

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR



F. THOMAS LUPARELLO
ACTING DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 14-004

**JEFFREY BOWSER,
Claimant–Petitioner,**

v.

**CLARK CONSTRUCTION and
SPECIALTY RISK MANAGEMENT SERVICES,
Employer/Insurer-Respondent.**

Appeal from a December 13, 2013 Compensation Order by
Administrative Law Judge Karen R. Calmeise
AHD No. 11-046B, OWC No. 669729

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2014 AUG 14 PM 11 56

Justin M. Beall for the Petitioner
Sarah Burton for the Respondent

Before MELISSA LIN JONES, HENRY W. MCCOY, and JEFFREY P. RUSSELL, *Administrative Appeals Judges.*

MELISSA LIN JONES for the Compensation Review Board, JEFFREY P. RUSSELL *dissenting.*

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

Mr. Jeffrey Bowser was a pile driver for Clark Construction (“Clark”) when he injured his head, neck, left shoulder, and left arm on April 28, 2010; the boat Mr. Bowser was working on in the tidal basin lurched, and he hit the back seat. In a Compensation Order dated June 24, 2011 an administrative law judge (“ALJ”) granted Mr. Bowser temporary total disability benefits from February 3, 2011 to the date of the formal hearing and continuing as well as medical treatment;¹ the Compensation Review Board (“CRB”) affirmed this Compensation Order.²

¹ *Bowser v. Clark Construction Group*, AHD No 11-046, OWC No. 669729 (June 24, 2011).

² *Bowser v. Clark Construction Group, LLC*, CRB No. 11-068, AHD No. 11-046, OWC No. 669729 (February 22, 2012).

On January 18, 2013, the parties attended a second formal hearing; Clark sought to modify the June 2011 Compensation Order and to terminate medical treatment including psychiatric care and temporary total disability benefits. Mr. Bowser requested ongoing medical treatment, authorization for psychiatric treatment, and change of his vocational rehabilitation counselor. In a December 13, 2013 Compensation Order, another ALJ ruled Mr. Bowser's head, neck, and back injuries had resolved. This ALJ concluded Clark presented evidence to substantiate terminating Mr. Bowser's medical benefits and wage loss benefits.³

Mr. Bowser disagrees with the December 2013 Compensation Order, and on appeal, Mr. Bowser argues there is no change of condition to justify modification of the June 24, 2011 Compensation Order. Specifically, Mr. Bowser asserts

Employer has offered no medical evidence or opinions that were not offered and considered and rejected by Judge Leslie in 2011 and subsequently affirmed by the CRB. Indeed, the instant Compensation Order fails to articulate any change of condition in disability and/or physical condition offered by Employer's examining doctors that would serve as a proper basis for modification because no such change in condition simply does not exist. [*sic*] [Footnote omitted.] Therefore, there is no evidence in the record upon which the ALJ could have relied in rendering her opinion that a change in condition has taken place and subsequent modification of the 2011 Compensation Order.^[4]

Mr. Bowser also argues the ALJ improperly rejected the treating physicians' opinions. Because, in Mr. Bowser's opinion, Clark did not demonstrate a change in his condition, he requests the CRB reverse the December 13, 2013 Compensation Order.

In opposition, Clark asserts the medical reports based upon examinations conducted after the June 2011 Compensation Order issued suffice to meet its burden to prove a change in Mr. Bowser's condition. Clark contends the December 13, 2013 Compensation Order is supported by substantial evidence and is in accordance with the law.⁵

ISSUES ON APPEAL

1. Did Clark present sufficient evidence to demonstrate a change of condition warranting termination of Mr. Bowser's medical and wage loss benefits?

³ *Bowser v. Clark Construction*, AHD No. 11-046B, OWC No. 669729 (December 13, 2013).

⁴ Claimant-Respondent's [*sic*] Memorandum of Points and Authorities in Support of Application for Review of December 13, 2013 Compensation Order, p. 6.

⁵ Although the ALJ declined to address the issues of voluntary limitation of income and failure to cooperate with vocational rehabilitation because Mr. Bowser no longer has a work-related disability, Clark has not appealed any issues regarding these defenses.

2. Did the ALJ improperly reject Mr. Bowser's treating physicians' opinions?

ANALYSIS⁶

Because Clark was paying Mr. Bowser ongoing benefits pursuant to the June 24, 2011 Compensation Order, the right to an evidentiary hearing to modify that prior Compensation Order is triggered only if there has been a threshold showing that there is reason to believe a change of condition has occurred.⁷ At this stage, the threshold is minimal.⁸

In essence, Mr. Bowser argues that because Clark must prove a change of conditions by "new evidence which directly addresses the alleged change of conditions,"⁹ Dr. Louis Levitt's opinions are not sufficient to meet that burden because Dr. Levitt reached the same diagnosis and the same recommendation to return to work in his November 1, 2011 and May 29, 2012 reports that he had reached in his reports issued prior to the 2011 Compensation Order.

Prior to the 2011 Compensation Order, Dr. Levitt opined Mr. Bowser was at maximum medical improvement and was capable of returning to work without limitation; these opinions were rendered based upon the medical records generated, diagnostic tests performed, and physical examinations conducted before issuance of the 2011 Compensation Order. After issuance of the 2011 Compensation Order, Dr. Levitt again opined Mr. Bowser needs no further treatment and is able to return to work immediately without modification of his work activities; however, these opinions are based upon

- A normal examination performed on November 1, 2011 including a lack of measurable, objective symptoms;
- Treatment by a pain management specialist who performed occipital trigger point injections;

⁶ The scope of review by the CRB is limited to making a determination as to whether the factual findings of the appealed 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. Section 32-1521.01(d)(2)(A) of the District of Columbia Workers' Compensation Act of 1979, D.C. Code, as amended, §32-1501 *et seq.* Consistent with this standard of review, the CRB is constrained to uphold a Compensation Order 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. *Marriott International v. DOES*, 834 A.2d 882, 885 (D.C. 2003).

⁷ *Washington Metropolitan Area Transit Authority v. DOES*, 703 A.2d 1225 (D.C. 1997); *Snipes v. DOES*, 542 A.2d 832 (D.C. 1988).

⁸ *Walden v. DOES*, 759 A.2d 186 (D.C. 2000).

Instead of conducting a *Snipes* hearing, the ALJ held Clark to the evidentiary standard of a change of condition has occurred rather than a reason to believe a change of condition has occurred. Because Clark satisfied a higher burden, the ALJ's error is harmless.

⁹ Section 32-1524(b) of the Act.

- Ongoing active treatment during the 8 months since the prior independent medical examination driven by subjective complaints “without clear evidence of any objective measure of pathology;”
- Continued use of multiple medications including muscle relaxants, non-steroidal anti-inflammatory medicine, Gabapentin, and narcotics;
- A normal examination performed on May 29, 2012 including a lack of measurable, objective symptoms;
- Physical restrictions by his current treating physician as utilized in the course of vocational rehabilitation;
- No evidence by exam or diagnostic testing of any structural injury to his spine or his legs;
- No evidence of ongoing cervical radiculopathy or active lumbar process; and
- No findings consistent with carpal tunnel syndrome.¹⁰

Similarly, Mr. Bowser argues Dr. Gary London’s opinions remain unchanged from before the 2011 Compensation Order and cannot serve as a basis for modification of that Compensation Order. Prior to issuance of the 2011 Compensation Order, Dr. London had opined Mr. Bowser

has no continuing injury causally related to anything that occurred on 4/28/2010. He requires no further medical care in my opinion. He should be encouraged to feel normal, do cervical exercises, and use over the counter medications. Pain management is not indicated. Continued treatment for headaches would be unrelated to anything that occurred on 4/28/2010. He reached maximum medical improvement long ago.

I strongly agree with the evaluations of Dr. Lewis [*sic*] Levitt, and to a reasonable degree of medical probability state that JB can return to his normal and usual employment as a Pile Driver without restriction.^[11]

Following issuance of the 2011 Compensation Order, in December 2011 Dr. London opined Mr. Bowser requires no additional medical treatment and is able to return to work; however, these opinions are based upon

¹⁰ Employer’s Exhibit 6.

¹¹ *Id.*

- New records from Dr. Neil A. Green dated May 12, 2011, August 5, 2011, September 6, 2011, and October 4, 2011 that do not set forth therapeutic changes or noteworthy treatment;
- Records from Dr. Sharma dated August 3, 2011 and September 6, 2011 expressing a normal neurological examination;
- A new report from Dr. Roger Denny dated August 26, 2011 finding normal neurological examination;
- Dr. Levitt's November 1, 2011 independent medical examination report; and
- A physical examination performed on December 5, 2011 which was essentially devoid of any new, objective symptoms.¹²

In June 2012, Dr. London's opinion was based upon another thorough neurological and musculoskeletal examination, an ongoing lack of objective findings, and additional records from Dr. Green, Dr. Sharma, and Dr. Levitt.¹³

Although Dr. Levitt and Dr. London reach the same conclusions in 2011 and 2012 that they had reached in their earlier reports, those conclusions are based upon new information and are sufficient to meet Clark's burden of proving a change of conditions. It is not the conclusion alone that is dispositive of whether or not the evidence qualifies as "new;" it is the foundation of that conclusion that is determinative of whether or not the evidence qualifies as "new."

Regarding the presumption of compensability, pursuant to §32-1521(1) of the Act, a claimant may be entitled to a presumption of compensability ("Presumption").¹⁴ In order to benefit from the Presumption, the claimant initially must show some evidence of a disability and the existence of a work-related event, activity, or requirement which has the potential to cause or to contribute to the disability.¹⁵ "[O]nce an employee offers evidence demonstrating that an injury was potentially caused or aggravated by work-related activity, a presumption arises that the injury is work-related and therefore compensable under the Act."¹⁶

¹² Employer's Exhibit 5.

¹³ *Id.*

¹⁴ Section 32-1521(1) of the Act states, "In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of evidence to the contrary: (1) That the claim comes within the provisions of this chapter."

¹⁵ *Ferreira v. DOES*, 531 A.2d 651 (D.C. 1987).

¹⁶ *Washington Hospital Center v. DOES*, 744 A.2d 992, 996 (D.C. 2000).

In this case, there is no dispute that Mr. Bowser's head, neck, left shoulder, and left arm injuries were compensable; that issue was resolved in the 2011 Compensation Order. At contention before ALJ Calmeise was whether those injuries have resolved and whether Mr. Bowser is capable of returning to work.

Mr. Bowser now argues to the CRB that he "seeks medical benefits in the form of continued treatment with his treating physicians [including] EMG testing as ordered by Dr. Matthew Ammerman on July 21, 2012 (CE 6, pg. 3), cervical epidural block at C7/T1 also ordered by Dr. Matthew Ammerman on June 21, 2012 (CE 6, Pg. 3; HT 55:4-7); pain management as ordered by Dr. Matthew Ammerman on September 30, 2010 (CE 6, Pg. 2) and Phillips & Green on April 19, 2012 (CE 3, Pg. 4); Dr. Frederic Salter on July 23, 2012 (CE 3, pg. 2); Dr. Neil Green on February 23, 2012 (CE 6, pg. 5); Neil Green on January 12, 2012 (CE 6, pg. 6) and specialized psychiatric care; and continued treatment with Dr. Sharma. previously [*sic*] ordered by Judge Leslie (C.O. 6/24/11) and refused by Employer to date."¹⁷ While Mr. Bowser may have been entitled to this treatment if Clark had not succeeded in its burden to prove grounds for modification of the 2011 Compensation Order, Clark was successful, and the essence of Mr. Bowser's argument regarding Clark's rebutting the Presumption is the same as his argument that Clark did not present sufficient evidence to prove a change of conditions, an argument disposed of above.

The remainder of his argument on this issue also is not persuasive. Mr. Bowser argues

[t]he evidence in the medical records and from Claimant at the Formal Hearing of January 18, 2013 indicates, unquestionably, that Claimant remains actively under the care of Drs. Ammerman[,] Phillips & Green[,] and Sharma, all of whom continue to treat him for his physical injuries related to his April 28, 2010 accident. Moreover, not one of these doctors have [*sic*] placed Claimant at Maximum Medical Improvement (MMI). Instead, their records indicate that further treatment in the form of additional diagnostic testing, medications, pain management, and other modalities are recommended in their professional opinions for Claimant at this time, including but not limited to, pain management, prescription of Vicodin by Dr. Sharma, continued treatment with Drs. Sharma, Berry-Edwards and Phillips & Green[.] Furthermore, as stated above, the IME's relied upon by Employer contain no new opinions other than those the Employer relied upon unsuccessfully at [the] Formal Hearing in 2011 that resulted in the previous Compensation Order. These IME reports should not be given equal weight (if any) when juxtaposed with the updated records of Drs. Sharma, Ammerman[,] and Phillips & Green, who all recommend continue[d] care on the

¹⁷ Claimant-Respondent's [*sic*] Memorandum of Points and Authorities in Support of Application for Review of December 13, 2013 Compensation Order, pp. 10-11.

basis of the treatment of Claimant, and all of which related this care to Claimant's workplace accident. (CE Nos. 3,5,7)^[18]

However, the CRB lacks authority to reweigh the evidence.¹⁹

Similarly, Mr. Bowser did not raise any specific arguments regarding the presumption of compensability. His focus remains on proof of a change of conditions; he contends he is entitled to ongoing psychiatric care based on Dr. Janice Berry Edwards' opinion because

Employer relies solely on the IME performed by Dr. Brian Schulman an for the reasons stated above, her opinions, which are the result of extensive care and treatment of the Claimant, should have been accepted over those of an IME doctor.^[20]

As before, the CRB lacks authority to reweigh the evidence, and Mr. Bowser raises no legal basis for overturning the ALJ's decision.

Furthermore, Mr. Bowser's argument that in addition to his medical records his testimony proves ongoing care is reasonable and necessary is rejected. When the issue for resolution is reasonableness and necessity of medical treatment, the utilization review process is mandatory.²¹ Once a utilization review report is submitted into evidence, that report is not dispositive but is entitled to equal footing with an opinion rendered by a treating physician.²² The ALJ

is free to consider the medical evidence as a whole on the question, and is not bound by the outcome of the UR report. The issue should be decided based upon the ALJ's weighing of the competing medical evidence and [the ALJ] is free to accept either the opinion of treating physician who recommends the treatment, or the opinion of the UR report, without the need to apply a treating physician preference.^[23]

¹⁸ *Id.* at 11.

¹⁹ *Marriott, supra.*

²⁰ Claimant-Respondent's [*sic*] Memorandum of Points and Authorities in Support of Application for Review of December 13, 2013 Compensation Order, p. 15.

²¹ See *Gonzalez v. UNICCO Service Company*, CRB No. 07-005, AHD No. 06-155, OWC No. 604331 (February 21, 2007).

²² See *Children's National Medical Center v. DOES*, 992 A.2d 403 (D.C. 2010).

²³ *Green v. Washington Hospital Center*, CRB No. 08-208, AHD No. 07-130, OWC No. 628552 (June 17, 2009).

Regardless of which opinion the ALJ gives greater weight, it is incumbent upon the ALJ to explain why one opinion is chosen over the other.²⁴ In Mr. Bowser's case, reasonableness and necessity of ongoing treatment was not at issue and could not have been at issue because neither party submitted a utilization review report.

In addition, Mr. Bowser's argument that the ALJ was not entitled to find his testimony not credible because a different ALJ found him credible in a prior Compensation Order is of no merit. Credibility determinations, like all other findings of fact, must be supported by substantial evidence in the record when reviewed as a whole.²⁵ When assessing Mr. Bowser's credibility, this ALJ determined he is not credible:

Claimant's testimony with regard to the discomfort and pain resulting from the head and neck injury is inconsistent with the medical records. Furthermore, I find Claimant's demeanor at the Formal Hearing to be deliberately evasive and contradictory. He testified, before the accidental injury to his head, he did not have reading or writing skills but he had friends to help him find his way while driving and he had friends in the union who have helped him when needed while working on jobs. However, at the formal hearing Claimant claimed he did not have anyone to help him follow up on job leads while working with the vocational rehabilitation specialist.^[26]

* * *

Claimant's subjective complaints of debilitating head pain and dizziness [are] not supported by his demeanor, affect, or behavior.

Over the course of three years of medical treatment, Claimant has consistently complained of high level of headache pain (6 to 8 out of a pain rate of 10) during the course of treatment with Dr. Sharma. Claimant reported his headache symptoms occurred daily, and consistently, he is in constant pain, and he claimed the medication only provided relief for several hours. (EE 5, HT 59-60) Claimant also complained that he was unable to sleep more than 2 hours at a time and that the headaches were constant. He testified the "headaches don't stop".(HT 60)

²⁴ *Haregewoin v. Loews Washington Hotel*, CRB No. 08-068, AHD No. 07-041A, OWC No. 603483 (February 19, 2008).

The CRB's Decision and Order transposes the claimant's name; the claimant's name is Haregewoin Desta, not Desta Haregewoin. *Desta v. Loew's Washington Hotel*, AHD No. 07-041A, OWC No. 603483 (December 7, 2007).

²⁵ See *Davis v. Western Union Telegraph*, Dir. Dkt. 88-84, H&AS No. 87-751, OWC No. 098216 (March 4, 1992).

²⁶ *Bowser v. Clark Construction*, AHD No. 11-046B, OWC No. 669729 (December 13, 2013), p. 2.

Although Claimant testified at the Formal Hearing that his headaches were constant and did not stop, he did not appear to be in discomfort during the two (2) hour Formal Hearing. (HT 60) Claimant reported to the treating neurologist that his head and neck pain was consistently at a 6 to 8 out of 10 level and he was unsure that he could perform a light duty flagging job with employer, however, in late 2011 Claimant underwent 40 hour welding certification process and he was able to update his welding certificate in May 2012. (EE 10 pg. 35)

However, the medical reports do not reflect that the Claimant appeared distressed or in pain from head pain or dizziness at any of the twenty[-]one (21) medical examination visits with the neurologist in 2011 and 2012. (EE pg. 16-58) Due to the absence of any noted observation of Claimant's head and neck pain by the treating physicians, I do not give great weight to Claimant's testimonial evidence that he continued to suffer head, neck, and shoulder pain after a period of treatment for his April 2010 work injury.^[27]

An ALJ's credibility determinations often are entitled to deference,²⁸ 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.²⁹

The ALJ concluded Mr. Bowser's compensable injuries have healed. Nonetheless, Mr. Bowser argues that his treating physicians' opinions should be found to be persuasive on the issue of the nature and extent of his disability (by which he means his entitlement to ongoing medical care):

First, Claimant seeks medical benefits in the form of continued treatment with his treating physicians [including] EMG testing as ordered by Dr. Matthew Ammerman on July 21, 2012 (CE 6, pg. 3), cervical epidural block at C7/T1 also ordered by Dr. Matthew Ammerman on June 21, 2012 (CE 6, Pg. 3; HT 55:4-7); pain management as ordered by Dr. Matthew Ammerman on September 30, 2010 (CE 6, Pg. 2) and Phillips & Green on April 19, 2012 (CE 3, Pg. 4); Dr. Frederic Salter on July 23, 2012 (CE 3, pg. 2); Dr. Neil Green on February 23, 2012 (CE 6, pg. 5); Neil Green on January 12, 2012 (CE 6, pg. 6) and specialized psychiatric

²⁷ *Bowser v. Clark Construction*, AHD No. 11-046B, OWC No. 669729 (December 13, 2013), p. 6.

²⁸ *Dell v. DOES*, 499 A.2d 102, 106 (D.C. 1985).

²⁹ *Torres v. Westin Hotels Washington, D.C.*, CRB No. 09-072, AHD No. 05-088B, OWC No. 590860 (May 3, 2010).

care; and continued treatment with Dr. Sharma. previously [sic] ordered by Judge Leslie (C.O. 6/24/11) and refused by Employer to date.

The evidence in the medical records and from Claimant at the Formal Hearing of January 18, 2013 indicates, unquestionably, that Claimant remains actively under the care of Drs. Ammerman[,] Phillips & Green[,] and Sharma, all of whom continue to treat him for his physical injuries related to his April 28, 2010 accident. Moreover, not one of these doctors have [sic] placed Claimant at Maximum Medical Improvement (MMI). Instead, their records indicate that further treatment in the form of additional diagnostic testing, medications, pain management, and other modalities are recommended in their professional opinions for Claimant at this time, including but not limited to, pain management, prescription of Vicodin by Dr. Sharma, continued treatment with Drs. Sharma, Berry-Edwards and Phillips & Green[.] Furthermore, as stated above, the IME's relied upon by Employer contain no new opinions other than those the Employer relied upon unsuccessfully at [the] Formal Hearing in 2011 that resulted in the previous Compensation Order. These IME reports should not be given equal weight (if any) when juxtaposed with the updated records of Drs. Sharma, Ammerman[,] and Phillips & Green, who all recommend continue[d] care on the basis of the treatment of Claimant, and all of which related this care to Claimant's workplace accident. (CE Nos. 3,5,7)^[30]

Given the ALJ's resolution of the foundational issue, this argument is moot. Even so, the ALJ recognized the treating physician preference but rejected those opinions in favor of the independent medical examination physicians' opinions because

[t]he medical records show that the treating physicians based their assessment of claimant's physical condition primarily upon claimant's subjective complaints of pain. Claimant has undergone diagnostic testing for his neck, head, and left shoulder complaints which resulted in no objective findings of injury to his head, neck, or cervical spine. Furthermore, the medical treatment for his head, neck and shoulder complaints have changed in the three years since the Claimant was injured.^[31]

Although the issues listed in the Compensation Order do not delineate the causal relationship between Mr. Bowser's compensable accident and any injury other than a psychological injury, he ALJ clearly went on to address all of the physical injuries Mr. Bowser alleged:

³⁰ Claimant-Respondent's [sic] Memorandum of Points and Authorities in Support of Application for Review of December 13, 2013 Compensation Order, pp. 10-11.

³¹ *Bowser v. Clark Construction*, AHD No. 11-046B, OWC No. 669729 (December 13, 2013), p. 7.

Over the course of Claimant's medical treatment, the initial work injury, a blow to the back of the head, has evolved to encompass complaints of left arm pain, lumbar pain, and lower extremity complaints. (EE 3 generally) [Footnote omitted.] Also, without explanation, the orthopedist's examinations evolved from treatment for injury to the base of the head and complaints of neck discomfort, to a diagnosis and treatment of radiating left upper extremity complaints. (EE 3 pg. 20)

Claimant's complaints of radiating left arm pain were confirmed by a June 2010 EMG study as indicative of carpal tunnel syndrome in the left upper extremity which accounts for a significant degree of his left upper extremity complaints of weakness, numbness and pain. Dr. Sharma's clinical assessments reference Claimant's left arm and left lower extremity condition (CE 5) However, a review of the neurologist reports over the course of treatment show that Dr. Sharma does not connect the left upper extremity carpal tunnel condition to the fall in the April 2010 boat incident. (CE 5)

Dr. Sharma repeatedly notes in his medical reports that the headaches and cervical lumbar issues are trauma induced (indicating the concerns resulted from the blow to Claimant's neck) however, the left arm issues were not noted to be trauma related. (Emphasis added)

Assessment

1. Post traumatic headaches persisting.
2. Post traumatic cervical thoracic and lumbar sacral strain persisting.
3. Pain and paresthesia of the Lt. upper and Lt. lower extremities.
(CE 5, pgs. 15-57)

As far as treatment was prescribed, Dr. Sharma noted the Claimant's subjective complaints of 8/10 intensity headache pain at each of the medical examinations from May 2010 through November 2012, however the neurological notations showed no objective findings and "no deficits elicited". (CE 5) Dr. Sharma continued to recommend Claimant continue with "prescribe [*sic*] analgesic pain medications and prophylaxis medications". (CE 5, medical reports Plan notations) The prescribed medication did not result in any improvement in Claimant's complaints and despite Claimant's constant complaints of intense

headache pain, Dr. Sharma continued with no change in the medication protocol. (CE 5, medical reports Plan notations)

The April 2010 head trauma did not result in an ongoing disabling condition because the recommended medical treatment was not prescribed to address the claimed work injury. Claimant was referred for pain management treatment with Dr. Matthew D. Ammerman, neurologist, who examined the Claimant only on two occasions, September 20, 2010 and two years later, on June 21, 2012. The June 2012 medical examination report authored by Dr. Ammerman reflects that the prescribed additional diagnostic tests are to address Claimant's ongoing carpal tunnel condition. Noting the Claimant's nerve test results and complaints of cervical spine tenderness and left arm numbness and tingling Dr. Ammerman ordered the repeat tests due to the left arm and left hand symptoms. (EE 6 pg. 30)

Claimant argues that the requested medical treatment as recommended by Dr. Ammerman, to undergo a repeat MRI and EMG test[] was to address the April 2010 head injury complaints. However, as referenced above, Dr. Ammerman recommended the EMG test to assess Claimant's ongoing non[-]work related carpal tunnel condition. The diagnostic tests were not recommended for Claimant's head or neck complaints.

Having found Claimant's medical evidence to be deficient for the above stated reasons, I find the greater weight should be given to the medical opinions expressed by Employer[']s medical experts to conclude that the Claimant can return to his regular work duties with no restrictions and that a modification of benefits is warranted. (EE 5, pg. 103 and EE 6, pg. 113). The Employer[']s medical opinions that the Claimant has reached MMI and that his head, neck and back complaints are not related to the April 2010 work injury, are more consistent, and comprehensive, and therefore, more persuasive. The Employer[']s IME and specialist opinion coupled with the other record evidence supports Employer's request to terminate Claimant's ongoing wage replacement benefits.^[32]

Although there is a preference for the opinion of a treating physician, that preference is not absolute, and when there are specific reasons for rejecting the opinion of a treating physician, the opinion of another physician may be given greater weight.³³ The ALJ gave specific reasons for

³² Claimant-Respondent's [sic] Memorandum of Points and Authorities in Support of Application for Review of December 13, 2013 Compensation Order, pp. 7-8.

³³ See *Butler v. Boatman & Magnani*, H&AS No. 84-348, OWC No. 044699 (Remand Order December 31, 1986) citing *Murray v. Heckler*, 624 F. Supp. 1156 (D.C. 1986).

rejecting the opinions of Mr. Bowser's treating physicians, and those reasons are supported by substantial evidence in the record; therefore, the CRB is without authority to reweigh the evidence in Mr. Bowser's favor.³⁴

Finally, Mr. Bowser asserts the ALJ erred in not ruling upon his request to change vocational rehabilitation counselors. Pursuant to §32-1507(a) of the Act, employers may be responsible for providing vocational rehabilitation to claimants who are unable to return to pre-injury employment:

The employer shall furnish such medical, surgical, vocational rehabilitation services, including necessary travel expenses and other attendance or treatment, nurse and hospital service, medicine, crutches, false teeth or the repair thereof, eye glasses or the repair thereof, artificial or any prosthetic appliance for such period as the nature of the injury or the process of recovery may require. The employer shall furnish such additional payment as the Mayor may determine is necessary for the maintenance of an employee undergoing vocational rehabilitation, not to exceed \$50 a week.

In this case, the ALJ credited Dr. Levitt's and Dr. London's opinions that Mr. Bowser is capable of returning to his pre-injury employment without limitations; therefore, vocational rehabilitation is not appropriate and was not awarded.

CONCLUSION AND ORDER

Clark presented sufficient evidence to demonstrate a change of conditions warranting termination of Mr. Bowser's medical and wage loss benefits, and the ALJ did not improperly reject Mr. Bowser's treating physicians' opinions. The December 13, 2013 Compensation Order is supported by substantial evidence, is in accordance with the law, and is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:



MELISSA LIN JONES
Administrative Appeals Judge

August 14, 2014

DATE

³⁴ *Marriott, supra.*

JEFFREY P. RUSSELL *dissenting*:

For the following reasons I must respectfully dissent from the majority decision.

The District of Columbia Court of Appeals (DCCA) has written:

Generally, the burden is on the party asserting that a change of circumstances warrants modification to prove the change. See *Nader v. de Toledano*, 408 A.2d 31, 48 (D.C. 1979), cert. denied, 444 U.S. 1078, 62 L. Ed. 2d 761, 100 S. Ct. 1028 (1980). In the context of workers' compensation law, the burden of showing a change of conditions has also been held to be on the party claiming the change, whether a claimant or employer. 8 Larson, *Larson's Workers' Compensation Law*, § 81.33 (c) at 15-1194.32; see also e.g., *Dillon v. Workmen's Compensation Appeal Bd.*, 536 Pa. 490, 640 A.2d 386, 390 (1994); *Ziegler v. Department of Labor & Indus.*, 14 Wash. App. 829, 545 P.2d 558 (1976). The burden may shift once the moving party establishes his case. 8 Larson, *supra*, § 81.33 (c) at 15-1194.42.

Washington Metropolitan Area Transit Authority, supra 703 A.2d 1225 at 1231 (*WMATA*).

Thus, although the ALJ appears to have recognized that the burden is upon Respondent to show that a change has occurred warranting a discontinuation of wage benefits, the only evidence presented of that alleged change were the opinions of the two original IME physicians. Those opinions, however, are identical to the opinions that they expressed and which were rejected by the prior ALJ in CO 1. That is, they merely repeat what they had stated at the earlier proceeding: Dr. Levitt and Dr. London believe now and have believed since prior to the prior hearing that Petitioner's work injuries were minor in nature and any disabling impact that they may have once had has resolved since prior to the earlier hearing. This is not evidence of a change of conditions. Rather, it is a mere repetition of the same basis for opposing the disability claim as was previously rejected.

While the majority cites numerous medical evaluations and test results that have occurred since the prior formal hearing, no one has stated an opinion on this record that I have seen that the condition has changed.

Neither IME physician's opinion provides any "reason to believe" that Petitioner's physical condition has improved, and thus the ALJ has identified no record evidence of any such change in Petitioner's physical capacity for work since the earlier formal hearing. In other words, on this record, at least from a physical perspective, Respondent has failed to meet either its burden under *Snipes v. DOES*, 542 A.2d 832, (D.C. 1988) or under *WMATA*.

It is noteworthy that in *Snipes*, in affirming the finding of the hearing examiner that there had been no change in condition shown, the court wrote:

In part, the hearing examiner rejected the medical reports on the ground they merely reasserted medical conclusions rejected in the prior hearing. Snipes argues that this violated the stricture of § 36-324 (b) [now § 32-1524 (b)] that the review should be limited ‘solely to new evidence.’ Even assuming that that subsection applies to the preliminary step of determining whether there is reason to believe a change of conditions has occurred, it seems evident that in this determination a hearing examiner must necessarily take into account what came before in determining whether a ‘change’ has occurred.

Snipes, supra at 835.

Thus, the DCCA affirmed the proposition that a mere recitation of the previously proffered but rejected medical opinions does not amount to “some evidence” of a change in conditions. If it fails to meet that limited standard, it cannot meet the greater preponderance of the evidence standard. Thus, the repetition by Drs. London and Levitt of their previous expressed opinions fail to support the ALJ’s decision to modify CO 1. The ALJ’s conclusion that “I find the Claimant has not sustained his burden of proving by a preponderance of the evidence he continues to be disabled from performing his pre-injury work to support his claim for continuing TTD [temporary total disability] benefits, including payment of medical expenses” represents a misapplication of the proper burden of proof.

I also note that the ALJ erred further in extending the modification to include a discontinuation of medical benefits. Modifications apply only to “the fact or degree of disability or the amount of compensation payable”, and not to claims for medical benefits.

On this record and considering the contents of the CO 2, there is but one conclusion that can be reached: the modification of the prior compensation order, CO 1, to permit discontinuation of wage loss benefits and medical care for the physical injuries, is unsupported by substantial evidence and is not in accordance with the law.

I note further that CO 2 explicitly rejects claims for carpal tunnel syndrome treatment on the grounds that these complaints are for a condition “which is not related to the April 2009 work injury”. CO 2, page 6 – 7. However, this finding, and the ALJ’s analysis, should also be vacated for two reasons. First, the only causal relationship issue raised in CO 2 is denominated as Issue 2, “Is the requested psychiatric treatment medically causally related to the work injury?”

First, causal relationship of any other medical claims was not before the ALJ, and she was therefore without authority to consider it.

Second, if the issue had been properly before the ALJ, D.C. Code §32-1521 (1) provides claimants with a rebuttable presumption that the claim for workers’ compensation benefits comes within the provisions of the Act. This presumption exists “to effectuate the humanitarian purposes” of the compensation statute, and evidences a strong legislative policy favoring awards in close or arguable cases. *Parodi v. DOES*, 560 A.2d 524 (D.C. 1989). *See also Spartin v.*

DOES, 584 A.2d 564 (D.C. 1990); and *Muller v. Lanham Company*, Dir. Dkt. 86-1, H&AS No. 85-36, OWC No. 0700456 (March 15, 1988).

This presumption extends not only to the occurrence of an accidental work place injury, but also to the medical causal relationship between an alleged disability and the accidental injury. *Whittaker v. DOES*, 668 A.2d 844 (D.C. 1995).

CO 2 contains no reference to the presumption or analysis of the claim for medical care for carpal tunnel injuries, in light of that presumption.

In any event, the finding in CO 2 to the effect that the requested medical care for the non-psychiatric injury claim is not causally related to the work injury, is vacated and reversed.

Regarding the psychological injury claims, CO 2 is likewise devoid of any such analysis or consideration. The presumption of compensability is not discussed at all, nor are any of the cases currently governing this somewhat complex field of analysis. See *McCamey v. D.C. DOES*, 947 A.2d 1191 (D.C. 2008) (en banc). CO 2 does not address whether the psychological claims are mental-mental or physical-mental, and does not discuss at any length or detail how they do or do not impact Petitioner's work capacity. For these reasons, I would vacate the denial of the claims raised by Petitioner for provision of medical care for psychiatric injury and/or disability, and remand for further consideration thereof.

Lastly, because the ALJ did not reach the failure to cooperate with vocational rehabilitation issue, the matter should be remanded for further consideration, with us noting that the Act does not contain any provision for ordering a claimant to participate in that process. Rather, it imposes a set of sanctions for an unreasonable failure to cooperate with the process.

The modification by termination of the award of temporary total disability benefits contained in the Compensation Order of June 24, 2011 should be vacated and reversed, and the matter remanded with instructions that the ALJ deny the request to modify Petitioner's disability status, and further consider the issue failure to cooperate with vocational rehabilitation. The denial of medical care for physical injuries ought to be vacated and reversed, and the matter remanded for entry of an award of continuing causally related medical care. The denial of medical care in connection with the claimed psychiatric or psychological injuries should be vacated and the matter remanded for further consideration of those claims.

/s/ Jeffrey P. Russell

Jeffrey P. Russell

Administrative Appeals Judge