

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 16-010

**KENNETH ALLEN,
Claimant-Respondent,**

v.

**DISTRICT OF COLUMBIA DEPARTMENT OF FIRE & EMERGENCY SERVICES,
Self-Insured Employer-Petitioner.**

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2016 JUN 22 PM 1 14

Appeal from a December 30, 2015 Compensation Order
by Administrative Law Judge Fred D. Carney, Jr.
AHD PBL No. 14-008, DCP No. 0468-WC-99-0500014

Decided June 22, 2016

Michael J. McAuliffe for the Claimant
Rahsaan J. Dickerson 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 ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

The Claimant was employed as a paramedic. On February 10, 1999, Claimant injured his neck when the ambulance in which he was riding hit a large pothole, causing Claimant's head to hit a shelf.

Claimant was subsequently diagnosed with a neck compression. Employer accepted this injury and paid disability benefits until Claimant returned to full duty in April of 1999. Claimant continued to receive treatment for his neck.

Claimant came under the care and treatment of Dr. Celerino M. Magbuhos. Dr. Magbuhos recommended a course of medication and conservative treatment. In a May 2014 deposition, Dr. Magbuhos continued to opine Claimant's current neck condition is medically causally related to the work accident. Claimant's exhibit 2 at 17-18. Dr. Magbuhos also opined that Claimant's neck condition permanently and totally disables him from performing his duties as a paramedic.

Claimant's exhibit 2 at 21-22. Dr. Magbuhos further opined Claimant's injury has not resolved. Claimant's exhibit 2 at 33.

Claimant has undergone various additional medical evaluations (AMEs) at Employer's request. In September of 2000, Claimant underwent a AME with Dr. Wayne C. Lindsey. Dr. Lindsey took a history of the injury, reviewed medical records, and performed a physical examination. Dr. Lindsey opined Claimant should have a functional capacity evaluation (FCE), and that "his symptoms can flare up at any time given the nature of his work." Employer's exhibit 2(c). Based on this opinion, Claimant returned to work at a desk job but subsequently ceased working due to pain.

In 2002, Claimant injured his left shoulder in a motorcycle accident.

Claimant underwent an AME with Dr. Steven Hughes on April 18, 2007. Dr. Hughes also took a history of Claimant's injury and treatment. After review of the medical records provided and a physical examination, Dr. Hughes opined Claimant's current neck complaints are unrelated to the work injury and Claimant could return to work full duty relative to the work injury.

Claimant underwent two AMEs with Dr. Lowell Anderson. On June 12, 2012, after taking a history, reviewing medical records, and performing a physical exam, he opined Claimant's neck condition was unrelated to the work injury of February 10, 1999. Dr. Anderson opined Claimant could not return to work as a paramedic due to non-occupational factors. Dr. Anderson reiterated these opinions at Claimant's second AME on May 7, 2013. Based upon Dr. Anderson's opinions, Claimant's disability benefits were terminated on October 9, 2013.

A full evidentiary hearing was held on May 8, 2014. At that hearing, Claimant sought reinstatement of his temporary total disability benefits from October 9, 2013 to the present and continuing. The issues presented were whether Claimant's current condition is medically causally related to the work injury and the nature and extent of Claimant's disability, if any. A Compensation Order (CO) was issued on December 30, 2015 granting Claimant's claim for relief.

Employer timely appealed. Employer argues the ALJ erred at the second step of the *Mahoney* burden shifting analysis as Claimant's evidence was neither relevant nor reliable. *Mahoney v. D.C. Public Schools*, CRB No. 14-067, AHD No. PBL 14-004 (November 12, 2014) (*Mahoney*). Claimant opposes Employers application for review, arguing the CO is supported by the substantial evidence in the record and in accordance with the law.

ANALYSIS¹

Employer's sole argument on appeal is that Claimant's evidence did not satisfy his burden under the second prong of the *Mahoney* analysis. It is settled that an employer first must produce reliable, probative and current evidence of a change of conditions prior to the date benefits were modified or terminated. *Mahoney, supra*. 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. Thereafter, if claimant meets this burden, 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:

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, supra at 8-9.

Employer takes issue with the ALJ's reliance on Dr. Magbuhos' medical opinions and deposition at the second prong of the *Mahoney* analysis, and argues the ALJ was in error in finding his opinion satisfied Claimant's burden. Employer argues:

Although Claimant's evidence regarding causation was current, it was neither relevant nor reliable, all of which is required under *Mahoney*. The ALJ's analysis under *Mahoney* should therefore have stopped at the second prong with a finding

¹The 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) (*Marriott*). 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. *Marriott, supra*, 834 A.2d at 885.

that Claimant had not satisfied his burden. Instead, the ALJ relied on sketchy, vague and imprecise evidence that was clearly contradicted by Dr. Anderson's more detailed analysis, which relied on relevant, probative, objective evidence. Consequently, the ALJ's finding that Claimant met his burden of production under *Mahoney* is not based on substantial evidence. The ALJ's finding with respect the Claimant's burden is not based on substantial evidence.

Employer's argument at 15.

In analyzing Claimant's evidence when determining if he satisfied the second prong of the *Mahoney* analysis, the ALJ stated:

At the next step, Claimant must produce reliable and relevant evidence that his disabling condition has not changed. Claimant introduced medical records and the Deposition of Dr. Magbuhos. On April 29, 2000, Dr. Hameed noted complaints of neck pain and recommended the use of a soft neck collar. (CE 7 at DCORMOOI79) Dr. Magbuhos contemporaneously noted on May 31, 2000, that Claimant was being treated in the clinic for recurrent neurologic symptoms following a cervical spine injury that Claimant sustained while on duty on February 10, 1999. (CE 7) Dr. Magbuhos noted muscle spasm on several occasions after April 2000. (CE 5; CE 7 at DCORMOOI24, DCORMOOI61, DCORMOOI65, DCORM 00177) At the deposition on May 5, 2014, Dr. Magbuhos testified that he had treated Claimant since May 2000, that he initially referred Claimant to physical therapy in 2000, that Claimant is prescribed home treatment with a soft collar and neck exercises, that Claimant was permanently and totally disabled from performing his job as a paramedic because any jolt to his neck may be paralyzing, that radiculopathy in this case is not the result of degenerative condition because of a lack of prior complaints, and that Claimant's current condition was caused by the accident because Claimant was asymptomatic before the accident and developed problems after the accident. (CE 2 at 10, 20-22, 34, 38) With this evidence, Claimant satisfied his burden of showing reliable and relevant evidence of a causal connection by providing the opinion of a treating internist and supporting medical records.

CO at 5, 6.

We find no error in the above analysis. At the second step, the ALJ is tasked with looking at Claimant's evidence to determine if said evidence satisfies Claimant's burden. A review of the evidence supports the ALJ's conclusions. Dr. Magbuhos' opinions rendered at the deposition were deemed relevant and reliable evidence, satisfying Claimant's burden at the second step of *Mahoney*, that of substantial evidence.

In attacking the ALJ's reliance on Dr. Magbuhos' opinion, Employer contends Dr. Anderson's opinion is more persuasive. However, at the second step at the *Mahoney* analysis, the ALJ need only consider Claimant's evidence to determine if Claimant has produced substantial evidence to show a change of condition has not occurred.

It is at the third step of the analysis where the ALJ is tasked to weigh all the evidence to determine if Employer has met the burden of proving by a preponderance of the evidence that claimant's benefits should be modified or terminated. Employer has not appealed the ALJ's conclusions at the third step. However, even considering Employer's argument that Dr. Anderson's opinions are more persuasive than Dr. Magbuhus' opinion, and, by implication, that its evidence satisfies the third stage of *Mahoney*, that argument amounts to a request that we re-weigh the evidence, a task which the CRB cannot do.

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. *Marriott, supra*.

CONCLUSION AND ORDER

The December 30, 2015 Compensation Order on Remand is **AFFIRMED**.

So ordered.