GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR

DEBORAH A. CARROLL
ACTING DIRECTOR

CRB No. 14-099

DEPT. OF EMPLOYMENT SERVICES
COMPENSATION REVIEW BOARD
2015 FEB 26 PM 2 13

JAMES DAVIDSON,
Claimant–Petitioner,

v.

DISTRICT OF COLUMBIA FIRE & EMERGENCY SERVICES,
Self-Insured Employer-Respondent.

Appeal from a July 23, 2014 Compensation Order by
Administrative Law Judge Fred D. Carney, Jr.
AHD PBL No. 99-073A, DCP No. 7610330003190005

Richard Link for the Claimant
Frank Mc Dougald for the Respondent[1]

Before HEATHER C. LESLIE, MELISSA LIN JONES, and JEFFREY P. RUSSELL, *Administrative Appeals Judges.*

HEATHER C. LESLIE, for the Compensation Review Board; MELISSA LIN JONES, *concurring.*

DECISION AND REMAND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

The Claimant was employed as an emergency paramedic. On February 3, 1999, Claimant injured his right wrist and lower back. Claimant came under the care and treatment of Dr. Hampton Jackson. Dr. Jackson passed away after which Claimant came under the care and treatment of Dr. Julio Gonzales.

Claimant's claim was accepted by the Employer, who paid disability benefits until February 17, 2011. On that date, the Claimant's benefits were terminated based on the additional medical evaluation (AME) of Dr. Robert Gordon. The Claimant timely appealed this termination.

A full evidentiary hearing was held on May 3, 2011. At that hearing, the Claimant sought reinstatement of temporary total disability benefits from February 18, 2011 to the present and continuing, payment of related medical expenses and bills, and authorization for treatment with

[1] The Compensation Order erroneously identifies Corey August as representing Employer at the Formal Hearing. A review of the hearing transcript reveals that Frank Mc Dougald represented Employer at the Formal Hearing.

Dr. Jackson. The Employer contested the nature and extent of the Claimant's disability. A Compensation Order (CO) was issued on October 31, 2011. In that CO, the ALJ awarded the Claimant the requested claim for relief. Employer unsuccessfully appealed the CO to the CRB.

On April 17, 2013, Claimant underwent an additional AME with Dr. Stanley Rothschild. Dr. Rothschild took a history of Claimant's injury and treatment and performed a physical evaluation. Dr. Rothschild opined Claimant's current condition is no longer related to his injury and that he could go back to work full duty, without restrictions. Thereafter, based on Dr. Rothschild's opinion, the Employer terminated Claimant's disability payments on June 10, 2013. Claimant timely appealed this termination.

A full evidentiary hearing occurred on October 1, 2013. Claimant sought reinstatement of medical benefits and temporary total disability benefits from June 17, 2013 to the present and continuing. The issue presented was the nature and extent of Claimant's disability. On June 23, 2014, a Compensation Order (CO2) was issued which denied Claimant's requested relief. Claimant timely appealed.

Claimant argues on appeal that the ALJ erred in finding that Dr. Rothschild's medical opinion was enough to substantiate a change in condition. Claimant also argues the evidence fails to support the conclusion that Claimant's condition has changed since the last Compensation Order, that the ALJ failed to review the medical evidence of Dr. Gonzalez, the CO2 is inconsistent with prior orders, and the CO2 fails to explain what duties Claimant is capable of performing.

Employer opposes the appeal, arguing the CO2 is supported by the substantial evidence in the record and in accordance with the law.

STANDARD OF REVIEW

The scope of review by the CRB, as established by the Act and as contained in the governing regulations, 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 applicable law. *See* D.C. Comprehensive Merit Personnel Act of 1978, as amended, D.C. Code § 1-623.01, *et seq.*, at § 1-623.28(a), and *Marriott International v. D. C. Department of Employment Services*, 834 A.2d 882 (D.C. 2003).

Consistent with this standard of review, the CRB is constrained to uphold 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 the reviewing authority might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

ANALYSIS

Claimant first argues that Dr. Rothschild's opinion is not enough to substantiate a modification or termination of benefits as his report is defective. In arguing the report is defective, Claimant contends that as he Dr. Rothschild did not review the functional capacity evaluation or objective testing, the basis of his opinion that Claimant can return to work is insufficient evidence of a

change in condition. Moreover, Claimant argues the law of the case is that Claimant has an ongoing disability, relying on the October 31, 2011. We disagree with Employer's argument.

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 in condition 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 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.

To satisfy its initial burden to show a modification is warranted, Employer produced the AME of Dr. Rothschild. Dr. Rothschild report includes a history taken from Claimant concerning his injury, as well as a summary of the medical treatment from July 2005 up to March 2013. While Dr. Rothschild did not review objective testing, this alone does render his opinion defective especially as the results of objective testing are summarized in the medical reports reviewed. Moreover, some of the medical documentation Dr. Rothschild reviewed is documentation not submitted or available at the prior hearing. Dr. Rothschild's opinion, based upon numerous medical records and his own physical examination of Claimant, is enough to satisfy Employer's initial burden of producing current and probative evidence that Claimant's condition has changed since 2011 to warrant a modification or termination of benefits thus shifting the burden to Claimant.

In tandem with this argument, Claimant argues the law of the case, as established in prior orders, is that Claimant suffers from an ongoing disability. We disagree. The modification provision outlined in § 1-623.24(d)(1-4) allows for modification of prior Compensation Order's, such as the Employer is trying to do in the case *sub judice*. The case Claimant relies upon does not

support his argument that Claimant's ongoing disability is the law of the case. *Irving v. DCPS*, CRB No. 10-138, AHD No. PBL 08-056B, (June 4, 2013) solely addresses jurisdictional issues arising out of the lack of a notice of determination on an issue sought to be adjudicated. What Claimant is arguing, that once a Claimant is found to be disabled it becomes the law of the case and cannot be changed regardless of a change in circumstances, in effect nullifies the modification provision. We cannot agree to this interpretation.

However, we are forced to remand the case because, after finding the Employer has satisfied its burden of production in the first step, the ALJ stated:

> Thus Employer has presented some evidence of a change in Claimant's condition that is adequate to shift the burden to Claimant to prove by preponderance of the evidence, that he was in fact temporarily totally disabled during the claim period.

CO2 at 5.

This is in error. At this juncture, the Claimant need only produce reliable and relevant evidence that conditions have not changed to warrant a modification or termination of benefits. To require Claimant to produce a preponderance of evidence, a higher standard, is incorrect. Because the ALJ utilized the incorrect burden at the second step of the burden shifting scheme, we are forced to remand the case. If the ALJ finds the Claimant produced reliable and relevant evidence that his condition has not changed to warrant a change in condition, then the ALJ is directed to weigh the evidence determine whether employer met its burden of proving by a preponderance of the evidence that claimant's benefits should be modified or terminated. In an effort to avoid further appeals, the ALJ must include a discussion of Claimant's work capabilities.

In an effort to avoid further remands, we will address some of Claimant's other arguments. We cannot agree to Claimant's arguments that since Claimant was found to be credible in prior orders, that he must be found credible before the current ALJ. As stated in *Bowser v. Clark Construction*, CRB No. 14-004, AHD No. 11-046(B) (August 14, 2014):

> An ALJ's credibility determinations often are entitled to deference, and in this case, because the ALJ's assessment flows both from the medical evidence in the record and from reasonable inferences that can be drawn from the ALJ's observations at the hearing, there is no reason to depart from affording that deference. That a different ALJ presiding over a different formal hearing on different issues under different circumstances found Mr. Bowser credible does not prevent other ALJs from reaching a different conclusion based upon Mr. Bowser's demeanor, Mr. Bowser's conduct at a formal hearing, and the evidence presented at that proceeding. (Footnotes omitted.)

However, we do find problematic the ALJ's credibility determination in the case before us. First, the ALJ finds the Claimant an incredible witness based on his appearance, demeanor, and lack of consistency with the other evidence of record. CO2 at 2. Contrary to this statement, the ALJ then states,

> I find Dr. Gonzales report of Claimant's complaints of pain and pain radiating down his left lower extremities is consistent with Claimant's testimony at the formal hearing.

CO2 at 3.

We cannot reconcile these two inconsistent statements. As we are remanding the case the ALJ shall address this inconsistency. If the ALJ finds Claimant an incredible witness based upon inconsistencies in the record, the ALJ shall explain this assessment by referencing specific testimony and medical evidence submitted.

Turning to Claimant's argument that the ALJ's conclusions regarding Dr. Gonzalez's opinion is contradicted by the record, we agree. The ALJ, in rejecting Dr. Gonzalez's opinion, states:

> Dr. Gonzalez's opinion parrots claimant's subjective complaints of pain but lacks any clinical support for the conclusion that claimants' complaints are the result of his 1999 work injury. There has been no medical explanation for his complaints today.

CO2 at 9.

As we stated above, the sole issue presented was the nature and extent of Claimant's disability. It seems that the ALJ is rejecting Dr. Gonzalez's opinion based on a lack of any clinical support regarding the medical causality of Claimant's condition. This is in error as the only issue to be determined is the nature and extent of disability, not whether the conditions are medically causally related to the work injury. Moreover, a review of the evidence reveals some objective testing to support Claimant's ongoing complaints. In April of 2012 a nerve conduction study was performed which is referenced in Dr. Gonzalez's report. Upon remand, if the ALJ continues to reject the opinion of Dr. Gonzalez's opinion, such reasons must flow rationally from the evidence presented.

We also note the ALJ references a treating physician preference in the decision. This preference was repealed as is no longer valid. *See District of Columbia Public Schools v. DOES,* 95 A.3d 1284 (D.C. 2014). While this error is harmless as the ALJ ultimately rejected Dr. Gonzalez's opinion, as we are remanding the case the ALJ is to strike any reference to the treating physician preference.

In sum, upon remand, the ALJ is to complete step two and step three, if necessary, of the burden shifting scheme outlined in *Mahony* above. If the ALJ proceeds to step three, the ALJ must include a discussion of Claimant's work capabilities, taking into consideration Claimant's medication use. The ALJ is also to clarify the determination of Claimant's credibility, reconciling the two inconsistent statements pointed out above. Finally, if the ALJ continues to reject Dr. Gonzalez's report, such reasons must flow rationally from the evidence presented bearing in mind the issue of medical causation has been stipulated by the parties. Finally, the ALJ is to strike any reference to the treating physician preference from the order.

CONCLUSION AND ORDER

The July 23, 2014 Compensation Order VACATED and REMANDED consistent with the above discussion.

FOR THE COMPENSATION REVIEW BOARD:

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

February 26, 2015
DATE

MELISSA LIN JONES *concurring*:

Based upon principles of *stare decisis*, this majority rightly relies upon *Mahoney* for the current interpretation of the burdens of production and proof in public sector workers' compensation cases; however, *Mahoney* was not without dissent:

> [A]s the majority points out,
>
> > once a claim for benefits has been accepted by the District of Columbia government's administrator of the Act, and has paid benefits for that claim, the burden of proof which normally rests with a claimant to establish a causal relationship between a condition and the claimant's employment is shifted to the employer to demonstrate a change of conditions has occurred sufficient to terminate or otherwise reduce those benefits. *Williams v. D.C. Department of Parks and Recreation*, CRB 08-0262, AHD No. PBL 07-029, PBL/DCP No. 761013-0001-2005-0007 (Dec. 13, 2007), nt. 2.
>
> This burden, however, is not one of proof but an "initial burden," as the majority also notes but discounts:
>
> > It is well-settled in this jurisdiction that once the DCP [footnote omitted] (the agency-employer) accepts an injured worker's claim as compensable, the DCP bears the <u>initial burden</u> to demonstrate a change in the injured worker's medical condition such that disability benefits need to be modified or are no longer

> warranted and must be terminated. [Footnote omitted.] The evidence used to modify or terminate benefits must be current and fresh in addition to being probative and persuasive of a change in medical status. [Footnote omitted.]
>
> The DCP's burden is one of production and requires an evaluation of the DCP's evidence standing alone without resort to evaluating or weighing the injured worker's evidence in conjunction thereto for if the DCP fails to sustain its burden, the injured worker prevails outright. [Footnote omitted.] However, if the DCP meets its burden, then the burden shifts to the injured worker to show through reliable, relevant, and substantial medical evidence that her physical condition has not changed and that benefits should continue. If the injured worker meets her burden, the medical evidence is weighed to determine the nature and extent of disability, if any. *Gaston Jenkins v. D.C. Department of Motor Vehicles*, CRB No. 12-098, AHD No. PBL11-049, DCP No. 761019000120060005 (August 8, 2012) (Emphasis added.); see also *Wentworth M. Murray*, 7 ECAB 570 (1955) (Based on the medical evidence, once termination of compensation payments is warranted, the burden shifts to the claimant to show by the weight of the reliable, probative and substantial evidence that any disability is causally related to the employment and results in a loss of wage-earning capacity).

As the District of Columbia Court of Appeals echoed in *Mahoney v. DOES*, (a public sector workers' compensation case involving Mr. Otis Mahoney, not Respondent), "The CRB stated that it agreed that the District had the initial burden to 'present [] persuasive medical evidence to terminate Mahoney's benefits' after which the 'burden then shifted back to [the claimant] to provide proof of an employment related impairment following the termination of benefits.'" *Mahoney v. DOES*, 953 A.2d 739, 742 (D.C. 2008).

Contrary to the majority's analysis, this situation is unlike the burden requirements in a private sector modification case. Although *Washington Metropolitan Area Transit Authority v. DOES*, (a private sector case) states, "the burden is on the party asserting that a change of circumstances warrants modification to prove the change," *Washington Metropolitan Area Transit Authority v. DOES*, 703 A.2d 1225, 1231 (DC. 1997), it is important not to overlook that same case also states "The burden may shift once the moving party establishes his case." *Id.* That shift is paramount here where the prior caselaw says the "initial burden" is on the government. That initial burden is one of production, not proof; only if the government meets that initial burden does the burden of proof shift to the claimant to prove compensability. Although prior caselaw states the standard is "substantial evidence," it is clear from *McCamey v. DOES*, 947 A.2d 1191 (D.C. 2008) that where, as in public sector cases, there is no presumption of compensability, the ultimate burden falls on the claimant to

prove by a preponderance of the evidence that a claim is compensable. Then, only once compensability has been established is the medical evidence weighed to determine the nature and extent of the claimant's disability, not entitlement or compensability but the type or amount of benefit owing.

Instead of the majority's modification analogy, once the government has accepted a claim, the posture is analogous to a private sector case wherein the employer has voluntarily paid benefits and the presumption of compensability has been invoked. In other words, accepting the claim in essence "invokes the presumption" because the government's investigation has led to the conclusion that a claim is compensable; therefore, the initial burden to terminate or modify benefits is on the government to prove through substantial evidence that a change is warranted, and if the government is successful, the burden returns to the claimant to prove entitlement to ongoing benefits by a preponderance of the evidence:

> the Employees' Compensation Appeal Board (ECAB) has consistently held that once the employer has accepted a claim for disability compensation and actually paid benefits, the employer must adduce sufficient medical evidence to support a modification or termination of benefits. See Chase, ECAB No. 82-9 (July 9, 1992); Mitchell, ECAB No. 82-28 (May 28, 1983); and Stokes, ECAB No. 82-33 (June 8, 1983). In addition, the Board has held that the medical evidence relied upon to support a modification or termination of compensation benefits, as well as being probative of a change in medical or disability status, shall be fresh and current.
>
> Therefore, while there is no statutory presumption de jure in favor of the claimant's claimed injury being work-related, under this Act unlike the private sector workers' compensation Act, D.C. Code §36-321, the foregoing cited case precedent appears to have established a de facto presumption once a claim has been accepted and benefits paid. *Williams v. D.C. Department of Corrections*, OHA No. PBL93-077B, ODC No. 8921 (June 29, 2001). (Admittedly, this quote is from a Compensation Order with no precedential value, but it is cited as an appropriate explanation of the burden, not as precedent for the burden.)

If at any point, the evidence is in equipoise, the party with the burden loses.

For these reasons, the dissent disagrees 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.

Rather, the dissent takes the position that if the government has accepted a claim for disability compensation benefits, the initial burden to terminate or modify benefits is on the government to prove through substantial evidence that a change is warranted; if the government is successful, the burden returns to the claimant to prove by a preponderance of the evidence entitlement to ongoing benefits as well as the nature and extent of any disability.

Mahoney v. D.C. Public Schools, AHD No. PBL 14-004, ORM/PSWCP No. 76000500012005-008 (November 12, 2014) (dissent at pp. 11-14).

As a member of the dissent in *Mahoney*, I write this concurring opinion to recognize that *Mahoney* is the law and must be applied in this case, but I still do not agree with the reasoning in *Mahoney*.

/s/ Melissa Lin Jones
MELISSA LIN JONES
Administrative Appeals Judge