her job requires heavy overhead use of her left shoulder. Claimant returned to Dr. Gordon on February 12, 2013. Dr. Gordon opined that there was nothing to indicate that any treatment Claimant was receiving was in any way related to what occurred on February 16, 2006.

As arranged by Employer, Claimant was examined by Dr. David Buchalter on July 31, 2014. Dr. Buchalter opined on September 11, 2014, that Claimant was capable of working full duty in her pre-injury capacity of a bus attendant and required no further medical treatment.

On March 27, 2015, PSWCP issued a NOD terminating Claimant's compensation and medical benefits, based on Dr. Buchalter's opinion.

The parties proceeded to a formal hearing on July 16, 2015. In a Compensation Order (CO) dated June 12, 2015, an administrative law judge (ALJ) determined Claimant had provided sufficient evidence of jurisdiction over the claim for the left shoulder, left arm, left hand. The ALJ further concluded Employer had not proven by a preponderance of the evidence that it properly terminated disability benefits for the injury to the shoulder and any residuals to such injuries. The ALJ ordered that Claimant's temporary total disability benefits and medical benefits be reinstated from March 27, 2015 to the present and continuing for the injury to the left shoulder and any causally related injuries. The ALJ also ordered that Employer conduct a utilization review of Dr. Ghorbani's treatment plan pursuant to D.C. Code § 1-623.23(a-2)(2). Claimant's claim for permanent partial disability benefits (PPD) was denied as premature.

Employer appeals the CO, asserting it is neither supported by substantial evidence nor in accordance with the law. Employer requests the Compensation Review Board (CRB) vacate the Compensation Order.

ISSUES ON APPEAL

1. Whether AHD has jurisdiction to decide the issue of whether Claimant's left shoulder problems are causally related to her February 16, 2006 fall.
2. Whether the ALJ improperly found that Claimant met her burden in producing reliable and relevant evidence that her condition has not changed.

ANALYSIS²

Whether AHD has jurisdiction to decide the issue of whether Claimant's left shoulder problems are causally related to her February 16, 2006 fall.

² The scope of review by the Compensation Review Board (CRB) and this Review Panel (hereafter, the Panel) as established by the District of Columbia Comprehensive Merit Personnel Act of 1978, as amended D. C. Code § 1-623.01(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. D. C. Code § 1-623.28(a). "Substantial evidence", as defined by the District of Columbia Court of Appeals (DCCA), is such evidence as a reasonable person might accept to support a particular conclusion. *Marriott Int'l. v. DOES* 834 A.2d 882 (D.C. 2003) (*Marriott*). Consistent with this scope of review, the CRB and this panel are bound 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.

Employer asserts:

Here, by letter dated June 6, 2006, the Program issued a NOD accepting Claimant's claim for injuries to her neck and lower back only. Neither Claimant's nor Employer's exhibits contain any documents issued subsequent to the June 6, 2006 NOD which evince the Claimant's attempt to challenge the Programs NOD or the Program's denial of Claimant's left shoulder injury, thereby triggering a right of appeal. Indeed, the ALJ's CO acknowledges that neither Claimant nor Employer's exhibits contain a Notice of Determination either accepting or rejecting Claimant's left shoulder injury. CO, p.6. Nonetheless, ALJ [sic] found that she had jurisdiction because of 'exceptional circumstances' which, per the ALJ, excuse Claimant's failure to challenge the NOD and ostensibly vest jurisdiction in the ALJ to address Claimant's left shoulder claim. Notwithstanding the ALJ's finding of excusable neglect on Claimant's behalf, the ALJ's resultant analysis regarding jurisdiction is fatally flawed, as the CRB has routinely held that, as a general principle, 'the **only** matters that DOES has authority to review are matters upon which [the Program] has rendered a decision, and it is that decision that is reviewed by DOES'. *Charnese Graham v. District of Columbia Public Schools*, CRB No. 15-007 (May 19, 2015).

Employer's Brief at 5, 6. (Emphasis in original).

In support of her position that AHD does have jurisdiction with regard to her left shoulder condition Claimant asserts;

[T]he NOD indicated that it applied to all injury claims associated with the claim number. Ms. Powell has always received treatment for and maintained a claim for benefits as the result of an injury to her left shoulder. Furthermore, the Employer has implicitly accepted the claim for the shoulder insofar as it paid for medical care and treatment, including two surgeries. When the Employer sent Ms. Powell for an AME, it was to assess the need for ongoing physical therapy to the left shoulder and also to make a determination as to whether the shoulder continues to disable Ms. Powell.

By issuing a Notice of Determination that terminated all of Ms. Powell's temporary total disability benefits and medical care and treatment for *all* injuries, the Employer indicated that it no longer believed Ms. Powell's left shoulder condition was medically causally related or that it was no longer disabling. In essence, the Employer could have found one of three things in this Notice of Determination: 1) that Ms. Powell's left shoulder condition is related to her injury but no longer disabling; 2) that Ms. Powell's left shoulder condition is related to her injury but was never disabling and the body part that was disabling no longer is; or 3) that Ms. Powell's left shoulder condition is not related to her work injury. In either of these situations, Ms. Powell was entitled to a determination (and the OHA had jurisdiction to determine) as to 1) whether the shoulder is medically

causally related and 2) whether she continues to be disabled as a result of the shoulder, some other condition, or some combination thereof.

Claimant's Brief at 6, 7.

We do not agree with Claimant's assertion that Employer "implicitly accepted the claim for the shoulder insofar as it paid for medical care including two surgeries", nor do we agree with Claimant that "by issuing a Notice of Determination that terminated all of Ms. Powell's temporary total disability benefits and medical care and treatment for *all* injuries, the Employer "opened the door to a determination as to causal relationship of Claimant's left shoulder injuries".

AHD only has jurisdiction over what PSWCP denied, not all that was claimed as injured. While neither party has presented the claim completed by Claimant, we take guidance from an unpublished DCCA memorandum opinion. The DCCA held that AHD could not exercise jurisdiction over a claim for an injury for which a claimant has not filed a specific claim, and for which a specific denial has not been issued by the PSWCP. Despite being an unpublished Memorandum Opinion and Order, it is instructive of the court's views, and we adopt those views on this subject. *D.C. Housing Authority v. DOES*, No. 12-AA-1824, Mem. Op. & J. (D.C. March 31, 2014). *See also Reyes v. D.C. Dept. of Mental Health*, CRB No. 14-158, (May 13, 2015). Thus we must conclude the ALJ lacked jurisdiction to address Claimant's left shoulder claim.

Whether the ALJ improperly found that Claimant met her burden in producing reliable and relevant evidence that her condition has not changed.

The ALJ correctly referred to the CRB's *en banc* decision in *Mahoney v. D.C. Public Schools*, CRB No. 14-067, (November 12, 2014) (*Mahoney*) and found both Employer and Claimant met their burdens of production. Specifically, the ALJ found with the report of Dr. Buchalter, Employer met its burden of producing current and probative evidence that Claimant's condition has sufficiently changed to warrant a modification or termination of benefits". We find no error in the ALJ's determination that Employer met the initial burden of production with this report.

As *Mahoney* sets forth:

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 at 8, 9.

The only "current" medical opinion the ALJ referred to in her discussion of the evidence to determine if Claimant has met her burden is a March 24, 2014 report of a nurse practitioner who found Claimant could not lift more than 25 pounds. CE 2 at 9. A review of CE 2 at 9 reveals that the employer's form completed by the nurse on March 24, 2014 fails to indicate what condition is precluding Claimant from lifting more than 25 pounds or whether the restriction is related to an injury or even a work-related injury. To the contrary, the form indicates Claimant's "medical condition" *does not* prevent her from working and under the "Remarks" section the nurse indicated "Patient may work". The ALJ refers to a January 7, 2015 MRI and states that it reveals "supraspinatus tendinopathy supraspinatus/infraspinatus atrophy, and possible chronic tear in bicipital tendon". The ALJ does not discuss how the MRI results establish an inability of Claimant to perform her bus attendant duties. The remainder of Claimant's evidence discussed by the ALJ includes reports of Dr. Byrnes, the most recent is dated April 5, 2011, which we conclude are not current and therefore not relevant medical reports.

As such, we determine the ALJ's conclusion that Claimant has met her burden of producing reliable and relevant evidence that conditions have not changed to warrant a termination of benefits is not supported by substantial evidence and the ALJ's award of benefits is accordingly reversed.

We do not disturb the ALJ's conclusion that Employer should conduct a utilization review of Dr. Ghorbani's treatment plan, as neither party challenges this determination. Nor do we find error with the ALJ's denial of Claimant's claim for PPD benefits, as premature.

CONCLUSION AND ORDER

The conclusion of the June 12, 2015 Compensation Order that Claimant has met her burden of producing reliable and relevant evidence that conditions have not changed to warrant a termination of benefits is not supported by substantial evidence and is REVERSED. The ALJ's award of temporary total disability benefits is VACATED.

So ordered