DEPT. OF EMPLOYMENT SERVICES
COMPENSATION REVIEW BOARD
2014 JUN 3 PM 12 58

COMPENSATION REVIEW BOARD

CRB 13-160

CHARLES E. SMITH III,
Claimant-Respondent,

v.

DISTRICT OF COLUMBIA DEPARTMENT OF PUBLIC WORKS,
Employer-Petitioner.

Appeal from a November 11, 2013 Compensation Order
By Administrative Law Judge Linda F. Jory
AHD PBL No. 08-035B, DCP No. 761020-0005-2004-0004

Margaret P. Radabaugh for the Petitioner
Charles E. Smith III *pro se*

Before: LAWRENCE D. TARR, *Chief Administrative Appeals Judge*, HENRY W. MCCOY and JEFFREY P. RUSSELL, *Administrative Appeals Judges*.

LAWRENCE D. TARR for the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

Claimant, Charles E. Smith III was employed as a trash collector for Employer, District of Columbia Department of Public Works. He injured his neck and left shoulder in a work-related accident on October 26, 2004. He has not returned to any employment. Employer accepted his claim and Claimant was paid temporary total disability benefits until June 5, 2013.

After his October 24, 2004 accident at work, Claimant was treated by orthopedic surgeon Dr. Nigel Azer. Dr. Azer referred Claimant to neurosurgeon Dr. Ross R. Moquin in August 2005. Dr. Moquin performed an anterior cervical discectomy and fusion on January 31, 2006. After

surgery, Claimant continued to treat with Dr. Nigel Azer and his associates, Dr. Rita Azer and Dr. Hampton Jackson, at the Metropolitan Washington Orthopedic Association.

On May 4, 2007 and August 24, 2007, Claimant was seen for a neurosurgical consultation by Dr. Andrea Douglas at Dr. Azer's request. On May 4, 2007, Dr. Douglas reported Claimant had "chronic cervical radiculopathy and persistent neck and back pain of unclear etiology" and that Claimant "has no further neurosurgical issues that require my intervention." In her report from the August 24, 2007 examination, Dr. Douglas reported Claimant was at maximum medical improvement and "Given his continued complaint of left shoulder pain, I have recommended that he undergo left shoulder x-ray." Dr. Azer's September 12, 2007 report stated x-rays were within normal limits.

The most recent medical report submitted by Claimant is Dr. Jackson's January 16, 2008 in which that doctor stated Claimant presented with persistent neck pain. He diagnosed "Status post cervical disc syndrome, persistent radiculopathy clinically, rule out adjacent disc syndrome. Dr. Jackson wanted to perform several diagnostic tests so that he could "give (Claimant) a better answer or explanation of his persistent symptoms with more diagnostic studies." Dr. Jackson concluded:

> Certainly, in my opinion, work activities will clearly aggravate and/or accelerate the deterioration of his work-related conditions sustained on 05/08/03."[1]

Claimant testified at the formal hearing that at some unspecified date, Dr. Jackson disassociated from Dr. Azer, and that after Dr. Jackson died Employer would not give him a panel for additional medical care.

> Q. [By Administrative Law Judge (ALJ)]: But Employer was still providing medical benefits up until this year?
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> A. [Claimant]: Yes. But when I called the insurance lady and asked her to send me a list to get another doctor to get some treatment, they never sent the list.

HT 16-17.

Claimant further testified that he still suffers from residual difficulties in his neck and left side that were caused by his accident. He said he cannot sit or stand for long periods of time and has difficulty lifting and running. (HT 17).

Dr. David C. Johnson, orthopedic surgeon, evaluated Claimant three times at Employer's request for Additional Medical Evaluations (AMEs) on December 13, 2007, August 4, 2011, and January 17, 2013. Dr. Johnson's consistent opinion has been Claimant does not need any further medical treatment.

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[1] Despite this incorrect date, Dr. Jackson titled his report with the correct accident date; "Spinal Center Consultation Report For Conditions Caused By Work Injury of 08/05/04."

Employer terminated paying Claimant's workers' compensation benefits on June 5, 2013. The notice advising Claimant that his benefits were ending stated the decision was based on Dr. Johnson's January 17, 2013, AME.

Claimant appealed the termination of his temporary total and medical benefits and a formal hearing was held on his claim. The presiding ALJ issued a Compensation Order (CO) in which she held that Claimant was not entitled to a resumption of his disability indemnity benefits but that Employer was liable for medical expenses causally related to Claimant's cervical injury. The ALJ held:

> Claimant has not provided an opinion from any physician that he remains unable to return to his trash collection duties contemporaneous with employer's termination of benefits or Dr. Johnson's most recent AME. Claimant explained at the status conference that he did not have any money to treat with any physician and employer had not authorized payment of medical expenses since 2011. Claimant advised at the Formal Hearing that even if he is unable to continue to receive wage loss benefits he still needs medical care. Claimant explained that after Dr. Hampton Jackson died employer did not forward him a list of other physicians he could treat with. Claimant credibly explained that he is "going to be messed up for the rest of his life" as a result of the work injury and that his is not getting any better. HT at 21.As is well settled in this jurisdiction, a finding that claimant is not entitled to wage loss benefits does not automatically terminate medical benefits for ongoing care. See *Page T. Hair v DC Dept. of Public Works*, CRB No. 08-156, AHD No. PBL No. 97-071A, DCP No. 76110-0003-2002-0002 (July [sic] 2008).
>
> Accordingly, claimant has not established that he remains entitled to ongoing wage loss benefits. Nevertheless, given his credible testimony that he continues to have pain and needs additional medical care for the residuals of his neck injury, claimant has established entitlement to ongoing medical care for his post cervical [sic] surgery problems.

CO at 4.

Only Employer has appealed the ALJ's decision

DISCUSSION AND ANALYSIS

On review, Employer argues that the ALJ's decision should be reversed because it is contrary to the evidence and the law. Employer argues that the ALJ erred by using the wrong standard of proof in the burden-shifting analysis that is utilized for cases in which Employer has accepted a claim but later modifies or terminates benefits. Employer also argues the ALJ erred by basing her decision to award medical care on Claimant's testimony without corroborating medical evidence.

In the CO, the ALJ utilized the three-step burden-shifting analysis. Employer does not dispute that the ALJ properly stated the first step of the burden-shifting analysis -- that the employer

must adduce reliable, probative substantive evidence of a change prior to the date benefits were modified or terminated. Employer also does not challenge the ALJ's decision that Employer had the burden of proof at the third step of the analysis to prove, by a preponderance of the evidence, that the modification or termination was justified.

Employer asserts that the ALJ erroneously stated Claimant's standard of proof at the second step of this burden-shifting analysis when she said Claimant had the burden to produce substantial evidence. The ALJ held:

> Claimant is required to show through and substantial medical evidence that his physical condition has not changed and that benefits should continue.

CO at 3.

It is Employer's position that the ALJ erred by using the substantial evidence standard of proof. Employer argues that the ALJ should have used the higher standard of proof, that of a preponderance of the evidence.

In support of its argument, Employer cites the CRB's 20013 decision, *Workcuff v. D.C. Housing Authority*, CRB No. 12-187(1), AHD No. PBL12 -022, DCP No. 761001000120020006 (August 30, 2013).

In *Workcuff*, the claimant was awarded ongoing temporary total benefits from February 21, 2002 to the present and continuing and payment of causally related medical benefits. On April 6, 2012, Employer issued a Final Decision on Reconsideration that terminated these benefits and Mr. Workcuff requested a formal hearing. In an October 25, 2012, CO, an ALJ reinstated benefits. *Workcuff v. D.C. Housing Authority,* AHD No. PBL12-022, DCP No. 761001000120060006 (October 25, 2012).

In response to Claimant's Motion for Reconsideration, the CRB stated:

> Mr. Workcuff relies on *Toomer* for the proposition that if the government meets its initial burden, the burden on the claimant is "to show through reliable, relevant and substantial medical evidence that his physical condition has not changed and that benefits should continue;" however, *Toomer* has been abrogated by several D.C. Court of Appeals cases that make it clear:
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> > In workers' compensation cases where, as here, there is no presumption of compensability, [footnote omitted in original] the burden of proof "falls on the claimant to show by a preponderance of the evidence that his or her disability was caused by a work-related injury." *McCamey v. District of Columbia Dep't of Employment Servs.*, 947 A.2d 1191, 1199 [footnote omitted] (D.C. 2008) (*en banc*) (citing *Washington Hosp. Ctr. v. District of Columbia Dep't of Employment Servs.*, 744A.2d 992, 998 (D.C. 2000)).

In a footnote to this passage, as additional authority for this holding, the CRB cited *Mahoney v. DOES,* 953 A.2d 739, 745 (D.C. 2008); and again cited *McCamey v. DOES,* 947 A.2d 1191 (D.C. 2008). *Workcuff v. D.C. Housing Authority*, CRB No. 12-187(1), AHD No. PBL12 -022, DCP No. 761001000120020006 (August 30, 2013).

We find the ALJ applied the correct standard of proof at the second step of the burden-shifting analysis required in public sector modification or termination claims when she applied the substantial evidence standard. We find *Workcuff is* inconsistent with long-standing precedent that has not been overruled.

None of the cases relied on by *Workcuff; McCamey v. DOES,* 947 A.2d 1191, 1199 (D.C. 2008) (*en banc*), *D.C. Department of Mental Health v. DOES, 15 A.3d 692, 698 (D.C. 2011)* and *Mahoney v. DOES*, 953 A.2d 739, 745 (D.C. 2008) were cases in which the public sector Employer accepted claim and then modified or terminated benefits. All the cases relied on in *Workcuff* involved challenges to initial decisions by Employer. There does not appear to be any inconsistency in the CRB and DCCA case law decisions that for initial claims, a public sector claimant has the burden to show by a preponderance of the evidence that his or her disability was caused by a work-related injury.

We should also note that the *Workcuff* decision has not been consistently followed by the CRB. Two decisions since *Workcuff* applied the preponderance standard at the second step.[2] Six decisions since *Workcuff* applied the substantial evidence burden of proof.[3]

Employer's other issue on appeal involves the ALJ's decision to award medical expenses causally related to his work-related accident. We find no error.

Pursuant to D.C. Code §§ 1-623.03(a)(1) and 1-623.03(a)(2), an injured government worker is entitled to medical services, appliances, and supplies if that worker sustained an on-the-job injury. Here, the ALJ accepted Claimant's testimony that Employer refused to give him a new list of doctors after Dr. Jackson died and accepted his testimony that he still needed medical attention because of the residual difficulties caused by his work accident.

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[2] *Ashton v. D.C. Department of Motor Vehicles*, CRB 10-193, AHD PBL No. 10-065, DCP No. 3010043875-0001 (July 7, 2011) and *Long v. D.C. Department of Corrections*, CRB No. 13-042, AHD No. PBL 08-087B, DCP No. 300991266863 (November 12, 2013).

[3] *Jones v. University of the District of Columbia*, CRB No. 13-027, AHD PBL06-112B, DCP No. 761039-0001-2003-0003 (October 21, 2013), *Mendez v. District of Columbia Public Schools*, CRB No. 2-046, AHD No. PBL 02-024, DCP No. LTBOEDDU00 (May 30, 2013), *Swanson v. D.C. Department of Corrections*, CRB No. 13-009, AHD No. PBL 11-024, DCP No. 761032000120000-0005 (May 21, 2013), *Gaston-Jenkins v. D.C. Department of Motor Vehicles*, CRB No 13-021, AHD No. PBL 11-049, DCP No. 7610190001200600005 (April 24, 2013), *Njomo v. D.C. Department of Youth Services*, CRB No 12-106, AHD No. PBL 11-002, DCP No 3009114587-0001 (August 9, 2012), and *Jones v. District of Columbia Superior Court*, CRB No. 10-003, AHD No. PBL 09-026, DCP No. 7610460001199-0002 (March 10, 2011).

We acknowledge that the ALJ stated "claimant has established entitlement to ongoing medical care for his post cervical surgery problems." While this statement is ambiguous, in light of the facts that no specific treatment or treatment regimen was at issue, we interpret the ALJ's decision as requiring Employer to fulfill its responsibility under the Code to provide Claimant with medical services -- a list from which to choose a treating physician for evaluation and possible treatment. We find no error that the ALJ relied on Claimant's testimony regarding his symptoms in this regard.

CONCLUSION AND ORDER

The November 11, 2013, Compensation Order is supported by substantial evidence, is in accordance with the law, and is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

Lawrence D Tarr

LAWRENCE D. TARR
Chief Administrative Appeals Judge

June 3, 2014
DATE