

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 16-074

**PATRICIA A. TELLISH,
Claimant-Petitioner,**

v.

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

Appeal from an April 27, 2016 Compensation Order
by Administrative Law Judge Fred D. Carney, Jr.
AHD No. PBL 05-028C, DCP No. 760003-0001-2005-0107

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2016 OCT 28 PM 1 32

(Decided October 28, 2016)

David M. Snyder for Claimant
Rahsaan Dickerson and Andrea G. Comentale for Employer

Before GENNET PURCELL, JEFFREY P. RUSSELL, and LINDA F. JORY, *Administrative Appeals
Judges*

GENNET PURCELL for the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

Patricia A. Tellish (“Claimant”) was employed as an instructor with the District of Columbia Public Schools (“Employer”). On April 28, 2005, Claimant was trampled by a group of students and knocked unconscious, and to the ground. Claimant suffered injuries to her head, knees, left elbow and arms and subsequently filed a claim for workers’ compensation benefits with the District of Columbia Office of Risk Management (“ORM”).

Citing a failure to timely file her claim, on August 25, 2005, ORM issued Claimant a notice of dismissal of claim. On September 23, 2005, Claimant requested a formal hearing with the Administrative Hearings Division (“AHD”) in the District of Columbia Department of Employment Services (“DOES”). Following a September 5, 2006 formal hearing at AHD an ALJ issued an order denying Claimant’s request for the formal hearing, citing the request as premature. Claimant responded by filing an appeal to the Compensation Review Board (“CRB”).

On February 16, 2007, the CRB determined AHD jurisdiction over Claimant's claim was proper and remanded the case to AHD with the directive to determine the merits of her claim as a matter of law. *See Tellish v. D.C. Public Schools*, CRB No. 07-001 (February 16, 2007).

On January 17, 2008, AHD issued a Compensation Order ("CO") accepting Claimant's claim and ordering ORM to pay Claimant the benefits sought.

Since the date of her 2005 incident, Claimant has received ongoing medical care for her work-related lower back pain from many physicians, including physiatrist Dr. Mark Klaiman. On June 10, 2009 Dr. Klaiman opined that Claimant's work injury was a lumbar strain which occurred "in the context of underlying degenerative disc disease." Dr. Klaiman later opined that Claimant's back pain with right radiculopathy is not related to her April 28, 2005 work injury.

On February 22, 2006, Dr. Todd Sloan performed an additional medical examination ("AME") of Claimant on Employer's behalf. Dr. Sloan opined that Claimant suffered from moderate to severe short-segment stenosis at L4-5, and that Claimant's work-related injury was a lumbosacral strain that had healed.

On July 11, 2008, Claimant underwent a second AME performed by Dr. Phillip J. Marion on Employer's behalf. Dr. Marion also opined that Claimant suffered a work-related lumbar strain as a result of her work injury which had "since resolved."

On October 17, 2013, Dr. Marion again examined Claimant and noted "no new complaints or any other changes". Dr. Marion noted and agreed with Dr. Sloan's lumbar spinal stenosis diagnosis and added that Claimant's back pain was "chronic, pre-existing, and not related to the April 28, 2005 work injury." Dr. Marion also opined that Claimant had reached maximum medical improvement in relation to her work injuries, and was capable of returning to work, with certain restrictions.

On August 7, 2014, approximately one year after Dr. Marion's AME report, ORM issued a Notice of Determination Regarding Termination of Workers' Compensation Benefits ("Notice") terminating Claimant's benefits and based upon Dr. Marion's AME.

Claimant appealed the Notice by filing with AHD an Application for Formal Hearing contesting the termination of her benefits.

After a formal hearing at AHD, an ALJ issued a CO denying Claimant's request for reinstatement of benefits and found that Employer met its burden of proving, by a preponderance of the evidence, that ORM's decision to terminate Claimant's benefits for the reasons provided in its Notice was justified under to the District of Columbia Government Comprehensive Merit Personnel Act of 1978 (D.C. Code § 1-623.1, *et seq.* ("Act")).

On May 27, 2016, Claimant timely appealed the CO to the CRB by filing an Application for Review and Petitioner's Memorandum of Points and Authorities in Support of its Application for Review ("Claimant's Brief") seeking reversal of the CO and asserting the CO was not based on

substantial evidence or otherwise in accordance with the applicable law. Claimant’s Brief at page 7.

Employer opposed Claimant’s appeal by filing Employer’s Opposition to Application for Review (“Employer’s Brief”). In its opposition, Employer asserted the CO is supported by substantial evidence and should be affirmed.

ISSUES ON APPEAL

Whether the CO’s conclusion, that Employer met its burden of proof by a preponderance of the evidence, that Claimant’s termination of benefits was justified is based on substantial evidence in the record and is in accordance with the law?

ANALYSIS¹

On appeal, Claimant asserts that the CO’s conclusions are not based on substantial evidence as the 2011, 2012, and 2013 AME opinions by Dr. Marion do not serve as “current and probative evidence” that Claimant’s condition has sufficiently changed to warrant a modification or termination of benefits. Claimant argues further, that although Dr. Marion provided causation-related opinions in 2011, 2012, and 2013, Dr. Sloan issued a “change in condition” opinion in 2006 that was consistent with Dr. Marion’s 2013 causation-related findings. Claimant argues that since Employer did not act at the time of Dr. Sloan’s 2006 opinion, Dr. Marion’s opinion, reflecting the same diagnosis and causation opinion cannot satisfy the “current evidence” requirement under the law. Claimant’s Brief at 7.

In a public sector case, once a claim for disability compensation has been accepted and benefits have been paid, to warrant a modification or termination of those benefits a three-prong burden-shifting analysis is applied. *Mahoney v. D.C. Public Schools*, CRB No. 14-067 (November 12, 2014) (*en banc*).

As we have held:

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 injured worker’s benefits continue unmodified or termination.

¹ The scope of review by the Compensation Review Board (“CRB”) and this Review Panel as established by the District of Columbia Comprehensive Merit Personnel Act of 1978, as amended D.C. Code § 1-623.01 and as contained in the governing regulations is 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. D.C. Code § 1-623.28(a). “Substantial evidence”, as defined by the District of Columbia Court of Appeals (“DCCA”), is such evidence as a reasonable person might accept to support a particular conclusion. *Marriott Int’l. v. DOES*, 834 A.2d 882 (D.C. 2003) (“*Marriott*”). Consistent with this scope of review, the CRB and this panel are bound 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, supra*, 834 A.2d at 885.

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 termination.

Mahoney, CRB No. 14-067.

With respect to the first prong, which requires the employer to produce current and probative evidence that a claimant's condition has changed and warrants a termination of benefits, the ALJ found that Dr. Marion's 2001, 2012 and 2013 AME reports consistently attributing Claimant's low back pain was due to her stenosis and degeneration and unrelated to her work injury. Dr. Marion's 2013 report reiterated his previous assessment of Claimant and determined she was able to return to work, with restrictions. Using the AME's as his basis for support, the ALJ correctly determined that the first prong of *Mahoney* was met.

Pursuant to *Mahoney*, the burden then shifted to Claimant to present reliable and relevant evidence that her condition had not changed to warrant a modification or termination of benefits. In making this determination, the ALJ considered the breadth of Claimant's testimony, and the November 6, 2014 report of Dr. Klaiman diagnosing her with chronic back pain and episodic sciatica, degenerative disc disease and right-side radiculopathy which he opined had been aggravated by the April 28, 2005 work injury. The ALJ concluded that Claimant had met her burden of "producing reliable and relevant evidence that conditions have not changed to warrant a modification or termination of benefits." CO at 7.

Finally, in weighing the evidence to determine whether, pursuant the third prong of *Mahoney*, Employer met its burden of proving by a preponderance of the evidence that Claimant's benefits should be terminated the ALJ concluded that Dr. Klaiman's opinion was consistent with that of Dr. Sloan's, and supported by the report of Dr. Marion and Claimant's testimony. Giving the preponderance of the evidentiary weight to Dr. Marion's report, the ALJ found no causal connection between Claimant's current condition and the April 28, 2005 work injury, and concluded Employer had sufficiently met its evidentiary burden.

Claimant also challenges the CO's conclusion that Claimant's current back condition was no longer causally related to the April 28, 2005 work injury arguing:

The Compensation Order's finding that the totality of the circumstances suggested [Claimant's] back condition was no longer causally related to the April 28, 2005 work injury is not supported by the substantial evidence in the record. The Compensation Order faulted Dr. Klaiman's testimony because 1) Dr. Klaiman said he was "speaking theoretically" when he said that [Claimant's] work injury contributed to her pre-existing disability, 2) That "there was no definitive link between the injury and the further degeneration of her stenosis," and that 3) He testified that [Claimant] no longer suffered from an "acute muscular event.[]" CO at 7. The Compensation Order instead relied upon Dr. Marion's opinion because

“[. . .] of its consistency and its logical concurrence with the other credible evidence of record including Dr. Klaiman’s opinion that there is no causal connection between Claimant’s current back pain and right leg radiation to the work injury.” CO at 8. However, this analysis is not supported by substantial evidence in the record and is a misreading of the evidence.

Claimant’s Brief at 8.

In considering whether Employer met its burden of proving, by a preponderance of the evidence whether Claimant’s benefits should be terminated, the ALJ reasoned:

. . . In weighing the evidence I find Employer’s [sic] has met its burden in proving that Claimant’s current conditions are the result of her pre-existing conditions and further Claimant can return to work. On cross-examination by Employer, Dr. Klaiman admitted that he was speaking theoretically when said that Claimant’s work injury contributed to the progression of her spinal degeneration. (CE 16 p. 279-80) He further admitted that he had no knowledge of a report by any doctor that stated the spondylolisthesis or stenosis resulted from the April 28, 2005 work injury. Dr. Klaiman answered when examined by Employer’s counsel that there was no definitive link between the injury and the further degeneration of her stenosis. He declined to say that Claimant’s back sprain has not resolved but admitted Claimant no longer had “an acute muscular event” [.] (CE 16 p. 287) Dr. Klaiman’s opinion that the strain has healed is consistent with Dr. Sloan’s 2006 opinion that Claimant’s back strain has resolved. Dr. Klaiman’s opinion is supported by the report of Dr. Marion and Claimant’s testimony.

CO at 7.

We do not agree that the ALJ misread the evidence pertaining to Dr. Klaiman. Moreover, the ALJ provided ample explanation as to why he credited Dr. Marion’s opinion, and gave it greater evidentiary weight than the opinion of Dr. Klaiman. The ALJ’s decision is well-reasoned, explained and in accordance with the law.

Claimant’s assertion that Employer’s failure to terminate Claimant’s benefits based on Dr. Sloan’s 2006 AME, constitutes a waiver of its right to terminate Claimant’s benefits based upon Dr. Marion’s 2013 AME is an illogical and faulty one.

As Employer correctly explained:

...[C]laimant’s argument that Dr. Marion’s various opinions on causation provided in 2011, 2012, and 2013 somehow negate the Program and/or the ALJ’s justification for terminating benefits is unavailing. As indicated in the Notice, the Program relied on Dr. Marion’s October 17, 2013 evaluation as a basis for terminating Claimant’s benefits. The October 17, 2013 evaluation noted a change of condition i.e. the resolution of Claimant’s work-related injuries, as justification for Doctor Marion’s opinion that Claimant was capable of returning to work.

* * *

In reaching his decision, the ALJ applied the correct legal standard (*Mahoney*) in analyzing the evidence and reaching his determination that Employer ultimately met the necessary evidentiary burden to justify its decision to terminate Claimant's workers' compensation benefits. Acting within his scope of authority, the ALJ found Claimant could return to work with certain restrictions. Based on the evidence and testimony, the ALJ did not find Claimant's current conditions related to her degenerative disc disease and stenosis to be attributable to her acute muscular event/strain of April, 2005.

Employer's Brief at 7 - 8.

We agree with Employer's rationale and decline to follow Claimant's argument on this issue. The fact that Dr. Marion's more recent causation-related opinions are consistent with medical opinions reached by Dr. Sloan in 2006, in no way lessens the viability or persuasiveness of the 2013 opinion. Dr. Sloan's 2006 opinion supports the CO's conclusion that Claimant's work related injury has been resolved and that her current back symptoms are unrelated to the April 2005 work-related injury.

Claimant also argues, in the alternative, that assuming *arguendo* that the Employer did manage to produce evidence current and probative enough to demonstrate a change of condition, the totality of the evidence supports that Claimant's disability is causally related to the work injury. Claimant's argument, ostensibly based on her disagreement with the ALJ's weighing of the evidence, is a request to reweigh the record evidence in this matter, a task we are not at liberty to carry out. *Marriott*.

The ALJ's conclusion that Employer has proven by a preponderance of evidence that there is no causal connection between Claimant's current condition and the work injury is supported by substantial evidence, and is in accordance with the law.

CONCLUSION AND ORDER

The April 27, 2016 Compensation Order's conclusion that Employer proved, by a preponderance of the evidence, that Claimant's termination of benefits was justified is based on substantial evidence in the record and is in accordance with the law and is AFFIRMED.

So ordered.