GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR

DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 15-192

DEPT. OF EMPLOYMENT SERVICES
COMPENSATION REVIEW BOARD
2016 MAY 23 PM 2 16

JAMES DAVIDSON,
Claimant–Petitioner,

v.

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

Appeal from an October 30, 2015 Compensation Order on Remand by
Administrative Law Judge Fred D. Carney, Jr.
AHD PBL No. 99-073A, DCP No. 761033000319990005

(Decided May 23, 2016)

Richard Link for the Claimant
Frank Mc Dougald for the Employer

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

HEATHER C. LESLIE, for the Compensation Review Board:

DECISION AND REMAND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

The procedural history pertinent to the current appeal is described by the Compensation Review Board (CRB) in a prior Decision and Remand Order (DRO):

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

Davidson v. DC Fire & Emergency Services, CRB No. 14-099 (February 26, 2015).

After considering the parties' arguments, the CRB determined a remand for further analysis and fact finding was necessary in light of the CRB's decision in *Mahoney v. D.C. Public Schools*, CRB No. 14-067 (November 12, 2014) (*Mahoney*). Specifically, the CRB remanded for the ALJ to apply the second step of the *Mahoney* analysis to determine whether Claimant produced reliable and relevant evidence that conditions had not changed to warrant a modification or termination of benefits. The ALJ was reminded that if he concludes the Claimant produced reliable and relevant evidence that Claimant's condition has not changed, the evidence must be 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.

The CRB, in an effort to avoid further remands, addressed several other arguments Claimant raised. The CRB first directed the ALJ, in considering the burden shifting scheme in *Mahoney*, to analyze and discuss Claimant's current work capabilities. The DRO also tasked the ALJ with clarifying the determination of Claimant's credibility, pointing out inconsistent language in the

CO regarding Claimant's credibility. The CRB also determined that the ALJ's rejection of Dr. Gonzalez's report did not flow rationally from the evidence presented. Finally, the ALJ was directed to strike reference to the treating physician preference as there is not a treating physician preference in public sector workers compensation cases.

A Compensation Order on Remand (COR) was issued on October 30, 2015. The ALJ found Claimant had produced reliable and relevant evidence that conditions had not changed to warrant a modification or termination of benefits. However, after weighing the evidence at the third step of the *Mahoney* analysis, the ALJ concluded that the Employer met its burden of proving by a preponderance of the evidence that Claimant's benefits should be terminated. The COR denied Claimant's request for reinstatement of disability benefits.

Claimant appealed. Claimant argues first, the ALJ's credibility assessment is not supported by the substantial evidence in the record. Second, Claimant argues the ALJ misapplied step three in the *Mahoney* analysis. For these reasons, Claimant urges the COR to be remanded for further analysis.

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

ANALYSIS[1]

Claimant first argues that the COR's finding that Claimant was an incredible witness is not supported by the substantial evidence in the record. Claimant specifically takes issue with the ALJ's determination that because Claimant was able to fly a plane once in the two years prior to the hearing, his testimony regarding his current disability was inconsistent.

In concluding that Claimant's testimony was incredible, the ALJ stated:

> I find Claimant's testimony incredible as to the extent of his disability based on his appearance and demeanor at the formal hearing and the lack of consistency of his testimony with the other credible evidence of record. Although Claimant was stiff and testified that he felt pain after five to ten minutes of testifying, Claimant was able to leave the witness stand without incident. I find that Claimant's demeanor when sitting while testifying did not indicate some pain-driven need to readjust his position and did not comport with Claimant's complaints to Dr. Gonzalez of pain radiating down his extremities or his appearance to Dr. Gonzalez of sitting in an antalgic position. I find Claimant's testimony on his disability inconsistent to the extent he was able to fly a plane once in the two years prior to the hearing. I find Claimant's testimony about his right hand having resolved

[1] The scope of review by the CRB 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. Workers' Compensation Act of 1979, as amended, D.C. Code § 32-1501, *et seq.*, (the Act) at § 32-1521.01 (d)(2)(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 must 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.

> inconsistent because be reported to Dr. Rothschild on April 22, 2013 with complaint of right wrist pain and he did not have any treatment for the right wrist in years.

COR at 3.

Thus, the ALJ's assessment of credibility was based in part on his observation of Claimant at the Formal Hearing as well as his testimony. The ALJ observed Claimant was able to sit for some time without any need to adjust for pain, contrary to his testimony and what he told Dr. Gonzalez. The ALJ gave several reasons, including his ability to fly and his testimony regarding his wrist complaints in light of Dr. Rothschild's report, and found Claimant incredible. As stated in our prior DRO,

> 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.

DRO at 4.

We affirm the ALJ's credibility determination as being supported by the substantial evidence in the record and in accordance with the law.

Claimant next argues the COR should be reversed because it misapplied step three in the *Mahoney* analysis. Specifically, Claimant argues the ALJ failed to address whether Claimant's dependence on medication prevents him from returning to work. Claimant's argument at 3. We agree.

In analyzing Employer's evidence, at the third step of the *Mahoney* analysis, the COR states:

> I note Dr. Rothschild's 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 acknowledged some tenderness in Claimant's back in April 2013, he determined that the strain/sprains Claimant sustained in 1999, including any aggravation of a pre-existing disease, had long since resolved. As a result, he opined that Claimant, based on his musculoskeletal condition, could return to work as an EMT. (EE 2)

COR at 6.

The ALJ seemingly limits his analysis of Dr. Rothschild's opinion to his musculoskeletal condition. This is in error.

As Claimant points out, in a prior Compensation Order, the ALJ noted:

> He is currently taking Oxycontin and Oxychondone to help him tolerate the pain for some years. (HT 63) The medication makes him drowsy and he is able to function for only a few hours a day. (HT 38&39, 63&64) Dr. Jackson recommended Claimant was not a candidate for laminectormy and the condition would not improve with conservative treatment. (HT 51).

Davidson v. D.C. Fire & Emergency Services, AHD No. 11-001, 5 (October 31, 2011).

In the COR before us, the ALJ briefly notes

> Dr. Gonzalez has treated Claimant consistently from March 27, 2012 to the present with medication including opiate drugs, i.e. Oxycontin, Oxycodone, and Morphine. (CE 2).

COR at 7.

In the findings of fact section, when summarizing Claimant's medical treatment with Dr. Gonzalez, the ALJ notes Claimant's continued use of pain medication, and Claimant's continued pain and drowsiness. *See* COR at 4-5. The COR however, fails to analyze or discuss whether since the October 31, 2011 Compensation Order, Claimant's condition, specifically his reliance on pain medication, has changed and what, if any, impact this reliance has on his ability to work as a paramedic. *See Marriot v. DOES*, 85 A.3d 1272, (D.C. 2014). We are forced to remand for further analysis and reiterate, as directed in our prior DRO, that discussion of Claimant's current work capabilities is warranted in the case *sub judice*. In light of Employer's burden at the third step of the *Mahoney* analysis, when addressing Claimant's reliance on pain medication, the ALJ must determine specifically what physical limitations, if any, Claimant currently suffers.

We next address Claimant's contention that the ALJ's acceptance of the opinion of Dr. Rothschild renders the prior orders meaningless. *See* Claimant's argument at 7. As stated our prior DRO, and pointed out in argument by Employer,

> 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*.

DRO at 3.

Dr. Rothschild's opinion does not affect the disability awards of prior compensation orders, nor do the prior orders negatively impact Dr. Rothschild's opinion, as Employer contends. The ALJ is tasked with analyzing Dr. Rothschild's opinion within the context of the modification provisions allowed and pursuant to the *Mahoney* analysis. Following Claimant's logic to its end, physicians would have to take into account prior legal determinations when rendering medical

opinion. We decline to follow this logic and limit a physician's medical opinion to fit the parameters of legal orders. We reject Claimant's argument.

Finally, Claimant argues that the ALJ, contrary to our prior DRO, focuses on medical causation, an issue not contested by the parties. Our prior DRO indicated the only issue to be resolved was the nature and extent of Claimant's injury, and expressed concern that the ALJ seemed to be conflating the issues in the prior order.

To clarify any confusion that may have resulted from our prior DRO, we reiterate that if the ALJ determines Employer proved, by a preponderance of the evidence, that Claimant's current disability has changed or that his condition has resolved, Employer has satisfied its burden that benefits should be modified or terminated.

Until such time as the ALJ addresses whether, since the findings of fact and conclusions of law outlined in the October 31, 2011 order, Claimant's condition - specifically his reliance on pain medication - has changed, and what, if any, impact his reliance on pain medication, has on Claimant's ability to work as a paramedic, we will not address other arguments.

CONCLUSION AND ORDER

The October 30, 2015 Compensation Order on Remand is VACATED and REMANDED. The ALJ is ordered to address whether Claimants condition, specifically his reliance on pain medication, has changed since the October 31, 2011 order, and what if any, impact this pain medication has on his ability to work as a paramedic.