

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 15-126

FRANCES WADE,
Claimant–Respondent,

v.

DISTRICT OF COLUMBIA DEPARTMENT OF MENTAL HEALTH,
Self-Insured Employer—Petitioner.

Appeal of a July 14, 2015 Compensation Order by
Administrative Law Judge Gwenlynn D’Souza.
AHD No. PBL 15-008, DCP No. 0465-WC-13-0500387

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
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(Decided January 5, 2016)

Andrew J. Hass for Claimant
Andrea G. Comentale and Frank Mc Dougald for Employer

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

HEATHER C. LESLIE, for the Compensation Review Board.

DECISION AND REMAND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

Claimant, a Consumer Affairs Specialist at St. Elizabeth’s Hospital, sustained a work-related injury on May 24, 2013 when she was assaulted at work by a patient. The Public Sector Workers’ Compensation Program (PSWCP) accepted the claim for the face/scalp contusion and concussion.

On January 29, 2015, a Notice of Determination (NOD) was sent to Claimant, advising her that benefits were terminated on that date based on an Additional Medical Examination (AME) of Dr. Jerry Freidman, who opined Claimant could return to work with no restrictions. Claimant requested a Formal Hearing, seeking restoration of benefits from January 29, 2015 to the present and continuing.

A full evidentiary hearing occurred on June 4, 2015. The issues to be adjudicated were described as such:

Whether AHD has jurisdiction over the claim of injury to the neck?

Whether Employer properly terminated benefits based on clear evidence Claimant has returned to work?

Whether Employer properly terminated benefits because Claimant's current condition is not causally related?

Compensation Order (CO) at 2.

On July 15, 2015, the CO was issued and ordered:

It is **ORDERED** that Claimant's claim for relief be, and hereby is, **GRANTED**, in part. It is further **ORDERED** that Claimant is hereby awarded temporary total disability benefits and medical benefits from January 29, 2015, to the present and continuing, for the accepted claim of injury and any residual claim of injury. Employer is hereby **ORDERED** to provide Claimant the appropriate claim forms and to process the amended claim for the neck, according to the applicable regulations.

CO at 8.

Employer timely appealed the CO. Employer argues the ALJ 1) did not have jurisdiction to consider the issue of tinnitus, 2) lacked jurisdiction to address the neck injury in any way, 3) erred in concluding Claimant satisfied the second prong of the analysis outlined in *Mahoney v. D.C. Public Schools*, CRB No. 14-067, AHD No. PBL 14-004 (November 12, 2014) (*Mahoney*), 4) erred in concluding that Claimant was disabled because of tinnitus, 5) erred in concluding Claimant is disabled because of headaches and 6) erred in determining Employer had not satisfied the third prong of the *Mahoney* analysis.

Claimant opposed Employer's Application for Review, stating that "as Claimant's tinnitus is a symptom and a direct and natural result of Claimant's concussion, the ALJ had jurisdiction to make a finding on it, and her finding is based on substantial evidence." Claimant's argument at 4. Claimant also argues that the ALJ's conclusions that Claimant satisfied the second prong of the *Mahoney* analysis and that Employer has not satisfied the third prong of the *Mahoney* analysis are 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 CO 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. Code § 1-623.1 *et seq.* ("Act").

Preliminarily we address confusion over the second listed issue in the CO. The second issue is described as “whether Employer properly terminated benefits based on clear evidence Claimant has returned to work”. CO at 2. As the claim for relief correctly notes, the Claimant requested reinstatement of disability benefits from January 29, 2015 to the present and continuing as the Claimant has not returned to work. See Hearing Transcript (HT) at 13, 62-63. It would seem that the ALJ meant to describe the issue as the nature and extent of Claimant’s disability, if any. As we are remanding the case discussed more fully below, the ALJ is directed to clarify the description of the second issue listed.

We next address Employer’s argument that the ALJ did not have jurisdiction to issue an order addressing Claimant’s neck. As the ALJ correctly concluded, Employer did not accept the neck injury as part of the claim. Claimant does not argue otherwise and our review of the evidence and administrative file confirms this conclusion that the neck is not an accepted injury. Thus, the ALJ is without authority to order any action related to the neck. As stated in *Linnin v. D.C. Public Schools*, CRB No. 15-111, AHD No. PBL 09-062B, 3 (November 23, 2015):

[W]e take guidance from the DCCA reversal of the CRB in *Jackson v. D.C. Housing Authority*, CRB 12-104, AHD No. PBL11-022A, DCP No. 30110173190-0001 (October 11, 2012) (*Jackson*), wherein the DCCA reversed a CRB affirmance of an AHD finding that AHD and DOES could 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 *Jackson’s* [sic] being an unpublished Memorandum Opinion and Order, we take it as instructive of the court’s views on this subject, and have adopted its views on this subject. See *D.C. Housing Authority v. DOES*, No. 12-AA1824, Mem. Op. & J. (D.C. March 31, 2014).

We vacate the portion of the Compensation Order in which the ALJ directed the PSWCP to provide Claimant with forms or to take any other specific action regarding administration of this claim. Such an order is beyond the authority of this agency. Assuming that DOES has jurisdiction over a dispute regarding a workplace injury, its authority is limited to adjudicating matters relating to compensability. While the agency has the power to adjudicate compensability and make awards, it has no power to order the PSWCP to do anything unrelated to the litigation of disputed claims. This agency’s power is declarative only. Enforcement of awards is a matter left to the judicial branch in the nature of imposition of a lien in Superior Court.

On remand, the ALJ is ordered to strike that portion of the award ordering Employer to provide claim forms and to process any claim for the neck.

Next, we address Employer’s argument that the ALJ erred in determining Claimant satisfied the second prong of the *Mahoney* analysis. After the Employer satisfied the first prong of the *Mahoney* analysis, the burden then shifts to the Claimant. Specifically, *Mahoney* states:

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.

Mahoney at 9.

The ALJ, in determining that Claimant satisfied the second prong, pointed to the reports submitted by the Claimant. A review of the evidence notes a letter written by Drs. Dunlap and Khan, which states that Claimant cannot return to work and recommends a neurosurgeon consultation for further evaluation. An accompanying handwritten letter by Drs. Dunlap and Khan notes a provisional diagnosis of cervical radiculopathy. As stated above, the neck condition is not within the jurisdiction of the ALJ. The ALJ's reliance on this report to support the Claimant's burden is in error.

However, Claimant's exhibits two and three note a diagnosis of concussion related to the work related injury of May 24, 2013. Both documents are from Dr. Mamedova at Patient First. The December 16, 2013 document indicates "Y" when answering whether there was a "disability" and that it began on December 16, 2013 and defers any light duty or full duty release to the specialist. We conclude that these documents are sufficient to satisfy the second prong of the *Mahoney* analysis and reject Employer's argument on this point.

We next turn to Employer's argument that the ALJ lacked jurisdiction to "consider, adjudicate, and award benefits based on tinnitus." Employer's argument at 7. We note in response that Claimant states that since tinnitus is a symptom or result of the accepted concussion, the ALJ could consider the diagnosis of tinnitus.¹ Claimant points this panel to footnote 1 of the CO concerning the ALJ's reliance on the Claimant's testimony, and mentions a reference to a diagnosis of tinnitus in the AME to argue the ALJ "in this case traced a logical path from Claimant's initial concussion to her related symptom of tinnitus and its effects, to her ongoing disability due to tinnitus." Claimant's argument at 6.

We cannot agree that the "logical path", as described by the Claimant, is supported by the substantial evidence in the record and is in accordance with the law. As we discuss next, it is problematic that the ALJ does not refer to any medical opinion by any physician in the record that the tinnitus is medically casually related to the concussion.

In determining that the Employer did not satisfy the third prong of the *Mahoney* analysis, the ALJ held:

The third and final step requires that Employer prove by a preponderance of the evidence that Claimant's benefits should be modified or terminated based on the nature and extent of Claimant's current condition. Preponderance of the evidence is defined as the greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact, but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the

¹ We agree that if tinnitus is a symptom of the accepted concussion, then any discussion of tinnitus is not beyond the jurisdiction of the ALJ, contrary to Employer's argument. If the tinnitus is a separate injury, then, similar to the neck condition, it would be beyond the scope of the ALJ's jurisdiction.

mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other. *See* BLACK'S LAW DICTIONARY 1301 (9th ed. 2009). In this regard, the administrative law judge may, of course, consider the reasonableness of the testimony and whether or not particular testimony has been contradicted or corroborated by other evidence. *McCamey v. District of Columbia Dept. of Employment Servs.*, 947 A.2d 1191, 1214 (2008).

In assessing the nature and extent of Claimant's current medical condition, I note Claimant testified that she experienced tremors two or three times a day. (HT 81) Although Dr. Friedman determined Claimant had preexisting essential tremors, Claimant testified to having no pre-injury symptoms of tremor and to experiencing a full body tremor at the time of the May 24, 2013 injury. (HT 81) I reject Dr. Friedman's finding of a preexisting tremor because he does not appear to rely on any contemporaneous medical documentation in determining Claimant had a preexisting essential tremor. However, even assuming *arguendo* that the tremor is a residual of the face/scalp contusion or concussion, I do not find that the tremor is disabling because Claimant was able to work with the tremor, including operating a computer, for several months between June 2013 and September 2013.

Claimant was also diagnosed with concussion and tinnitus. Claimant testified to having symptoms of post-May 24, 2013 tinnitus, which affects her ability to hear persons three or four times a day. (HT 67, 73-78) I credit Claimant's testimony about her symptoms because although she could hear everything at the hearing, she did not experience an episode of tinnitus during the hearing. Therefore, her ability to hear everything at the hearing is not dispositive.

In this case, concussion was an accepted condition in this case. I find that the symptoms of tinnitus are related to the concussion. *See* footnote 1. It appears the symptoms of tinnitus would affect Claimant's ability to hear and respond appropriately to an emergency in a hospital setting where violent persons are housed. Based on this record as presented, I am not persuaded that Claimant's tinnitus has lessened to the point that Claimant can return to work. Therefore, I find the concussion-related symptom of tinnitus continues to be disabling.³

I find that the headaches are post-traumatic and related to the concussion. *See* DORLAND'S 29TH EDITION 789. With regards to the causal relation of headaches, Dr. Friedman determined the episodic headaches were not related to work injury on May 24, 2013, but were instead related to a muscle contraction. (EE 8) It appears he is referring to a muscle contraction in the area about the neck, which was sensitive to touch during examination. (EE 8) There is, however, no evidence that such a muscle contraction occurred prior to the May 24, 2013 injury. The record reveals that on June 4, 2013, which is eleven days after the altercation, Claimant complained during medical examination that she had an acute and mild pain located on the top of the head and temporoparietal scalp with associated spasm all over the head but without pain radiation. (EE 6) Thereafter, on September 27, 2013, Claimant complained of persistent headaches, neck pain, and other conditions. (EE 9) The headaches may

start in the middle of the head. (HT 78) Dr. Friedman does not address Claimant's diagnosis of concussion and the relation, if any, to the headaches.

Based on this record, Employer has not shown that the headaches are unrelated to the accepted claim of a concussion. Employer has not proven the neck muscle contraction is the cause of all the headaches because the headaches sometimes start at the middle of the head, an area that is not in direct contact with the neck. Employer has not shown that the muscle contractions are unrelated to the post-injury history of muscle spasm. Also, of concern is whether Claimant's disabling condition has increased, to the extent the possible leak of cerebrospinal fluid may be a gradual result of the concussion. Absent evidence on these material facts, the undersigned has lingering doubts about a lack of causal relation between the headaches and concussion.

³ I also doubt that Claimant's concussion has lessened to the extent she appears to have some symptoms related to a concussion of the brain retrograde amnesia and emotional lability. Claimant was unable to recall pre-injury events, including the taking of a pre-injury MRI of the cervical spine. (HT 43) Claimant felt traumatized and left her house only once a week. (HT 62-65)

CO at 6-7.

The CO, in several instances, appears to rely on the ALJ's lay determination, and not any medical diagnosis nor opinion in evidence, which is error. For instance, the ALJ refers in the CO footnote 1, to a definition of a concussion from *Dorlands*, to support the proposition Claimant has been diagnosed with tinnitus which is related to the concussion. The ALJ also relies upon this broad definition to conclude that Claimant may have amnesia - a condition no doctor has suggested. CO at 7. The ALJ also comments on a possible leak of cerebrospinal fluid, another condition no doctor has mentioned. CO at 3. The ALJ, when summarizing medical opinions in the record, refers to Employer's Exhibit 9 which is not a medical opinion, but Employer's NOD and a layman's summary of the medical documentation.

Notably, the ALJ does not refer to any medical evidence in the record when coming to the conclusion that Claimant's headaches and tinnitus are related to the accepted concussion and are disabling. This is in error, as the ALJ's medical opinions are speculative. Indeed, Dr. Friedman opines, that Claimant's headaches are not causally related to the work injury, underlying the need for the ALJ to refer to medical opinion stating that the headaches and tinnitus are related to the concussion.

It is settled that ALJs cannot substitute a legal opinion for a medical opinion. As we have stated:

Even if an ALJ may draw reasonable inferences from the evidence,²³ without substantial evidence in the record to support such inferences, those inferences cannot be upheld on appeal, particularly when those inferences go beyond legal conclusion into the realm of medical conjecture.

If there is evidence in the record to support the ALJ's conclusions, the ALJ remains

free to cite that evidence in support of those conclusions. If, however, there is no evidence in the record to support the ALJ's conclusions, the ALJ exceeds the scope of authority in rendering medical opinions.²⁴

²³ See *George Hyman Construction Co. v. DOES*, 498 A.2d 563, 566 (D.C. 1985).

²⁴ *Seals v. The Bank Fund Staff Federal Credit Union*, CRB No. 09-131, AHD No. 144, OWC No. 653446 (May 20, 2010).

Daly v. R.J. Reynolds, CRB No. 12-023, AHD No. 10-193A (April 3, 2012).

The legal determination that a medical condition is medically causally related must be based on evidence in the record, not an ALJ's speculation and conjecture. Here, the ALJ did not base her legal conclusion on any record based evidence. Therefore, the ALJ's decision is not supported by substantial evidence in the record and cannot be affirmed.

CONCLUSION AND ORDER

The July 14, 2015 Compensation Order is not supported by the substantial evidence in the record and is not in accordance with the law. It is VACATED and REMANDED for further consideration in accordance with the discussion above.

So ordered.