GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR

F. THOMAS LUPARELLO
DIRECTOR

DEPT. OF EMPLOYMENT SERVICES
COMPENSATION REVIEW BOARD
2014 DEC 12 AM 10 35

COMPENSATION REVIEW BOARD

CRB No. 14-098

CONSTANCE WARE,
Claimant–Respondent,

v.

DISTRICT OF COLUMBIA DEPARTMENT OF CORRECTIONS,
Self-Insured Employer-Petitioner

Appeal of an August 18, 2014 Order by
Administrative Law Judge Linda F. Jory
AHD No. PBL 96-083E, DCP No. 761032-0001-1999-0003

Eric A. Huang for the Petitioner
Harold Levi for the Respondent

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

HEATHER C. LESLIE for the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

Claimant worked for the Employer as a Correctional Officer. Claimant sustained a work-related injury on October 3, 1989. The then Office of Risk Management Disability Compensation Program (DCP), now Public Sector Workers' Compensation Program, (PSWCP) accepted the claim and awarded wage loss and medical benefits.

Claimant was paid temporary total disability benefits until September 30, 2011 when benefits were terminated. Employer sent a Notice of Determination (NOD) to Claimant's post office box on August 30, 2011, advising her that benefits were terminated. Claimant's counsel was faxed a copy of the NOD on October 17, 2011. Claimant requested a reconsideration of this decision on October 26, 2011 through counsel. DCP issued a Final Decision on Reconsideration, stating Claimant's request for reconsideration was untimely.

Claimant requested a Formal Hearing, seeking restoration of benefits. Employer argued the Administrative Hearings Division (AHD) did not have jurisdiction to hear the case as the Claimant failed to timely request a formal hearing or reconsideration within the 30 day time period prescribed after issuance of the August 30, 2011 NOD. On March 4, 2013, a Compensation Order (CO) was issued, finding that service was not properly made upon Claimant or Claimant's counsel and remanded the case to the PSWCP with instructions to consider Claimant's request for reconsideration.

On May 31, 2013, a Final Decision on Reconsideration was issued by PSWCP. The Claimant's claim was again denied. In that denial, PSWCP again reiterated that it first believed Claimant's initial request for reconsideration was untimely. However, PSWCP also decided Claimant's appeal on the merits when it concluded that the medical evidence revealed a change of condition such that Claimant could return to work in a full duty capacity.

Claimant appealed the May 31, 2013 decision. A full evidentiary hearing occurred on June 25, 2014. Claimant sought an award of temporary total disability benefits from September 30, 2011 to the present and continuing and payment of causally related medical benefits. The issues to be resolved were the nature and extent of Claimant's disability, whether the Claimant's current condition is medically casually related to the work accident, and whether AHD has jurisdiction to adjudicate the claims put forth by the Claimant.

A CO was issued on July 17, 2014. In that CO, the ALJ concluded she did have jurisdiction to adjudicate Claimant's claim as the March 4, 2013 CO affirmatively determined that the NOD was not properly served upon Claimant. The CO determined the Employer was collaterally estopped from arguing the issue of the timeliness of Claimant's request for reconsideration. The CO further determined that Employer had failed to meet its burden of establishing Claimant was no longer disabled as a result of her work related injury and granted Claimant's request for disability benefits and payment of medical expenses.

Employer timely appealed. Employer argues first that the ALJ incorrectly applied the doctrine of collateral estoppel in declining to address the timeliness of the Claimant's request for reconsideration. Employer further urges this panel to find the March 4, 2013 order not in accordance with the law. Employer argues that even if AHD did have jurisdiction, the CO erred when it granted Claimant disability benefits as the ALJ did not properly analyze the burden shifting scheme. Finally, Employer argues the ALJ incorrectly applied the treating physician preference.

Claimant opposed Employer's Application for Review, arguing the denial of wage loss benefits is supported by the substantial evidence in the record and in accordance with the law.

ANALYSIS

The scope of review by the CRB is limited to making a determination as to whether the factual findings of the Order are based upon substantial evidence in the record and whether the legal

conclusions drawn from those facts are in accordance with the applicable law.[1] Section 1-623.28(a) of the District of Columbia Government Merit Personnel Act of 1978, as amended, D.C. Code § 1-623.1 *et seq.* ("Act").

Turning to Employer's first argument, Employer argues that the ALJ applied the doctrine of collateral estoppel erroneously. Employer argues the untimeliness of Claimant's appeal should be addressed. We only note that AHD cannot review its own decisions. ALJ Carney found that service was not proper and remanded the case to the Public Sector Workers' Compensation Program for further consideration of Claimant's request for reconsideration. A Final Order on Reconsideration was issued which was then appealed to AHD. ALJ Jory adopted the prior order's conclusion that service was not properly effectuated, as it was not proper for her to review ALJ Carney's order. We now address the issue.

While the CO refers to 7 DCMR § 108.4 , Employer urges us to find former 7 DCMR 3131.15[2] controlling. We find 7 DCMR § 105.to be controlling. Titled "Program Notices of Initial Determinations and Eligibility Determinations", it states:

> 105.1 The Program shall issue a notice of determination (NOD) regarding each ID and ED pursuant to this section. An NOD of an ID or ED shall be issued using a standard form developed by the Program that informs the claimant of the right to request reconsideration or a hearing before the OHA, whichever is applicable. Sample NODs shall be published on ORM's website.
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> 105.2 An NOD shall be issued:
>
> (a) When accepting a claim for benefits or when modifying, suspending, or terminating benefits;
> (b) When changing the type of benefits a claimant receives;
> (c) When amending an NOD pursuant to § 111 of this chapter;
> (d) When accepting or denying a claim for recurrence of injury pursuant to § 120 of this chapter; or
> (e) When issuing a schedule award pursuant to section 2307 of the Act.
>
> 105.3 An NOD shall contain a narrative description of the rationale for the decision, cite relevant portions of the supporting documentation or claim file, and attach supporting documentation.
>
> 105.4 An NOD shall be sent to the claimant's last known address by first-class mail, postage prepaid. A certificate of service shall be executed by the Program at the time of mailing. If the claimant is represented by an attorney, a copy of the NOD shall be sent to the claimant's attorney. *Failure to send a copy of the NOD to the claimant's*

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[1] "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. District of Columbia DOES*, 834 A.2d 882 (D.C. 2003).

[2] 7 DCMR § 3100 was repealed on July 27, 2012.

> *attorney shall not constitute a failure to provide notice to the claimant, nor shall it toll any deadlines under this chapter, unless failure to do so unduly prejudices the claimant.*

Emphasis added.

Employer does not argue it served Claimant's counsel, even though the ALJ noted Claimant's counsel had been counsel of record since January 2007. Employer argues that sending the notice to Claimant's last known address was sufficient. We disagree.

As Claimant testified, and the ALJ found persuasive, Claimant did not receive the notice in the mail. As the ALJ further stated,

> Employer has not presented any evidence that it served Claimant's representative. Claimant also posits that she did not receive a copy of Employers NOD until October 17, 2011. Therefore, I find the inadequate notice tolled the running of the thirty day period for Claimant to seek reconsideration or a formal hearing.

Ware v. D.C. Dep't of Corrections, AHD No. PBL 96-083D, DCP No. 761032000119990003 (March 4, 2013).

Having not received the NOD sent to her or her counsel of record, Claimant was unduly prejudiced as she was unaware of the NOD. Employer's arguments are unpersuasive and we affirm the ALJ's determination that notice was inadequate as it is supported by the substantial evidence in the record and is in accordance with the law.

Turning to Employer's second argument, Employer alleges the ALJ employed the incorrect burden shifting procedure in public sector cases. Employer specifically argues that the ALJ erred in placing a substantial evidence standard on the Claimant, rather than a preponderance of the evidence standard. We disagree.

Since the issuance of the CO under review, as Employer correctly points out, the CRB has issued an en banc decision in *Mahoney v. D.C. Public Schools*, CRB No. 14-067, AHD No. PBL 14-004 (November 12, 2014). In *Mahoney*, the CRB concluded that 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 his condition has not changed at this second step in the analysis. Claimant is not required to establish this by a preponderance of the evidence.

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 clamant 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.

Turning to the case under review, the ALJ determined notwithstanding the inconsistent CRB decision regarding the public sector burden shifting scheme, Claimant's burden was that of substantial evidence. *Id* at 7. Per *Mahoney*, the ALJ was correct. Employer's argument that the ALJ should have utilized a preponderance of the evidence burden of proof when analyzing the Claimant's evidence is rejected.

Employer further argues the Claimant's evidence did not satisfy the preponderance or substantial evidence standard. Employer argues:

> Dr. Daniels' characterization of the objective evidence was exaggerated and cannot support the Claimant's burden. Moreover, Dr. Daniels' conclusions never bear on the issue of causation. Employer asserts further that while much of Dr. Daniels' diagnosis of the Claimant's current condition may be correct, without a full review of Claimant's medical history it was impossible for him to relate her current condition to the workplace accident in 1989.

Employer's argument at 41.

In analyzing Claimant's evidence, the ALJ relied upon the medical reports of Dr. Daniels and Dr. Ignacio. Specifically, the ALJ quoted the May 5, 2011 medical report of Dr. Henry M. Daniels:

> In terms of her lower back I recommended that she continue a weight reduction program as well as medication for pain. Physical therapy is likely to help from a standpoint of helping to lose weight as well as increase the mobility in terms of the lower back and the neck.
>
> The patient has not been able to work for many years and at this point does not appear to be able to return to work requiring any significant physical exertion such as lifting, pushing, pulling, as well as repetitive bending at the waist. She may have difficulty also with prolonged sitting without the ability to change her position form time-to-time.

> In terms of her neck, she would have difficulty performing work requiring repetitive flexion and extension motions of the neck and overhead reaching, lifting, pushing, and pulling.

CE 10 at 10.

In addition, claimant relies on the opinion of Dr. Ignacio, who spent the last 7 years treating claimant with various pain management offerings. On February 12, 2009, Dr. Ignacio wrote:

> In my opinion, she is 100% totally and permanently disabled to work since 1993. There is a high probability that she will not be able to return to productive work. In fact, there is a high probability in the future that she may need more procedures and even surgery for the cervical spinal stenosis and the lumbar disc syndrome. She will remain under my care for the above mentioned medical conditions. The above condition was rendered with a reasonable degree of medical certainty.

CO at 6-7.

We conclude that the above evidence is enough to satisfy Claimant's burden of providing substantial reliable and relevant evidence regarding the nature and extent of her disability as well as that her conditions were medically causally related to the work injury.[3] Employer, in attacking Dr. Daniels opinion, is essentially asking this panel to reweigh the evidence in its favor, a task we cannot do.

Employer also argues the ALJ erred in affording Claimant's physicians a treating physician preference, pursuant to *Proctor v. District of Columbia Public Schools*, CRB No. 12-194, AHD No. PBL 06-105A (May 15, 2013). On this point, the ALJ states:

> The Undersigned in mindful that D.C. Code §623.3(a-2)(4) was repealed by D. C. Law 18-233, however as the CRB has reasoned – an ALJ is permitted to find the treating physician opinion persuasive *without* affording it a preference in accordance with the Court of Appeals in *Kralick v. District of Columbia Department of Employment Services*, 842 A.2d 705 (D.C.)(Kralick). See *Proctor v. District of Columbia Public Schools*, CRB No. 12-194, AHD No. PBL 06-105A, DCP No. 760002-0001-1999-0023 (May 15, 2013)(Proctor). (Footnote omitted). Emphasis added.

CO at 8.

Contrary to what the Employer argues, it is clear by the above quotation, the ALJ did not afford the treating physicians any preference. After stating the above, the ALJ concluded:

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[3] We note, as Employer points out in argument, that Dr. Daniels reports begin with the notation that he is examining the Claimant for conditions associated to the October 3, 1989 work injury.

> Having witnessed claimant functioning in the hearing room, and given the opinions of both Dr. Daniels and Dr. Ignacio, it is determined employer had not met its burden of establishing by a preponderance of evidence that claimant no longer retains a work related disability and claimant is entitled to reinstatement of her temporary total disability benefits.

CO at 8.

Thus, the ALJ found the opinion of Dr. Ignacio and Dr. Daniels more persuasive *without* affording either doctor any preference. Having relied upon the opinions of Dr. Ignacio and Dr. Daniel's, both of whom opined Claimant was unable to return to work because of her injury, the ALJ concluded the Employer had not met its burden, that of a preponderance of the evidence, that Claimant could return to work. *See Mahoney, supra.* The ALJ's conclusions are supported by the substantial evidence in the record and in accordance with the law. As such, we are constrained uphold a CO that is supported by substantial evidence, even if there also is contained within the record under review substantial evidence to support a contrary conclusion and even if the CRB might have reached a contrary conclusion.

CONCLUSION AND ORDER

The August 18, 2014 Compensation Order is supported by the substantial evidence in the record and is in accordance with the law. It is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

/s/ Heather C. Leslie
HEATHER C. LESLIE
Administrative Appeals Judge

December 12, 2014
DATE