

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA MARÍA MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 12-046

LIGIA M. MENDEZ,

Claimant - Respondent,

v.

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,

Employer - Petitioner.

Appeal from a February 24, 2012 Compensation Order on Fourth Remand
of Administrative Law Belva Newsome
AHD No. PBL 02-024, DCP No. LTBOEDDU001551

Ligia M. Mendez, *Pro Se*
Pamela Smith, Esquire, for the Employer

Before HEATHER C. LESLIE, and HENRY MCCOY, *Administrative Appeals Judges*, and LAWRENCE
D. TARR, *Chief Administrative Appeals Judge*.

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 24, 2012, Compensation Order on Fourth Remand (COR4) issued by an Administrative Law Judge (ALJ) in the Hearings and Adjudication Section of the District of Columbia Department of Employment Services (DOES). In that COR4, the ALJ granted the Claimant's request for temporary total disability benefits. We VACATE AND REMAND.

BACKGROUND AND FACTS OF RECORD

The Claimant was a cafeteria worker for the Employer. On February 2, 2001, the Claimant sustained injuries to her lower back and head after she fell while attempting to sit on milk crates. The Claimant sought treatment for her injuries, returned to work and subsequently retired after the end of the school year.

Pursuant to the Claimant's initial Application for Formal Hearing, an evidentiary hearing was held before the Office of Hearings and Adjudications on August 19, 2002. A Compensation Order (CO) was issued on June 26, 2003 which awarded the Claimant payment of contested medical expenses and reimbursement for personal leave time that had been utilized immediately following her injury.¹ Claimant's claim for temporary total disability benefits (which was initially presented as a claim for permanent partial wage loss benefits) was denied. Pursuant to an appeal by the Claimant, the CRB reversed the CO and remanded the case for further consideration.²

A Compensation Order on Remand (COR1) issued March 12, 2008.³ Claimant's claim for payment of causally related medical expenses was again granted, and again her claim for temporary total disability benefits was denied.

The Claimant appealed the COR1 to the CRB, and pursuant to a Decision and Remand Order dated May 29, 2008, the CRB again rejected the denial of the Claimant's claim for temporary total disability benefits.⁴ For essentially the same reasons as articulated in *Mendez I*, the CRB remanded the case for reconsideration of the nature and extent of the Claimant's disability, and whether the Claimant voluntarily limited her income by resigning from her employment for reasons unrelated to her injury or disability.

Upon remand pursuant to *Mendez II*, Hearings and Adjudications issued a Compensation Order on Remand (COR2) on August 14, 2008 based upon the existing evidence of record without further evidentiary proceedings.⁵ That COR2 found, as with the earlier orders, that the Claimant was no longer disabled as a result of her injuries and that she had voluntarily retired from her employment for reasons not related to her injury. The Claimant timely appealed again.

In an Order dated April 14, 2009, the CRB vacated the COR2.⁶ The CRB found there was,

Simply no evidentiary basis supporting the ALJ's rejection of Dr. Balbus' medical opinion based on the assertion found in the Compensation Order that, "Dr. Balbus' causality finding in his August 13, 2002 report directly contradicts his October 18, 2001 report finding that Claimant's low back injury had reached maximum medical improvement and that her lumbosacral problems were due to her diabetic neuropathy." COR2 at 7-8. We thus can discern no substantial evidence of record to support the ALJ's finding that Claimant failed to demonstrate through reliable,

¹ *Mendez v. DC Public Schools*, AHD No. PBL 02-024, DCP No. LTBOEDU001551 (June 26, 2003).

² *Mendez v. D.C. Public Schools*, CRB (Dir. Dkt.) No. 2-04 (November 30, 2005)(*Mendez I*).

³ *Mendez v. DC Public Schools*, AHD No. PBL 02-024, DCP No. LTBOEDU001551 (March 12, 2008).

⁴ *Mendez v. D.C. Public Schools*, CRB No. 08-136 (May 30, 2008) (*Mendez II*).

⁵ *Mendez v. DC Public Schools*, AHD No. PBL 02-024, DCP No. LTBOEDU001551 (August 14, 2008).

⁶ *Mendez v. D.C. Public Schools*, CRB No. 09-023 (April 14, 2009 (*Mendez III*)).

relevant, and substantial medical evidence that she continued to have a disability that is causally related to the accepted injury.

Mendez III, *supra* at 8.

The CRB further found the determination that the Claimant had voluntarily limited her income when she retired was not ripe for adjudication because DCP had not issued a determination on that issue.

On January 15, 2010, a Compensation Order on Remand (COR3) was issued.⁷ The ALJ again denied the Claimant's requested disability benefits. The ALJ stated Dr. Balbus' medical reports and opinions were not to be afforded the treating physician preference because (1) his opinion changed between October 18, 2001 and August 13, 2002 and (2) Dr. Balbus also agreed with all of the medical evidence that the Claimant could return to work in a light duty capacity. COR3 at 8. The ALJ also found the Claimant had voluntarily limited her income by retiring for reasons unrelated to her injury.

The Claimant appealed. A Decision and Remand Order was issued on November 29, 2011 which vacated the COR3.⁸ The CRB found the COR3 did not follow the remand order of *Mendez III* and again vacated and remanded the case for further findings of fact and conclusions of law consistent with *Mendez III*.

On February 24, 2012, a Compensation Order on Fourth Remand (COR4) was issued granting the Claimant's claim for relief.⁹ The Employer timely appealed, arguing the CRB was without authority to change the claim for relief in the 2005 decision and remand order, that the COR is not supported by substantial evidence as it did not discuss all the evidence, specifically that of Dr. Robert A. Smith, and finally, that the Claimant is not entitled to an award after the date of the Formal Hearing.

THE STANDARD OF REVIEW

The scope of review by the CRB, as established by the Act and as contained in the governing regulations 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. Comprehensive Merit Personnel Act of 1978, as amended, D.C. Official Code § 1-623.01, *et seq.*, (the "Act") 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 and this Review Panel are 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,

⁷ *Mendez v. DC Public Schools*, AHD No. PBL 02-024, DCP No. LTBOEDU001551 (January 15, 2010).

⁸ *Mendez v. D.C. Public Schools*, CRB No. 10-065 (November 11, 2012) (*Mendez IV*).

⁹ *Mendez v. DC Public Schools*, AHD No. PBL 02-024, DCP No. LTBOEDU001551 (February 24, 2012).

and even where the reviewing authority might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

DISCUSSION AND ANALYSIS

We are unfortunately faced with another appeal in the case at bar, eleven years after the Formal Hearing was held.

The Employer raises three arguments. The first argument is the CRB was without authority to change the claim for relief and that by so doing, the CRB violated the Employer's due process rights. Second, the COR is not supported by substantial evidence as it did not discuss all the evidence, specifically that of Dr. Robert A. Smith. And finally, the Claimant is not entitled to an award after the date of the Formal Hearing.

We note our prior decision stated, in light of the prior CRB directives,

We are, again, constrained to remand the case back to the ALJ for further necessary findings of fact as to whether Petitioner's physical condition has changed such that she is able to return to her former pre-injury employment without restrictions, based upon the weighing of the totality of the medical and other relevant evidence of record, as indicated in the prior CRB orders and as quoted extensively above.

Mendez IV at 7-8.

We also noted the following language,

In *Mendez I* the presiding Review Panel, in overturning the June 26, 2003 Compensation Order's finding that Petitioner's work-related injury had fully resolved and/or was no longer disabling, acknowledged that there may exist medical evidence of record that would support such a finding, but that it was error on the part of the then-presiding ALJ to have reached his conclusion based exclusively on the medical assessments and reports of Petitioner's treating physicians, particularly that of Dr. Balbus. Virtually the same error has occurred with respect to the determination made pursuant to the COR of August 14, 2008 now on appeal. The ALJ has relied upon the medical reports and opinions of Petitioner's treating physicians, to the exclusion of all other relevant evidence of record, in drawing a conclusion that is simply not sustainable based upon the cited medical evidence. *Accordingly, we find ourselves with no choice but to remand to AHD for further necessary findings of fact as to whether Petitioner's physical condition has changed such that she is able to return to her former pre-injury employment without restrictions, based upon the weighing of the totality of the medical and other relevant evidence of record.* (Emphasis added.)

Mendez IV, supra at 4-5.

In response to our Decision and Remand Order, quoted above, the ALJ issued a decision wherein the findings of fact of the January 15, 2010 Compensation Order on Remand were adopted in their entirety as long as they did not contradict any finding of fact and conclusion of law in the

November 29, 2011 Decision and Remand Order. The ALJ listed three findings, all direct quotes from the prior Decision and Remand Order. Thereafter, the analysis section of the COR4 consisted of two paragraphs:

In the Decision and Remand Order of May 30, 2008, the CRB incorporated its first Decision and Remand Order of November 30, 2005. The CRB changed the relief sought by the Claimant from permanent partial disability to temporary total disability. Based upon the burden of proof standard set forth in *Vernell Chase v. D.C. Department of Human Services*, ECAB No. 82-9 (July 9, 1992), claimant bears the burden of demonstrating through reliable, relevant and substantial medical evidence that she continued to have a disability that is causally related to the accepted injury.

Relying upon the medical reports of Dr. Balbus, Claimant has demonstrated through reliable, relevant, and substantial medical evidence that she continued to have a disability that is causally related to the accepted injury.

COR4 at 4-5.

This is the entirety of the discussion and analysis section. We cannot ascertain what evidence the ALJ used to support her decision as the order fails in any fashion to address *whether Petitioner's physical condition has changed such that she is able to return to her former pre-injury employment without restrictions, based upon the weighing of the totality of the medical and other relevant evidence of record*. As the COR4 failed to follow the dictates of the prior orders, we are forced to vacate the award in its entirety.

A review of the tortured history of the case, beginning with the Formal Hearing held on August 19, 2002, reveals multiple ALJ's, several Compensation Orders on Remand, and several appeals spanning over 9 years of procedural history. Much of this history is due to Decision and Remand Orders being ignored. After several orders which denied the claim for relief, we are now faced with a cursory order which grants the claim for relief with little explanation. Moreover, we are now unfortunately faced with a file that has medical evidence from over a decade ago and additional procedural questions raising due process rights, including whether the CRB was authorized to change the claim for relief.

Based on the foregoing factors, we vacate and remand the case. We also order the Office of Hearings and Adjudications, pursuant to our authority under 7 DCMR § 261.15, to convene a new expedited Formal Hearing to allow the parties to obtain new and current medical documentation and testimony on the medical status of the Claimant to support their case theories, as well as to clarify the claim for relief.¹⁰ We urge this case to be set as soon as possible in order that the parties may obtain a final order expeditiously.

¹⁰ 7 DCMR § 261.15, states

Nothing in these rules, however, shall be construed to limit the authority of the Chief Administrative Appeals Judge to approve the use of forms, documents and practices not inconsistent with these rules that shall assist in managing appeals coming before the Board, nor shall these rules limit the authority of an Administrative Law / Appeals Judge to issue any lawful order for purposes of case management or any other matter in particular cases.

CONCLUSION

The COR4's award of disability benefits is not supported by the substantial evidence in the record and not in accordance with the law.

ORDER

The February 24, 2012 COR4 is VACATED and REMANDED for a new hearing on the merits of the claim.

FOR THE COMPENSATION REVIEW BOARD:

HEATHER C. LESLIE
Administrative Appeals Judge

May 30, 2013
DATE