

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

Department of Employment Services

MURIEL BOWSER  
MAYOR



DEBORAH CARROLL  
DIRECTOR

COMPENSATION REVIEW BOARD

**CRB No. 15-100**

**CHARNESE GRAHAM,  
Claimant-Respondent,**

v.

**DISTRICT OF COLUMBIA PUBLIC SCHOOLS  
Self-Insured Employer-Petitioner.**

Appeal from a May 22, 2015 Compensation Order on Remand  
by Administrative Law Judge Fred D. Carney, Jr.  
AHD No. PBL 12-028A, DCP No. 30100108934-40001

DEPT. OF EMPLOYMENT  
SERVICES  
COMPENSATION REVIEW  
BOARD  
2015 OCT 26 AM 9 35

(Decided October 26, 2015)

Eugene I. Kane for Claimant  
Andrea G. Comentale for Employer

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

LINDA F. JORY for the Compensation Review Board.

**DECISION AND REMAND ORDER**

FACTS OF RECORD AND PROCEDURAL HISTORY

On January 5, 2010, Ms. Charnese Graham was working as a social service representative for the District of Columbia Public Schools (“Employer”) when a filing cabinet fell on her. The Public Sector Workers’ Compensation Program (“PSWCP”) accepted Ms. Graham’s claim for “[a]cute strain of the dorsal ligament of the right wrist, contusion to the right shoulder, [and] subacromial bursitis.” Employer’s Exhibit 11.

On February 8, 2013, PSWCP terminated Ms. Graham’s workers’ compensation disability benefits. Consequently, the parties proceeded to a formal hearing to determine whether PSWCP properly terminated benefits based on the nature and extent of any remaining disability and whether the Administrative Hearings Division (AHD) can order other legal relief, particularly the authorization for the requested medical treatment or an order regarding the adequacy of treatment. *Graham v. D.C. Public Schools*, DCP No. 30100108934-40001, OHA No. PBL12-028A (December 22, 2014), p. 2. An administrative law judge (“ALJ”) granted Ms. Graham’s

claim for relief on the grounds that Employer had not proven a termination was justified by “a change in medical condition such that Claimant could return to work based on the nature and extent of her disability.” *Id.* at p. 8.

Employer appealed the December 12, 2014 Compensation Order (CO). On May 19, 2015, the Compensation Review Board (CRB) issued a Decision and Remand Order (DRO) which concluded:

AHD does not have jurisdiction to consider the effects of Ms. Graham’s carpal tunnel syndrome when assessing whether Ms. Graham is entitled to restoration of her workers’ compensation disability benefits. Because the ALJ did consider the effects of Ms. Graham’s carpal tunnel syndrome when assessing whether Ms. Graham is entitled to restoration of her workers’ compensation disability benefits, the December 22, 2014 Compensation Order is vacated, and this matter is remanded for the ALJ to reconsider Ms. Graham’s claim for relief based upon her accepted injuries. Until the ALJ’s ruling on Ms. Graham’s claim for relief is restricted to her accepted injuries, any remaining issues are not ripe for consideration on appeal.

DRO at 6.

The CRB also disagreed with Employer’s assertion that the ALJ relied solely upon Claimant’s testimony to determine if Claimant met her burden under the second prong of the test set forth in *Mahoney v. D.C. Public Schools*, CRB No. 14-067, AHD No. PBL 14-004 (November 12, 2014), which is reliable and relevant evidence that conditions have not changed to warrant a modification or termination of benefits. However, the CRB agreed with Employer that the ALJ erred in determining Claimant satisfied her burden of producing reliable and relevant evidence that her *overall medical condition* has not changed significantly to warrant a termination of benefits. Specifically the CRB found:

Unfortunately, the ALJ relied upon Ms. Graham’s “overall medical condition” rather than her medical condition as it relates to her accepted injuries. Specifically, the ALJ considered Ms. Graham’s carpal tunnel syndrome when weighing the evidence to assess whether Employer met its burden of proving by a preponderance of the evidence that claimant’s benefits should be terminated.

A Compensation Order on Remand (COR) was issued by AHD on May 22, 2015, which concluded Employer had not proven by a preponderance of evidence that the termination of Claimant’s benefits was justified as it had not shown a change in medical condition such that Claimant could return to work. Claimant’s claim to reinstate her temporary total disability (TTD) benefits and medical care from February 8, 2013 to the present and continuing was granted.

Employer appeals the COR, asserting that the COR is neither supported by substantial evidence and not in accordance with the law. Employer requests the Compensation Review Board (CRB) vacate the COR.

## ISSUES ON APPEAL

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

### ANALYSIS<sup>1</sup>

#### ***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, AHD No. PBL 14-004, DCP No. 76000500012005-008 (November 12, 2014) (*Mahoney*) and found both Employer and Claimant met their burdens of production.

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.

Employer asserts that the ALJ's finding that Claimant met her burden of producing reliable and relevant evidence that her condition has not changed is neither supported by the record nor the law. Specifically, Employer asserts the ALJ's finding that Claimant met her burden because her medical evidence supported the existence of fluid in her right subclavian/subdeltoid bursa, and that this was related to the original work place injury is an incorrect conclusion. Employer argues:

First while the Claimant submitted an April 23, 2010 MRI that indicated a "tiny amount of fluid" that 'may represent bursitis' this was *not* confirmed through a May 27, 2011 MRI. The Claimant, at hearing, never testified to a May 27, 2011 MRI. No May 27, 2011 MRI was submitted into evidence. The only mention of a May 27, 2011 MRI was by Dr. Shammas, who noted that one occurred. Claim. Exh. (z) at 2. This MRI apparently showed no tears or rotator cuff problems, and while Dr. Shammas noted negative changes from the 2010 MRI, he never

---

<sup>1</sup> The scope of review by the CRB is limited to making a determination as to whether the factual findings of the 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 the applicable law. Section 1-623.28(a) of the District of Columbia Government Merit Personnel Act of 1978, as amended, D.C. Official Code § 1-623.1 *et seq.* ("Act"). Consistent with this standard of review, the CRB must uphold a Compensation Order that is supported by substantial evidence, even if there is substantial evidence in the record to support a contrary conclusion, and even where the CRB might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

specifically discussed bursitis in the shoulder. *Id.* More importantly, Dr. Shammass in his July 26, 2011, his May 21, 2012, and May 1, 2013 reports never mentioned bursitis as the cause of Claimant's pain attributing her pain repeatedly to potential problems with the claimant's elbow, unrelated to any of the accepted injuries. Claim Exh (z). Thus, it was entirely inaccurate for the ALJ to say that the record confirmed that bursitis was confirmed by a May 27, 2011 MRI when there is no objective test in the record, no report by Dr. Shammass, and nothing in Claimant's testimony to support the continued existence of bursitis.

Employer's Brief at 15.

Claimant's response is largely based on Counsel's misplaced reliance on a treating physician's preference that is no longer afforded Claimant's under the PSWCA. *See District of Columbia Public Schools v. DOES*, 95 A.3d 1284 (DC 2014).

As Employer correctly states, the only medical evidence the ALJ referred to in his discussion of the evidence to determine if Claimant has met her burden are an April 26, 2010 MRI and a May 27, MRI. The ALJ's discussion of Claimant's evidence is as follows:

Continuing with the second prong, Claimant satisfied her burden of producing reliable and relevant evidence that her medical condition is related to her accepted injuries has not changed significantly to warrant a termination of benefits. Claimant posited evidence that the results of the April 26, 2010 MRI of the right shoulder provided some objective evidence of fluid in the right subclavian/subdeltoid burse, which was confirmed through the May 27, 2011 MRI.

COR at 5.

With regard to Employer's assertion as it pertains to the second step of the *Mahoney* steps, Claimant merely stated the COR "further finds that the Employee met the second step of the three step burden shifting analysis". Claimant's Brief at 14. Claimant does not challenge Employer's assertion with regard to the MRI.

We agree with Employer that the only reference in the record to a May 27, 2011 MRI is Dr. Shammass July 26, 2011 report wherein Dr. Shammass reported:

She underwent repeat MRI right shoulder done on 5-27-11 with negative results for any changes from the last MRI done a year earlier. The only positive change was hypertrophy of the AC joint \_\_\_\_\_. [sic] Otherwise there was no tear neither (sic) in the tendon or ligaments.

CE Z at 2.

We agree with Employer that the ALJ committed reversible error when he found Claimant met her *Mahoney* second-step burden because his decision is not supported by substantial evidence.

Contrary to the ALJ's finding, the May 27, 2011 MRI did not confirm the result of the April 26, 2010 MRI.

We do not however, reverse the ALJ's decision because there is some evidence in the record which could support Claimant's burden that she remains unable to perform the 50 pound lifting requirements of her pre-injury duties. We are precluded from making our own determination from the record and offer no opinion now as to whether Claimant met her burden. *King v. DOES*, 742 A.2d 460, 465 (D. C. 1999).

The determination that Claimant met her burden with respect to the second prong is not supported by substantial evidence. Therefore, the ALJ erred in reaching the 3<sup>rd</sup> prong of the *Mahoney* steps and in awarding the claim for relief.

#### CONCLUSION AND ORDER

The May 22, 2015 Compensation Order on Remand is not supported by substantial evidence. The award is VACATED and the matter remanded for the ALJ to reconsider whether Claimant has produced sufficient evidence to meet the second step of the three step burden shifting *Mahoney* analysis and if so to analyze the evidence with respect to the third step and to render a new decision.

*So ordered.*