

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR



F. THOMAS LUPARELLO
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 14-042

JEREMIAH ABU-BAKR,
Claimant-Respondent,

v.

DISTRICT OF COLUMBIA DEPARTMENT OF PUBLIC WORKS,
Self-Insured Employer--Petitioner

Appeal of an March 19, 2014 Order by
Administrative Law Judge Fred D. Carney, Jr.
AHD No. PBL 11-038, DCP No. 30120819055-0001

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2014 DEC 10 AM 11 31

Salvatore Zambri for the Respondent
Eric Adam Huang for the Petitioner

Before: HEATHER C. LESLIE, MELISSA LIN JONES, *Administrative Appeals Judges* and LAWRENCE D. TARR, *Chief Administrative Appeals Judge*

HEATHER C. LESLIE, *Administrative Appeals Judge*, for the Compensation Review Board,
MELISSA LIN JONES *concurring*.

DECISION AND REMAND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

Claimant, a Motor Vehicle Operator for the Employer, sustained a work-related injury on March 10, 2010. The Public Sector Workers' Compensation Program accepted the claim and awarded wage loss and medical benefits.

On June 8, 2011 a Notice of Determination (NOD) was sent to Claimant, advising him that benefits were terminated effective July 8, 2011. Claimant requested a Formal Hearing, seeking restoration of benefits from July 8, 2011 to October 14, 2011. The sole issue presented for adjudication was the nature and extent of Claimant's disability. On March 19, 2014, a Compensation Order (CO) was issued granting Claimant's request for disability benefits.

Employer timely appealed the decision. Employer argues first that the ALJ incorrectly utilized the burden shifting scheme in public sector cases. Second, Employer argues the ALJ's findings of fact and conclusions of law are not supported by the substantial evidence in the record.

Claimant opposes the appeal, stating the CO is supported by the substantial evidence in the record and in accordance with the law, thus should be affirmed.

ANALYSIS

The scope of review by the CRB is limited to making a determination as to whether the factual findings of the Order are based upon substantial evidence in the record and whether the legal conclusions drawn from those facts are in accordance with the applicable law.¹ Section 1-623.28(a) of the District of Columbia Government Merit Personnel Act of 1978, as amended, D.C. Code § 1-623.1 *et seq.* (“Act”).

Turning to Employer’s first argument, Employer argues the ALJ erred in the third prong of the burden shifting scheme when the ALJ failed to weigh the Employer’s evidence to support the conclusion that “Employer had not shown by a preponderance of the evidence a change in Claimant’s condition to warrant a termination of Claimant’s benefits.” CO at 8. We agree with Employer that the ALJ did not utilize the correct burden shifting scheme but for different reasons.

In addressing Employer’s first argument, we note that the ALJ stated at the onset,

It is well settled in this jurisdiction that once the WC accepts an injured worker’s claim as compensable, and benefits have been paid, Employer must adduce persuasive evidence sufficient to substantiate a modification or termination of an award of benefits. *See TOOMER v. D.C. Department of Corrections*, CRB No. 05-202, OHA No. PBL No. 98-048A, DCP No. LT5-DOC001603 (May 2, 2005).

CO at 4.

The ALJ then described the second step in the burden shifting scheme as,

Employer has presented of [sic] a change that is adequate to shift the burden to Claimant to prove by a preponderance of the evidence that he was in fact temporarily totally disabled during the claim period.

CO at 6.

The ALJ then concluded, after reviewing the evidence,

Claimant has shown he has the preponderance of the evidence on his side of the controversy.

CO at 7.

¹ “Substantial evidence,” as defined by the District of Columbia Court of Appeals, is such evidence as a reasonable person might accept to support a particular conclusion. *Marriott International v. DOES*, 834 A.2d 882 (D.C. 2003).

The above analysis is in error as the ALJ misapplied burden shifting scheme outlined in our recent decision, *Mahoney v. D.C. Public Schools*, CRB No. 14-067, AHD No. PBL 14-004 (November 12, 2014). In *Mahoney*, the CRB stated the Employer first must produce reliable, probative and current evidence of a change prior to the date benefits were modified or terminated. If the Employer satisfies this burden, then the burden shifts to the Claimant who then must produce substantial evidence that his condition has not changed at this second step in the analysis. Claimant is not required to establish this by a preponderance of the evidence. Thereafter, if Claimant meets his burden, then the employer has the burden of proving by a preponderance of the evidence that claimant's benefits should be modified or terminated.

Stated another way, *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 claimant 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.

Because the ALJ utilized the incorrect burden shifting scheme, we are forced to remand the case. Upon remand, the ALJ is to reanalyze the Claimant's claim for relief, using the above outlined burden shifting scheme.

We also address Employer's second argument, that the ALJ's findings of fact and conclusions of law are not supported by the substantial evidence in the record. Employer, in support of its argument, points to several instances where it alleges the ALJ misstated the evidence in the record. We agree.

First, we agree with the statement outlined by Employer in footnote 1 which states:

The CO suffers from numerous typographical and date errors which require correction to prevent a confusing record:

Throughout the CO, the ALJ dates the workplace injury as either March 10, 2010, March 11, 2010 or on other mistaken occasions as March 10, 2011 and March 11, 2011. The Claimant testified at hearing that the accident occurred on March 10, 2010, and the work hardening reports and FCE report corroborates this. Dr. Levitt noted the date of injury as March 11, 2010. The Employer accepts that the date of injury was March 10, 2010, as long as this date is represented consistently throughout the CO.

In the "Background" section, the ALJ mistakenly writes in two separate places that the Claimant's benefits ended on July 28, 2011, as opposed to the correct date, July 8, 2011. In this same section, the ALJ mistakenly writes that the Notice of Intent to Terminate was issued on July 28, 2011, when it was issued on June 8, 2011. Additionally, the ALJ mistakenly writes that Claimant suffered an injury to his "left ankle" in March 2010, when the injury should correctly be designated as "left knee."

In the "Claim for Relief" section, the ALJ mistakenly writes that the claim for benefits runs from July 28, 2011 to October 14, 2011, instead of the correct date range of July 8, 2011 to October 14, 2011.

In the "Findings of Fact" section, the ALJ notes that Dr. Schreiber release Claimant to return to work with restrictions on August 14, 2011, when the correct date of release was October 14, 2011.

In the "Discussion" section, CO P5 ¶6, when quoting Dr. Mess, the ALJ cites a May 10, 2010 report, when the correct date is May 10, 2011. Additionally, in finding that the employer satisfied its initial burden, the ALJ noted that the Claimant experienced a change in the condition of his "left ankle," when the change of condition should be correctly designated as Claimant's "left knee." The ALJ, in quoting Dr. Mess later, CO P6 ¶4, cites a May 19, 2011 report when the correct date of the report was May 10, 2011.

Employer's argument at 13.

We agree with Employer that the above errors cause confusion and must be addressed. We particularly note that as there is not a May 19, 2011 report by Dr. Mess, this causes confusion as to whether the ALJ meant to rely upon the May 10, 2011 report or the May 24, 2011 when referencing opinions by Dr. Mess. Upon remand, the ALJ is directed to correct the above errors and refer to the correct dates in any finding of facts and conclusions of law.

The Employer also argues several statements made by the ALJ are not supported by the evidence, including:

The May 10, 2011 report of Dr. Mess does not support the conclusion that Dr. Mess related the new injury to the work hardening process, as the ALJ concludes. Employer's argument 22-23.

Dr. Schreiber's August 12, 2011 report does not opine that Claimant was unable to return to work "due to work injury." Employer's argument at 24-25.

As we are remanding the case, we caution the ALJ that and conclusions made by the ALJ determining whether Claimant's wage loss is caused by the work injury, are dependent opinion the experts and evidence submitted. It is settled that ALJ's cannot substitute a legal opinion for a medical opinion.² We point out the above statements as after reviewing those particular reports, we conclude there is some merit to the Employer's argument. We are quick to note this conclusion is not meant to sway the ALJ's ultimate conclusion, only that the ALJ must base any conclusions, even those related to medical opinions, upon the evidence and not just conjecture. Upon remand, the ALJ is to identify where in the record Dr. Mess and Dr. Schrieber opined that the Claimant's work injury caused the claimed disability.

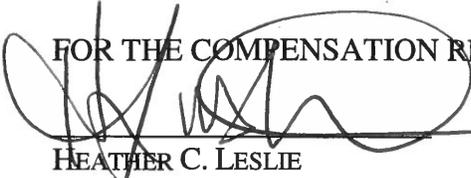
We also caution the ALJ upon remand, that Dr. Levitt's opinion occurred before the re-injury. Any comparisons to other later medical reports by other physicians should be made with this fact in mind in order to avoid any further confusion or appeals.

Until such time as the above issues are addressed and the ALJ has re-evaluated the evidence of record and applied the burden shifting scheme correctly, we decline to address any of Employer's other arguments.

CONCLUSION AND ORDER

The March 19, 2014 Compensation Order is not supported by the substantial evidence in the record and in not accordance with the law. It is VACATED and REMANDED for further consideration in accordance with the discussion above.

FOR THE COMPENSATION REVIEW BOARD:


HEATHER C. LESLIE
Administrative Appeals Judge

December 10, 2014

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,

² See *Seals v. The Bank Fund Staff Federal Credit Union*, CRB No. 09-131, AHD No. 144, OWC No. 653446 (May 20, 2010).

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.^[3]

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 initial burden 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.^[4]

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

³ *Williams v. D.C. Department of Parks and Recreation*, CRB 08-026, AHD No. PBL 07-029, PBL/DCP No. 761013-0001-2005-0007 (Dec. 13, 2007), nt. 2.

⁴ *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).

the ‘burden then shifted back to [the claimant] to provide proof of an employment related impairment following the termination of benefits.’”⁵

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,”⁶ it is important not to overlook that same case also states “The burden may shift once the moving party establishes his case.”⁷ 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.⁸ 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.

⁵ *Mahoney v. DOES*, 953 A.2d 739, 742 (D.C. 2008).

⁶ *Washington Metropolitan Area Transit Authority v. DOES*, 703 A.2d 1225, 1231(DC. 1997).

⁷ *Id.*

⁸ 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.

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.⁹

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 claimant 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.^[10]

⁹ *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.

¹⁰ *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