

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
ACTING DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 14-115

**JOANN VAUGHN,
Claimant-Respondent,**

v.

**DISTRICT OF COLUMBIA CHILD AND FAMILY SERVICES,
Self-Insured Employer-Petitioner.**

Appeal from September 8, 2014 Compensation Order
by Administrative Law Judge Fred D. Carney, Jr.
DCP No. 30110865112-0001, OHA No. PBL13-035A

Lindsay Neinast for the Employer
JoAnn Vaughn for the Claimant

Before MELISSA LIN JONES, LINDA F. JORY, and HEATHER C. LESLIE, *Administrative Appeals Judges.*

MELISSA LIN JONES for the Compensation Review Board.

DECISION AND REMAND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

On August 3, 2011, Ms. JoAnn Vaughn was employed by District of Columbia Child and Family Services ("Employer") as a social worker. On that day, when attempting to separate a child and mother, the mother struck Ms. Vaughn and knocked her to the ground. Ms. Vaughn injured her left eye and her lower back.

Ms. Vaughn's claim was accepted as compensable, but a dispute arose over Ms. Vaughn's entitlement to ongoing wage loss benefits and medical benefits. Following a formal hearing, an administrative law judge ("ALJ") awarded Ms. Vaughn "restoration of her wage loss and medical benefits from date of termination to the present and continuing, authorization for a new car with sensors to aid Claimant in avoiding an accident due to diminished peripheral vision in her left eye and vocational rehabilitation to help Claimant find a job closer to home." *Vaughn v.*

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D.C. Child and Family Services, AHD No. PBL13-035A, DCP No. 30110865112-0001 (September 8, 2014)¹ at p. 2.

On appeal, Employer asserts the ALJ erred by relying on Ms. Vaughn's inability to make her commute from Baltimore to the District of Columbia to find she met her burden of proving she remains entitled to wage loss benefits. Employer also asserts that when inappropriately shifting the burden back to Employer, the ALJ improperly invoked the treating physician preference. Finally, Employer asserts the ALJ exceeded his jurisdiction by ruling on a claim not included in the Notice of Determination. For these reasons, Employer requests the Compensation Review Board ("CRB") reverse the September 8, 2014 Compensation Order.

In response, Ms. Vaughn contends she remains entitled to workers' compensation disability benefits.

ISSUES ON APPEAL

1. Did the ALJ apply the proper burdens of production and persuasion in this public sector case?
2. Did the ALJ err by affording Dr. Sheri Rowan's opinions a preference?
3. Did the ALJ have jurisdiction to award Ms. Vaughn relief that was not denied in the Notice of Determination?

ANALYSIS²

There is no dispute that Employer accepted Ms. Vaughn's claim for eye and back injuries as compensable. In *Mahoney v. D.C. Public Schools*, AHD No. PBL 14-004, ORM/PSWCP No. 76000500012005-008 (November 12, 2014), the CRB recently clarified the burden-shifting scheme to be applied in public sector workers' compensation cases wherein the government has accepted the claim:

¹ Footnote 1 in the Compensation Order inaccurately states a party's appeal rights:

On August 29, 2014, a copy of this decision was mailed to the parties however the Claimant's address was incorrectly listed as 1123 Royster Place Apt. D, Bel Air, Maryland. This order corrects that mistake. The parties' right to seek review begins upon receipt of this order.

Vaughn v. D.C. Child and Family Services, AHD No. PBL13-035A, DCP No. 30110865112-0001 (September 8, 2014), p. 1. It is issuance of a Compensation Order, not receipt of a Compensation Order, that triggers the limitations period for filing an appeal. See § 1-623.28(a) of the D.C. Comprehensive Merit Personnel Act of 1978, as amended. D.C. Code § 1-623.01 *et seq.* ("Act") and 7 DCMR § 135.2.

² 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. See § 1-623.28(a) of the Act. 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).

[O]nce 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.

Id. at pp. 8-9.³

The ALJ did not apply these burdens. Instead, the ALJ placed the initial burden on Employer to "adduce persuasive evidence sufficient to substantiate a modification or termination of the award of benefits [pursuant to *Toomer v. D.C. Department of Corrections*, CRB No. 05-202, OHA No. PBL98-048A, DCP No. LT5-DOC001603 (May 2, 2005).]" *Vaughn, supra*, p. 4. Then, based upon Dr. Jeffrey L. Wexler's opinion, the ALJ shifted the burden to Ms. Vaughn "to present evidence that would constitute a preponderance of the evidence that she continues to suffer with a disability or condition resulting from her employment that causes his [*sic*] wage loss." *Id.*

Because the ALJ applied the incorrect burdens, the law requires the CRB remand this matter, and until the correct burdens have been applied, the CRB declines to address whether a claimant who has been released to full duty without restriction remains disabled if unable to work close to home.

Furthermore, when assessing whether Ms. Vaughn had met the burden he had set, the ALJ credited the medical opinion of Dr. Rowen by affording Dr. Rowan's opinions a treating physician preference, *Vaughn, supra*, at p. 5; however, in *D.C. Public Schools v DOES*, 95 A.3d 1284 (2014), the Court of Appeals reviewed a 2010 statutory amendment repealing the treating physician preference in public sector claims and ruled

[t]he legislative history manifests a clear and unmistakable intent on the part of the Council to accord equal weight to the testimonies of both treating and non-treating physicians in public-sector cases brought under the [Act].

³ Although *Mahoney* was not a unanimous decision, neither it nor its progeny has been appealed; therefore, the majority opinion in that case reflects the current state of the law.

Id. at 1288. Thus, there is no treating physician preference to apply in this case, and again, the law requires the CRB remand this matter.

Finally, the ALJ acknowledged that the Notice of Determination

in this matter does not address the issue of whether or not providing Claimant with a new car or improvements to her current automobile is a reasonable and necessary form of treatment. The burden of production now shifts to Employer to produce evidence that payment of Claimant’s medical expenses until [the Public Sector Workers’ Compensation Program (“PSWCP”)] has made an initial determination that such is not a reasonable and necessary treatment I will decline to so state here.

Vaughn, supra, pp. 5-6. Nonetheless, he granted Ms. Vaughn’s claim for relief including “authorization for a new car with sensors to aid Claimant in avoiding an accident due to diminished peripheral vision in her left eye and vocational rehabilitation to help Claimant find a job closer to home.” *Id.* at p. 2.

The plain language of § 1-623.24(b)(1) of the Act requires “the issuance of a decision” by the PSWCP before an injured worker may request a formal hearing. *Sisney v. D. C. Public Schools*, CRB No. 08-200, AHD No. PBL08-066, DCP No. DCP007970 (July 2, 2012). In other words, the Act is clear that the actual issuance of a Final Determination⁴ is a prerequisite to AHD’s adjudication of the request for benefits. *Id. See also Burney v. D.C. Public Service Commission*, CRB No. 05-220, OHA No. PBL97-016A, DCP No. 345126 (June 1, 2005). Thus, AHD lacks authority to rule upon a request unless the PSWCP has issued a Final Determination denying that request. Again, the law requires we remand this matter.

CONCLUSION AND ORDER

The September 8, 2014 Compensation Order is not supported by substantial evidence, is not in accordance with the law, and is VACATED. Because the ALJ applied the wrong burdens of production and persuasion in this public sector case, applied a treating physician’s preference to Dr. Rowan’s opinions, and awarded Ms. Vaughn relief that was not denied in the Notice of Determination, this matter is REMANDED for further consideration consistent with this Decision and Remand Order.

FOR THE COMPENSATION REVIEW BOARD:

/s/ Melissa Lin Jones

MELISSA LIN JONES

Administrative Appeals Judge

February 24, 2015

DATE

⁴ The phrase “Final Determination” is used generically to refer to any final decision rendered by the PSWCP.