

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

**Department of Employment Services**

MURIEL BOWSER  
MAYOR



DEBORAH A. CARROLL  
ACTING DIRECTOR

**COMPENSATION REVIEW BOARD**

**CRB No. 14-105**

**COLICCHIO PROCTOR,  
Claimant-Petitioner,**

v.

**DISTRICT OF COLUMBIA PUBLIC SCHOOLS,  
Employer-Respondent.**

Appeal from a September 10, 2014 Amended Compensation Order on Remand  
by Administrative Law Judge Linda F. Jory  
AHD No. PBL 06-105A, DCP No. 760002-0001-1999-0023

DEPT. OF EMPLOYMENT  
SERVICES  
COMPENSATION REVIEW  
BOARD  
2015 FEB 23 PM 1 07

Andrea G. Comentale for Employer  
Harold L. Levi for Claimant

Before HEATHER C. LESLIE AND JEFFREY P. RUSSELL, *Administrative Appeals Judges*, LAWRENCE  
D. TARR, *Chief Administrative Appeals Judges*.

HEATHER C. LESLIE, for the Compensation Review Board; JEFFREY P. RUSSELL, *dissenting*.

**DECISION AND REMAND ORDER**

**FACTS OF RECORD AND PROCEDURAL HISTORY**

This case is before the Compensation Review Board (CRB) on the request of the Claimant for review of the Amended Compensation Order on Remand (COR) issued September 10, 2014 by an Administrative Law Judge (ALJ) in the Administrative Hearings Division of the District of Columbia Department of Employment Services (DOES). In that COR, the ALJ denied Claimant's claim for reinstatement of temporary total disability benefits.

Claimant was employed as a truancy officer and teacher's aide when she was injured on September 26, 1994 when she fell and injured her right knee. The claim was accepted and Claimant received disability and medical benefits for a period of time.

Claimant subsequently began having problems in her left knee. Based upon the results of an Additional Medical Evaluation (AME), Claimant's benefits were terminated on April 6, 2012.

That AME opined that Claimant's condition was no longer the result of her September 26, 1994 slip and fall. Employer had accepted the incident and resultant injury as compensable, and paid temporary total disability benefits and provided medical treatment until April 6, 2012, when they were terminated based upon the AME report.

Following a formal hearing, the ALJ issued a Compensation Order on November 21, 2012, reinstating temporary total disability benefits after applying the treating physician preference to the opinion of Dr. John Delahay. That Order was appealed to the CRB which affirmed the Order on June 20, 2013.

Employer appealed the Order to the District of Columbia Court of Appeals (DCCA). On July 31, 2014, the DCCA reversed the CRB's affirmance, finding:

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).

*District of Columbia Public Schools v. DOES*, 95 A.3d 1294 (D.C. 2014).

Upon Remand, the ALJ accorded equal weight to the opinions of Dr. Delahay and the opinion of Dr. Louis Levitt, the physician Employer sent Claimant to for an AME. After according equal weight to both Dr. Levitt and Dr. Delahay's opinions, the ALJ found the opinion of Dr. Levitt more persuasive and denied Claimant's claim for reinstatement of temporary total disability benefits.

Claimant appealed. Claimant argues the ALJ failed to properly apply the burden shifting scheme applicable to public sector cases and that the COR is not based upon the substantial evidence in the record. Employer opposes the appeal.

#### STANDARD OF REVIEW

The scope of review by the CRB, as established by the Act and as contained in the governing regulations, is generally 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. *See* D.C. Comprehensive Merit Personnel Act of 1978, as amended, D.C. Code § 1-623.01, *et seq.*, (the Act), at § 1-623.28 (a), and *Marriott International v. DOES*, 834 A.2d 882 (D.C. 2003). Consistent with this standard of review, the CRB and this review panel are constrained to affirm 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 this panel might have reached a contrary conclusion. *Id.*, at 885.

## DISCUSSION AND ANALYSIS

The first argument Claimant puts forth is that the COR failed to apply the correct burden shifting scheme applicable to public sector cases when Employer has terminated benefits. As we recently stated in *Mahoney v. D.C. Public Schools*, CRB No. 14-067, AHD No. PBL 14-004 (November 12, 2014), the Employer first must produce reliable, probative and current evidence of a change prior to the date benefits were modified or terminated. If the Employer satisfies this burden, then the burden shifts to the Claimant who then must produce substantial evidence that her condition has not changed at this second step in the analysis.

*Mahoney*, an en banc decision, summarized the burden shifting scheme as follows:

In conclusion, we find that once the government-employer has accepted and paid a claim for disability benefits, the employer has the burden of proving by a preponderance of the evidence that conditions have changed such that the claimant no longer is entitled to the benefits.

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* at 8-9.

Claimant does not appeal the conclusion that the Employer produced evidence which would warrant a termination in benefits, thereby satisfying the first step in the above analysis, but takes issue with the ALJ's handling of the second and third step in the burden shifting scheme. Claimant points out several findings of fact that were not discussed in the ALJ's analysis and cannot be reconciled with the ALJ's determination that Claimant failed to meet her burden of production at the second step. Moreover, Claimant argues that by holding the Employer's AME more persuasive, the COR ultimately applied the ultimate burden of persuasion on the Claimant.

A review of the COR shows that after having found the Employer produced evidence to support a reasonable basis for terminating Claimant's benefits, the ALJ noted,

Accordingly, the burden of production remains on claimant to show that claimant's condition has not changed such that a termination of benefits is warranted. If such a showing is made, the burden shifts back to employer. *See*

COR at 5.

The ALJ then goes on to analyze the evidence submitted by Claimant, notably Dr. Delahay's opinion quoting his March 7, 2012 report:

I have been asked by the above named patient to write a follow-up note regarding her disability request. I have reviewed the documentation forwarded to me and would simply like to clarify some of my statements. It is indeed true that this patient has bilateral osteoarthritis of knees. I do agree that her initial injury was to one knee and that is certainly unlikely that the problem in the other knee was caused by that injury. I do believe that the fall such as the one that Mrs. Proctor sustained can [a]ccentuate the underlying disease and indeed accelerate its course. Therefore, I do believe that some of her arthritis can be attributed to the fall in question.

COR at 5-6.

After discussing the above opinion and Dr. Levitt's report, the ALJ then states:

In extreme contrast to Dr. Delahay's cautious, ambiguous opinion that "*some* of claimant's arthritis *can* be attributed to the fall in question" [emphasis added], Dr. Levitt's opinion that "A minor incident at work that verified she had no structural trauma to her knee cannot be justified as the basis for progressive arthritis in a 65 year old female who stands 5' 11" and weighs 245 lbs." is deliberate and unequivocal. Without the benefit of an evidentiary preference, such as the treating physician's preference, the undersigned previously afforded Dr. Delahay, the undersigned cannot find Dr. Delahay's opinion to be persuasive on the issue of the causal relationship of claimant's current inability to work.

Thus, it is concluded claimant has met not her burden [sic] of establishing entitlement to a reinstatement of her wage loss benefits.

COR at 7.

We agree with Claimant that the above analysis is in error. The ALJ seems to have skipped the second step in the burden shifting scheme wherein the Claimant need only produce reliable and relevant evidence that conditions have not changed to warrant a modification or termination of benefits. In the second step, the ALJ is tasked with looking at the Claimant's evidence when coming to this determination. Instead, the ALJ seems to have weighed the evidence in total including Dr. Levitt's opinion, thus skipping the second step in its entirety and proceeding directly to step three. Even more problematic, the ALJ then places the burden on *Claimant* to establish her entitlement to a reinstatement of wage loss benefits. This is in error as at this stage 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.

We cannot affirm a COR that reflects “a faulty application of the law.’ *WMATA . v. DOES*, 992 A.2d 1276, 1280 (D.C. 2010) As such, we are forced to remand the case with instructions to reconsider the evidence and utilize the analysis outlined in *Mahoney, supra*. Until such time, Claimant’s other arguments are premature.

CONCLUSION AND ORDER

The September 10, 2014 Amended Compensation Order on Remand is VACATED and REMANDED for further findings of fact and conclusions of law consistent with the above discussion.

FOR THE COMPENSATION REVIEW BOARD:



HEATHER C. LESLIE  
*Administrative Appeals Judge*

February 23, 2015

DATE

JEFFREY P. RUSSELL, *dissenting*.

I disagree with the result reached by the majority and would affirm the ALJ’s decision.

*/s/ Jeffrey P. Russell*

JEFFREY P. RUSSELL  
*Administrative Appeals Judge*