

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 15-014

**NORA SURRETT,
Claimant-Respondent,**

v.

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

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2015 JUN 29 AM 11 16

Appeal from December 30, 2014 Compensation Order
by Administrative Law Judge Fred D. Carney, Jr.
DCP No. 760005-0001-2001-0005, OHA No. PBL10-012A

Frank McDougald for the Employer
Andrew Hass for the Claimant

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

MELISSA LIN JONES for the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

On June 12, 2001, Ms. Nora Surratt injured her back, shoulder, head, and pelvis when she fell while working as a special education assistant for the District of Columbia Public Schools ("Employer"). Employer paid Ms. Surratt temporary total disability compensation benefits and medical expenses until December 3, 2012.

Following a formal hearing, an administrative law judge ("ALJ") granted Ms. Surratt reinstatement of temporary total disability compensation benefits and medical expenses from December 3, 2012 to the date of the formal hearing and continuing. The ALJ ruled that pursuant to the *Mahoney* burden-shifting scheme, Employer had met its initial burden, Ms. Surratt had met her burden, and when weighing the evidence in the record as a whole, Employer had not met its burden of proving by a preponderance of the evidence that Ms. Surratt's benefits should be terminated. *Surratt v. D.C. Public Schools*, AHD No. PBL10-012A, DCP No. 760005-0001-2001-0005 (December 30, 2014).

Employer appeals the Compensation Order asserting it is not based upon substantial evidence because it ignores the opinions of physicians other than Dr. Jason Brokaw. Employer also argues the ALJ erred by relying on *McCamey v. DOES* in this physical injury case. For these reasons, Employer requests the Compensation Review Board (“CRB”) reverse the Compensation Order.

In response, Ms. Surratt asserts Employer’s arguments “simply represent a disagreement with the decision made by the ALJ.” Claimant’s Memorandum of Points and Authorities in Opposition to Employer’s Application for Review, p. 5. Ms. Surratt also asserts the ALJ’s reference to *McCamey v. DOES* is consistent with the compensability of an injury that is a natural consequence of the original work-related injury or an aggravation of that original work-related injury. Ms. Surratt requests the CRB affirm the Compensation Order.

ISSUES ON APPEAL

1. Is the December 30, 2014 Compensation Order supported by substantial evidence and in accordance with the law?
2. Did the ALJ err by citing to *McCamey v. DOES* in this physical injury case?

ANALYSIS¹

When the government seeks to terminate previously-accepted benefits in a public sector case, 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.

¹ 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 D.C. Comprehensive Merit Personnel Act of 1978, as amended. D.C. Code §1-623.01 *et seq.*, (“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).

Mahoney v. D.C. Public Schools, CRB No. 14-067, AHD No. PBL 14-004, 8-9 (November 12, 2014). The ALJ relied upon Dr. Marion’s opinion to satisfy the first step in the analysis:

With regards to the first prong, Employer has meet [*sic*] its initial burden of providing current and probative evidence that Claimant’s medical condition has sufficiently changed to warrant a termination of benefits. [Footnote omitted.] The reason provided in the notice of termination of benefits was the “current symptoms are not causally related to the date of injury. Specifically, Dr. Marion, after conducting a physical exam and reviewing limited medical records, indicated that “there remains no objective functional impairment that would preclude Claimant from resuming any occupation as it pertains to her claim only and not any underlying conditions or age.”

Surratt, supra, at pp. 5-6. Neither party disputes that Employer met its initial burden.

When shifting the burden to Ms. Surratt, the ALJ relied upon the opinion of Dr. Hampton J. Jackson, Jr:

At the next step, Claimant has satisfied her burden of producing reliable and relevant evidence that the accepted claims for the medical condition affecting the back and both legs has not changed significantly to warrant a termination of benefits. Claimant posited evidence that on August 2, 2002, Dr. Hampton J. Jackson, Jr, the treating physician who specializes in orthopedic surgery, diagnosed Claimant with progressive lumbar syndrome with para-radicularitis based on his review of the June 14, 2001 bone scan, the August 14, 2001 MRI report, the November 1, 2001 nerve conduction study, and the May 21, 2002 nerve conduction study. Dr. Jackson indicated the medical condition amounts to a broken spine at the left L4 pars/facet area with rotary instability, which is responsible for leg and back pain.

Id. at p. 6. Neither party disputes that Ms. Surratt met her burden.

Employer takes issue with the ALJ’s weighing of the evidence at the third step of the analysis. After summarizing the medical evidence in the Findings of Fact, to reach the conclusion that Ms. Surratt remains entitled to benefits the ALJ weighed the evidence without the benefit of a treating physician preference and concluded termination was unjustified:

The third and final prong requires, in order for the Employer to prevail, that the Employer must show by a preponderance of the evidence that Claimant’s benefits should be terminated because of a lack of causal relationship. [Footnote omitted.] In making an assessment of causal relationship, the treating physician preference is no longer applicable in public sector worker’s [*sic*] compensation cases. [Citations omitted] Therefore, the competing physicians’ reports must be weighed without benefit of any treating physician preference. However, an administrative law judge is permitted to find the treating physician opinion persuasive without affording the opinion a preference. [Citation omitted.]

In assessing the causal relationship of Claimant's medical condition and the June 12, 2001 injury, many doctors have provided a variety of opinions related to spondylolysis, radiculopathy, [footnote omitted] and malingering. Recently, Dr. Brokaw diagnosed Claimant's current condition as debilitation of the past 10 years, particularly due to bed rest and inactivity. No other doctor contradicts this contention, and, therefore, I credit Dr. Brokaw's opinion in this regard. Since Dr. Brokaw attributed Claimant's current condition to treatment recommended as a result of the June 12, 2001 injury, the disability is a direct and natural result of the accident. *McCamey*, 947 A.2d at 1209. Therefore, I hold that since the disabling condition is related to recommend treatment for the accepted claim, Employer was unjustified in terminating benefits, and the injured worker's benefits must continue.

Id. at pp. 6-7. The ALJ's conclusion is supported by substantial evidence in the record; Dr. Brokaw opined that although Ms. Surratt's soft tissue injury progressive debilitation is not causally related to her work injury, her prolonged inactivity renders her incapable of gainful employment. Employer's Exhibit 3. In his addendum, Dr. Brokaw specifically opined, "To be clear, I would relate her incapability of gainful employment at this time to her debilitation over the past 10 years. She has used bed rest and has been very inactive over the past 10 years. This is not related to the work injury, but has made her very weak." Employer's Exhibit 4. Although Ms. Surratt's debilitation from her bed rest may not be directly related to her work-related injury in a medical sense, as the ALJ points out, in a legal sense, it is.

Employer's argues

[t]he record does not support the conclusion reached by the ALJ. It cannot be disputed that Drs. Brokaw, Collins, Smith, and Marion all have indicated that Claimant's current condition is unrelated to the June 12, 2001 injury. Dr. Draper examined Claimant in November 2001 and he concluded that she suffered a lumbosacral strain from the June 12, 2001 injury and that she should "reach maximum medical improvement on or about 2/01/2002." EE 9. Following Dr. Draper's assessment, all of the physicians that evaluated Claimant expressed the consistent view that she had reached maximum medical improvement and that any problems she was experiencing were unrelated to the June 12, 2001 injury. In performing their evaluations of claimant, the doctors necessarily noted that she had problems. However, the doctors were not in any way endorsing or approving of the medical treatment she had been receiving by her treating physician, Dr. Jackson. It is noteworthy that some of the physicians were critical of the treatment provided by Dr. Jackson.

Memorandum of Points and Authorities in Support of Petitioner's Application for Review, p. 10. Employer's argument, in essence, is that the CRB should reweigh the evidence in its favor. The CRB lacks authority to do so. *Marriott, supra*.

Finally, Employer objects to the ALJ's citing to *McCamey v. DOES* because this case "does not involve Claimant's mental/psychological status." Memorandum of Points and Authorities in Support of Petitioner's Application for Review, p. 10. The ALJ cited *McCamey* for the proposition that benefits may be awarded as a result of a consequence from a work-related

injury, *e.g.* an inability to return to work caused by ten years of bed rest and inactivity to treat a work-related injury. The CRB finds no grounds to overturn the decision on this basis.

CONCLUSION AND ORDER

The December 30, 2014 Compensation Order is supported by substantial evidence, is in accordance with the law, and is AFFIRMED. The ALJ did not err by citing to *McCamey v. DOES* in this physical injury case.

FOR THE COMPENSATION REVIEW BOARD:



MELISSA LIN JONES

Administrative Appeals Judge

June 29, 2015

DATE