

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 15-003

**LAWRENCE MYERS,
Claimant-Respondent,**

v.

**DISTRICT OF COLUMBIA PUBLIC SCHOOLS,
Employer-Petitioner.**

Appeal from a December 3, 2014 Compensation Order
by Administrative Law Judge Fred D. Carney, Jr.
ORM/DCP No. 761006-0001-1999-0005, AHD No. 13-014

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Eric Adam Huang for the Employer
Lawrence Myers, *pro se*

Before JEFFREY P. RUSSELL, MELISSA LIN JONES, and LINDA F. JORY, *Administrative Appeals Judges.*

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

DECISION AND REMAND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

Lawrence Myers (Claimant) sustained an injury to his low back while employed as a Boiler Plant Operator on March 13, 1990. The Office of Risk Management accepted his claim and paid benefits from the date of injury until August 23, 2012, when they were terminated based upon the reports from Dr. Jay Parikh, who performed an Additional Medical Evaluation (AME) on June 12, 2012 and authored three reports, dated June 12, 2012, July 6, 2012 and July 10, 2012.

Claimant sought reinstatement of his wage loss and medical benefits at a formal hearing conducted before an Administrative Law Judge (ALJ) in the Administrative Hearings Division (AHD) of the Department of Employment Services (DOES).

Following that hearing, the ALJ issued a Compensation Order reinstating Claimant's benefits from the date of termination to the present and continuing. Employer filed an Application for

Review (AFR) and a Memorandum of Points and Authorities Supporting Petitioner's Application for Review (Employer's Brief). Claimant filed nothing in opposition.

In Employer's Brief, Employer argues that, although the ALJ purported to apply the three step analytic framework laid out by the CRB in *Mahoney v. DCPS*, CRB No. 14-067 (November 12, 2014)(en banc), the Compensation Order erroneously concluded that Claimant had satisfied his burden, the second step under *Mahoney*, being the burden of producing "reliable and relevant evidence that conditions have not changed to warrant a modification or termination of benefits", and that even if Claimant had satisfied that burden, the ALJ erroneously concluded, under the third step, that Employer's evidence did not amount to a preponderance of the evidence establishing that Claimant's benefits should be terminated.

Because the ALJ erred in finding that Employer had met its initial first step under *Mahoney*, we vacate the Compensation Order, and remand the matter to AHD with directions that a Compensation Order denying Employer's modification request be entered due to Employer's failure to meet its initial burden under *Mahoney*.

ANALYSIS

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 different conclusion. *Marriott International v. DOES*, 834 A.2d 882, 885 (D.C. 2003).

Just as the District of Columbia Court of appeals has stated that it cannot ignore a fundamental misunderstanding of the law, nor can we affirm a decision which reflects a misconception or faulty application of relevant law. See, *D.C. Department of Mental Health v. DOES*, 15 A.3d 692 (D.C. 2011).

In *Mahoney*, the CRB wrote:

The Employer first has the burden of producing current and probative evidence that claimant's condition has sufficiently changed to warrant modification or termination of benefits. If the employer fails to present this evidence then the claim [by Employer for modification] fails and the injured worker's benefits continue unmodified or terminated.

Although Employer introduced a number of Functional Capacity Evaluations (FCEs) and vocational rehabilitation reports that could be construed to suggest that Claimant is unmotivated to return to work and has not been universally cooperative or compliant with the vocational rehabilitation process, Claimant's benefits were not suspended or terminated for that reason. Rather, the "Notice of Termination Regarding Public Sector Workers' Compensation Benefits" states:

WHY HAVE YOU RECEIVED THIS NOTICE

Based on the information you provided us, and the other information outlined in this notice, we conclude that you are no longer eligible for workers' compensation benefits. Payments have been terminated effective August 23, 2012 due to recommendations of the Additional Medical Evaluation (AME) completed by Dr. Jay Parikh on June 12, 2012

...

SUBSEQUENT MEDICAL REPORTS

You attended an Additional Medical Evaluation (AME) on June 12, 2012 with Dr. Jay Parikh. Dr. Parikh concluded that you can return to work as a custodian with no restrictions. This conclusion is based upon Dr. Parikh's June 12, 2012 report and his addendums dated July 6, 2012 and July 10, 2012. A copy of those reports were sent to Dr. Djinge Lindsay-Strickland on July 17, 2012 for her comment and review. A copy of Dr. Parikh's reports are attached.

EE 7.

Review of Dr. Parikh's reports confirms that they do, in fact, state that he is of the opinion that Claimant can work as a custodian. See, EE 4, 5 and 6. The problem is, Claimant was not employed as a custodian. Rather, he was injured while working as a Boiler Operator. This discrepancy is noted by Dr. Parikh himself in his first report, EE 4, where he writes "The patient mentioned that he has been working as a steam engineer for a long time. The last time, he worked as a custodian was in May 1979. Contradictory to the medical records provided, the patient was working as a steam engineer and not as a custodian as per the patient when he first injured his back in 1987."

By way of clarification we note that the 1987 date differs from the date of injury referred to in the Compensation Order, but that is of no moment in this appeal. At the formal hearing there was a rather lengthy preliminary discussion concerning how Claimant had actually suffered two work injuries, but the parties stipulated that the injuries be considered to have a date of injury of March 13, 1990. See, HT 13 – 20.

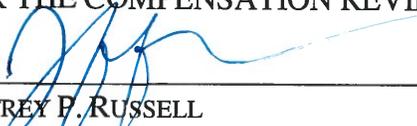
Why Dr. Parikh persisted in opining concerning Claimant's capacity to perform an irrelevant job, and why Employer felt that an opinion that Claimant could return to an irrelevant job justified termination of benefits, are beyond our understanding, but doing so is not in accordance with the law. Unless Employer adduced evidence that Claimant was offered a position that he was capable of performing at no loss of wages, it is immaterial that Dr. Parikh is of the opinion that Claimant can work as a custodian.

We have reviewed Dr. Parikh's reports closely, and in none of them does he express the opinion that Claimant's work related low back injury has resolved. We have also reviewed the remainder of Employer's evidence (Employer called no witnesses) and can find no other evidence that supports a finding that Claimant can return to work as a Boiler Operator. Accordingly, Employer failed to provide evidence sufficient to meet its initial burden under *Mahoney*, in which case the inquiry is ended.

CONCLUSION AND ORDER

Employer's evidence is insufficient to meet its initial burden under *Mahoney*, and that determination is reversed. The remaining findings and conclusions are vacated. The failure of Employer to meet its initial burden renders the denial of its request for modification in accordance with the law, and it is affirmed. The matter is remanded to AHD for entry of Compensation Order on Remand granting Claimant's request for reinstatement of benefits due to Employer's failure to establish the first step under *Mahoney*.

FOR THE COMPENSATION REVIEW BOARD:



JEFFREY P. RUSSELL
Administrative Appeals Judge

May 22, 2015

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,

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. *Williams v. D.C. Department of Parks and Recreation*, CRB 08-0262, AHD No. PBL 07-029, PBL/DCP No. 761013-0001-2005-0007 (Dec. 13, 2007), nt. 2.

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. *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).

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 the 'burden then shifted back to [the claimant] to provide proof of an employment related impairment following the termination of benefits.'" *Mahoney v. DOES*, 953 A.2d 739, 742 (D.C. 2008).

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," *Washington Metropolitan Area Transit Authority v. DOES*, 703 A.2d 1225, 1231(DC. 1997), it is important not to overlook that same case also states "The burden may shift once the moving party establishes his case." *Id.* 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. 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. 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.

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. *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.)

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.

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*.


MELISSA LIN JONES
Administrative Appeals Judge