COMPENSATION REVIEW BOARD

CRB No. 13-027

VALERIE JONES
Claimant– Respondent,

v.

UNIVERSITY OF THE DISTRICT OF COLUMBIA,
Employer - Petitioner

Appeal from a February 7, 2013 Compensation Order by
Administrative Law Judge Linda F. Jory
AHD No. PBL06-112B, DCP No. 761039-0001-2003-0003

Kirk D. Williams, Esquire, for the Claimant
Lindsey M. Neinast, Esquire, for the Employer

Before: HEATHER C. LESLIE, JEFFREY RUSSELL and HENRY W. MCCOY, *Administrative Appeals Judges*.

HEATHER C. LESLIE, *Administrative Appeals Judge*, for the Compensation Review Board.

DECISION AND REMAND ORDER

OVERVIEW

This case is before the Compensation Review Board (CRB) on the request for review filed by the Employer - Petitioner (Employer) of the February 7, 2013, Compensation Order (CO) issued by an Administrative Law Judge (ALJ) in the Office of Hearings and Adjudication of the District of Columbia Department of Employment Services (DOES). In that CO, the Claimant's request for reinstatement of disability benefits from August 2, 2012 to the present and continuing was granted.

FACTS OF RECORD AND PROCEDURAL HISTORY

The Claimant was employed as a campus police officer by the Employer. On November 11, 2002, the Claimant injured her knees, elbow, cervical spine and lumbar spine when she fell at work. At the time of the injury, the Claimant was working light duty due to a previous injury.

The Claimant's claim was accepted by the Employer and she received disability and medical benefits. The Claimant received medical care from the Metropolitan Institute of Orthopedics and

Dr. Phillip Omohundro, MD. Ultimately, the Claimant underwent an MRI which revealed a tear of the supraspinatus and infraspinatus and a labral tear. The claimant underwent surgery. The Claimant has not returned to work.

The case was the subject of two prior Compensation Orders issued on May 15, 2008 and on October 22, 2008. In the May 15, 2008 CO, the Claimant's temporary total disability benefits were reinstated as the Claimant was not found to have failed to cooperate with the Employer's functional capacities evaluation. On October 22, 2008, a CO reinstated the Claimant's temporary total disability benefits as the ALJ found the Employer had failed to meet its burden to support the adjustment of benefits based upon a change in wage earning capacity.

Since 2008, the Claimant has continued to treat with Dr. Omohundro. On November 16, 2011, Dr. Omohundro increased the Claimant's lifting maximum to 20 pounds, from 10 pounds previously.

The Claimant underwent multiple additional medical evaluations (AME) at the request of the Employer. On July 6, 2009, the Claimant underwent an AME with Dr. Robert Collins. Dr. Collins took a history of the injury and performed a physical exam. Dr. Collins opined the Claimant was at maximum medical improvement and could return to work under light duty restrictions; no lifting over 20 pounds and no overhead or strenuous work with her right shoulder.

On September 29, 2011 and May 9, 2012, the Claimant underwent an AME with Dr. Jason Brokow. At both visits, Dr. Brokow took a history, performed a physical examination, and reviewed medical records. Dr. Brokow opined that the Claimant's condition and continued need for treatment was related to her "widespread degenerative changes" unrelated to the soft tissue injury of November 14, 2002. Dr. Brokow stated, "all further treatment since that time has been related entirely to preexisting disease that was not aggravated by the injury in question." In Dr. Brokow's opinion, the Claimant was capable of full duty, full time work without restrictions in relation to the November 14, 2002 injury.

Relying on Dr. Brokow's opinion, the Employer terminated the Claimant's workers' compensation benefits effective August 2, 2012. The Claimant timely requested a reconsideration of this decision, which was subsequently denied. The Claimant then requested a Formal Hearing.

A full evidentiary hearing was held on December 19, 2012. At that hearing, the Claimant sought reinstatement of temporary total disability benefits as of August 2, 2012. The Employer contested whether the Claimant's alleged disability remained medically causally related to the work injury and whether the Claimant remains temporarily and totally disabled. A CO was issued on February 7, 2013 which granted the Claimant's claim for relief.

The Employer timely appealed on March 11, 2013. The Employer argues the ALJ erred in placing on the Employer the burden of proving suitable alternative employment in the District of Columbia. The Employer also argues that the substantial evidence indicates that the Claimant no longer has a continuing work related disability.

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. S*ee* D.C. Comprehensive Merit Personnel Act of 1978, as amended, D.C. Official Code § 1-623.01, *et seq.*, at § 1-623.28(a), and *Marriott International v. DOES*, 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

The D.C. Code provides for modification of an award of compensation if the Disability Compensation Program has reason to believe a change of condition has occurred, such as in this case. See *Lynch v. District of Columbia Dept. of Corrections*, DDCC No. 338499; H&AS No. 944-91, March 12, 1992. D.C. Code §1-623.24(d)(1).

> An award may not be modified because of a change to the claimant's condition unless:
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> (A) The disability for which compensation was paid has ceased or lessened;
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> (B) The disabling condition is no longer causally related to the employment;
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> (C) The claimant's condition has changed from a total disability to a partial disability;
>
> (D) The employee has returned to work on a full-time or part-time basis other than vocational rehabilitation under §1-623.04; or
>
> (E) The Mayor or his or her designee determines based upon strong compelling evidence that the initial decision was in error**.**

D.C. Code §1-623.24(d)(4).

The Employees' Compensation Appeals Board (ECAB)[1] consistently held once the government-employer has accepted a claim of disability compensation, and has actually paid benefits, the employer must adduce persuasive medical evidence sufficient to substantiate a modification or termination of an award of benefits. *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, ECAB has held

[1]Prior to 1998, the Employees' Compensation Appeals Board (ECAB) was responsible for ruling on appeals of Final Compensation Orders issued by the Assistant Director for Labor Standards.

the evidence relied upon to support a modification or termination of compensation benefits must be current and fresh in addition to being probative and persuasive of a change in medical status. *Robinson*, ECAB No. 90-15 (September 16, 1992). These holdings remain persuasive authority in public sector workers' compensation cases.

Upon such a showing, the burden of production shifts to the Claimant to show that the Claimant's condition has not changed such that at termination of benefits is warranted.

With the above principles in mind, we turn to the CO under review. To satisfy its burden of showing a modification was warranted, the Employer submitted the AME of Dr. Brokaw who opined, as the ALJ noted, that the Claimant is at maximum medical improvement as it relates to her work injury and that her current condition is due to arthritic changes. Furthermore, Dr. Brokaw opined that the Claimant could return to work full duty, full time.

However, after quoting Dr. Brokaw's opinion and acknowledging the Employer's argument that the disabling condition is no longer causally related to the Employment, the ALJ does not determine whether or not the Dr. Brokaw's opinion is enough to substantiate the termination of benefits. Indeed, the ALJ never concludes one way or the other whether or not the disabling condition is medically causally related to the November 14, 2002 injury. Determining first whether or not the current disabling condition is causally related to the work injury has a direct bearing on whether or not the Claimant is still disabled because of the injury. The ALJ seems to have skipped this issue.

The ALJ stated,

> Employer asserts, albeit obliquely, that Dr. Brokaw's opinion satisfies §§ 1-623.24(d)(1) as it establishes *(B) The disabling condition is no longer causally related to the employment*, that while claimant still has a partial disability it is not the result of the November 2002 injury and in fact claimant's disability has returned to the same light duty status claimant enjoyed when she suffered the 2002 fall. Initially, it appeared that there has not been a change in claimant's condition since the prior Compensation Order, as the ALJ made a specific finding of fact that claimant was released to light duty work "with restrictions from lifting more than 10 lbs." However, a thorough review of the medical evidence submitted since 2008, reveals that Dr. Omohundro did in fact increase claimant's lifting ability on November 16, 2011 to twenty pounds with frequent lifting and carrying up to ten pounds.

CO at 5.

We cannot tell, based upon the above discussion, whether or not the ALJ found the Claimant's current impairment to be medically causally related to the November 14, 2002 injury. This is in error. See *Kralick v. DOES*, 842 A.2d 705 (D.C. 2004). When an ALJ fails to make factual findings on each materially contested issue, an appellate body is not permitted to make its own finding on the issue; it must remand for the proper factual finding. *See Jimenez v. DOES*, 701 A.2d 837, 838-840 (D.C. 1997). As the Court of Appeals explained in *King,* 742 A.2d. 460, 465, (D.C. 1999), basic findings of fact on all material issues are required, for "[o]nly then can this court determine upon review whether the agency's findings are supported by substantial evidence and

whether those findings lead rationally to its conclusions of law." *See also Sturgis v. DOES,* 629 A. 2d 547 (D.C. 1993). The CRB is no less constrained in its review of compensation orders issued by AHD. *See WMATA v. DOES, (Juni Browne, Intervenor),* DCCA No. 06-AA-27 (June 14, 2007). *Accord, Hines v. Washington Metropolitan Area Transit Authority*, CRB No. 07-004, AHD No. 98-263D (December 22, 2006).

Thus, where an ALJ fails to make express findings on all contested issues of material fact, such as the case *sub judice* where we cannot ascertain whether or not the ALJ found the Claimant's current condition to be medically casually related to the work injury, the CRB can no more "fill the gap" by making its own findings from the record than can the Court of Appeals upon review of a final agency decision, but must remand the case to permit the ALJ to make the necessary findings. *See Mack v. DOES,* 651 A.2d 804, 806 (D.C. 1994). Upon remand, the ALJ is directed to consider whether or not the Employer submitted evidence to satisfy it's burden warranting modification on the issue of whether the Claimant's current condition is medically causally related to the work injury.

The Employer also argues that the ALJ erred when placing upon the Employer the burden of proving suitable alternative employment in support of its termination. The Employer posits that the CO "confuses private and public sector compensation law." Employer's Argument at 10. Specifically, the Employer takes umbrage with the reference to *Logan v. DOES,* 805 A.2d 237 (D.C. 2002*)(Logan)*. We agree. The ALJ inappropriately applied the burden shifting scheme of *Logan*. We cannot affirm a Compensation Order that "'reflects a misconception of the relevant law or a faulty application of the law.' *Washington Metro. Area Transit Auth. v. DOES,* 992 A.2d 1276, 1280 (D.C. 2010) (quoting *Georgetown University v DOES,* 971 A.2d 909, 915 (D.C. 2009)." *D.C. Department of Mental Health v. DOES,* 15 A.3d 692 (D.C. 2011). Upon remand, the ALJ is to apply the proper law, outlined above.

Moreover, we also take note that many of the cases the ALJ cites to support the proposition that the Employer must show suitable employment opportunities that meet Claimant's physical capabilities are cases that specifically dealt with Claimant's undergoing vocational rehabilitation and allegations of non-cooperation by the Employer. Such is not the case here. The Employer is specifically arguing that the Claimant can return to her pre-injury status. Employer's argument at 10, fn 2. Thus, the ALJ, is to determine whether or not the Employer has adduced evidence sufficient to substantiate the termination of the Claimant's benefits. If so, the burden would shift to the Claimant to show through reliable, relevant, and substantial medical evidence that her physical condition had not changed and that benefits should continue. *Perry v. D.C. Department of Child and Family Services,* CRB No. 07-074, AHD No. PBL06-038, DCP/ODC No. 761010-8-2003-3 (May 29, 2007).

CONCLUSION AND ORDER

The Compensation Order of February 7, 2013 is not supported by the substantial evidence in the record or in accordance with the law. It is VACATED and REMANDED consistent with the above discussion.

FOR THE COMPENSATION REVIEW BOARD:

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HEATHER C. LESLIE
Administrative Appeals Judge

October 21, 2013
DATE