GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR

DEBORAH CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 15-061

DEPT. OF EMPLOYMENT SERVICES
COMPENSATION REVIEW BOARD
2015 AUG 6 PM 12 39

PLANCHITTA JONES,
Claimant–Respondent,

v.

DISTRICT OF COLUMBIA DEPARTMENT OF PARKS AND RECREATION
Self-Insured Employer–Petitioner.

Appeal from a March 19, 2015 Compensation Order by
Administrative Law Judge Fred D. Carney, Jr.
AHD No. PBL 13-024, DCP No. 30100393140-0001

(Decided August 6, 2015)

Matthew T. Famiglietti for Claimant
Lindsay M. Neinast for Employer

Before, LINDA F. JORY, HEATHER C. LESLIE, and JEFFREY P. RUSSELL, *Administrative Appeals Judges.*

LINDA F. JORY for the Compensation Review Board:

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

Claimant worked for employer as a recreation specialist. On February 22, 2010, Claimant slipped and fell on a concrete surface. On March 15, 2010 the Office of Risk Management/Public Sector Workers' Compensation Program (PSWCP) issued a Notice of Determination Regarding Original Claim for Compensation (NOD) accepting Claimant's claim for the injury to the left leg, left knee, upper left thigh, and upper back as they related to the injury of February 22, 2010.

On August 5, 2011, Dr. Rida N. Azer, an orthopedic surgeon, reported that Claimant complained of a pain in the neck and that an x-ray of the cervical spine showed a narrowing of the medial and lateral joint spaces.

On October 5, 2012, PSWCP issued a NOD terminating Claimant's compensation benefits, based on an additional medical examination (AME) performed by Dr. Richard Draper on May 4, 2012.

The parties proceeded to a formal hearing on April 3, 2013 which reconvened on May 6, 2013. In a Compensation Order dated March 19, 2015, an administrative law judge (ALJ) determined the accepted body parts include "over and around the thoracic spine, cervical spine, and right shoulder blade, particularly the backside right shoulder." The ALJ further concluded Employer has not proven by a preponderance of the evidence that it was justified in terminating Claimant's benefits as Employer has not proven that Claimant's current conditions is no longer causally related to the workplace injury.

Employer appeals the Compensation Order (CO), asserting that the CO is neither supported by substantial evidence and not in accordance with the law. Employer requests the Compensation Review Board (CRB) vacate the Compensation Order.

ISSUES ON APPEAL

1. Whether Employer's Application for Review (AFR) should be dismissed because Employer did not serve Claimant with a copy of its AFR on the date listed on the Certificate of Service and did not provide Hearing Transcripts.

2. Whether the Administrative Hearings Division (AHD) has jurisdiction to decide the issue of whether Claimant's right shoulder problems are causally related to her February 22, 2010 fall.

3. Whether the ALJ improperly found that Claimant met her burden in producing reliable and relevant evidence that her condition has not changed.

4. Whether Employer met its burden that of establishing a change in condition based on an AME report of Dr. Robert Draper.

ANALYSIS[1]

[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(the Act) 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. App. 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*, 834 A.2d at 885.

Claimant initially asserts Employer's Application for Review should be dismissed as Employer did not serve Claimant with a copy on the date listed on the Certificate of Service, and therefore it should be deemed untimely, citing to 7 DCMR § 258.6, which provides:

> At the same time that the petitioner files the Application for Review and supporting memorandum with the Board, the petitioner shall:
>
> (a) Serve a copy, by mail or personal delivery, copies of same upon opposing party(ies) who shall be designated the 'respondent' for purposes of proceedings before the Board.

Employer's AFR was filed and date stamped by CRB on April 20, 2015.

A review of Employer's filing reveals it filed its AFR with its supporting Memorandum and the AFR included a Certificate of Service section which stated:

> I hereby certify that on this 20th day of April 2015, the foregoing Application for Review of Compensation Order, Memorandum of Points and Authorities Supporting Petitioner's Application for Review, and Index were delivered to:
>
> ADMINISTRATIVE HEARINGS DIVISION — *via* Hand Delivery
> 4058 Minnesota Avenue, NE 4th Floor
> Washington, D.C. 20019
>
> Matthew T. Famiglietti, Esq. — *via* First-Class Mail
> 2101 L. Street, NW, Suite 800
> Washington, DC 20037
>
> /s/_____
> Lindsay M. Neinast
> Assistant Attorney General

The Certificate is signed by counsel of record, and is an attestation by a member of the District of Columbia Bar as to the date the AFR was placed in the mail. DC Superior Court Rules provide:

> Rule 11. Signing of pleadings, motions, and other filings; representation to Court; sanctions.
>
> (a) Signature. -- Every pleading, written motion, and other filing shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party. . . .
>
> (b) Representations to court. -- By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other filing, including an electronic filing, an attorney ... is certifying that to the

> best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, --
>
> (1) it is not being presented for any improper purpose, ...
>
> * * *
>
> (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery...

The two day period between Counsel's affixing a signature to the Certificate of Service and the date of the post mark is sufficiently short, and the fact that the AFR received by the CRB is date stamped the same date as the date attested to in the Certificate of Service, permits an inference that despite being mailed as represented, the postmark does not reflect the date of mailing. We accept Counsel's attestation as a member of the Bar of the District of Columbia that the Certificate of Service accurately reflects the date the item was placed in the mail, and that the delay in receipt of the AFR by Respondent does not demonstrate that it was not placed in the mail on the date stated.

Moreover, even if the AFR was not mailed to opposing counsel on the same day that it was filed, such failure would not warrant the dismissal of the AFR. The CRB has authority to utilize the Rules of the District of Columbia Court of Appeals to resolve procedural issues, 7 DCMR § 261.4, and pursuant to Rule 3(a)(2) of Rules of the District of Columbia Court of Appeals, "failure to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal." *Hartgrove v. Aramark Corp.*, CRB No. 09-133, AHD No. 04-476A, OWC No. 590360 (August 16, 2011),

Claimant further asserts that the hearing transcript is a document filed by a party to an appeal and must be served upon the opposing party. Claimant's assertion is without merit. Neither party is required to obtain a copy of the hearing transcript when an AFR is filed nor is there any requirement to provide the opposing party with a copy of the hearing transcript. The hearing transcript is provided to the Administrative Hearings Division where it becomes part of the official record.

Claimant's Motion to Dismiss is accordingly DENIED.

Whether AHD has jurisdiction to decide the issue of whether Claimant's right shoulder problems are causally related to her February 22, 2010 fall.

Employer asserts:

> In the instant matter, it is undisputed that Claimant injured her left leg, left knee, upper left thigh and upper back. It is also undisputed that Claimant's TTD and medical benefits for her left leg, left knee, upper left thigh and upper back were terminated in an October 5, 2012 Notice of Intent to Terminate Public Sector Workers' Compensation Payments. It is further undisputed that Claimant never

> filed a claim for an injury to her right shoulder and that a final notice regarding Claimant's shoulder was never issued. Accordingly, the ALJ lacked jurisdiction to award Claimant benefits regarding her shoulder because a final determination regarding a claim for a shoulder injury was never issued.

Employer's Brief at 4. (Citations omitted).

Claimant cites five private sector decisions for her response that "A subsequent injury, whether an aggravation of the original injury or a new and distinct injury is compensable if it is the direct and natural progress of a compensable primary injury".

The Act and regulations require that before an injured public sector employee may have a formal hearing, the employee must (1) allege she has made a claim to the PSWCP and (2) prove PSWCP denied the claim. If (1) and (2) are proven, then AHD's jurisdiction, that is, the issue or issues that AHD may consider at the formal hearing, is defined by that which PSWCP denied in the NOD. As the CRB has held:

> While the courts have broad grants of authority to adjudicate matters, the adjudicatory authority of an administrative agency is limited by an enabling act. Under the Act governing this matter, a claim for benefits for a work-related injury must first be made to the Public Sector Division of the Office of Workers' Compensation, that is, the OBA. See D.C. Official Code § 1-623.24 (a); 7 DCMR §§ 104, 105, 106, 199. The OBA, now the TPA, is responsible for conducting necessary investigations into an injured worker's claim and then making an initial determination either to award or deny disability compensation benefits for that claim. It is only if the injured worker is dissatisfied with the determination the worker can request a hearing before the ALJ. See D.C. Official Code § 1-623.24 (b)(1). Thus, an ALJ is without ancillary authority to adjudicate claims for compensation that have not been first presented to the OBA, or the TPA, for investigation and resolution.")

Burney v. D.C. Public Service Commission, CRB No. 05-220, OHA No. PBL97-016A, DCP No. 345126 (June 1, 2005).

In concluding that the "accepted claim included the body parts over and around the thoracic spine, cervical spine, and right shoulder blade, particularly the backside right shoulder", the ALJ explained:

> Employer disputes whether the shoulder is part of the accepted claim because it contends that the upper back is limited to the thoracic spine and the cervical spine. However, the accepted claim was, *inter alia*, for the upper back. (EE 1, ALJ 1). The back is defined as "the posterior part of the trunk from the neck to the pelvis" See Dorlands's 29th Ed., p. 185. Using this definition, the subscapularis muscle and the teres minor muscle are located in the upper back. See Dorland's 29th Ed., p. 1145. Moreover, around June 2012, Employer referred Claimant to Dr. Shammas who indicated Claimant's treatment authorization was for *her shoulder*

> and her knee. (EE 9). Based on these facts, I find that the upper back is not limited to the spinal area, and does include muscles over and around the shoulder blade, particularly the area from the subscapularis to the teres minor muscle. In addition, I find the supraspinatus muscle extends from the cervical spine. Therefore, the accepted claim includes the body parts over and around the thoracic spine, cervical spine, and right shoulder blade, particularly the backside right shoulder.

CO at 6.

This Panel agrees with the ALJ's analysis with regard to the subscapularis and teres muscles' location in the upper back area. We also can find no error in the ALJ's conclusion that by accepting the upper back claim PSWCP accepted all of the muscles in the upper back and not just the spinal area.

Accordingly, we reject Employer's assertion that the ALJ lacked jurisdiction to award Claimant benefits regarding her shoulder because a final determination regarding a claim for a shoulder injury was never issued. Employer did not limit the upper back to only the spine, therefore all of the muscles of the upper back are included.

Whether the ALJ improperly found that Claimant met her burden in producing reliable and relevant evidence that her condition has not changed.

Employer asserts that the ALJ's finding that Claimant met her burden of producing reliable and relevant evidence that her condition has not changed is neither supported by the record nor the law.

Claimant asserts:

> The Employer sent Claimant to Dr. Shammas and authorized treatment for her shoulder and her knee. ALJ Carney relied on the finding of Dr. Shammas that 'Claimant had persistent chronic pain following an injury on the job that she sustained back on February 22, 2010' (Claimant's Exhibit 3).

Claimant's Brief at 2.

The ALJ correctly referred to the CRB's *en banc* decision in *Mahoney v. D.C. Public Schools*, CRB No. 14-067, AHD No. PBL 14-004, ORM/PSWCP No. 76000500012005-008 (November 12, 2014) (*Mahoney*) and found both Employer and Claimant met their burdens of production. Specifically, the ALJ found the report of Dr. Draper equated to "substantial, recent, current and probative evidence that Claimant's condition has sufficiently changed to warrant a modification or termination of benefits". *Mahoney, supra.* We find no error in the ALJ's determination that Employer met the initial burden of production with this report.

As *Mahoney* sets forth:

> 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.

The only medical opinion the ALJ referred to in his discussion of the evidence to determine if Claimant has met her burden is a January 28, 2013 report of Dr. Shammas. With regard to Dr. Shammas' opinion, the ALJ stated:

> On January 28, 2013, Dr. Shammas determined Claimant had persistent chronic pain following an injury on the job that she sustained back on February 22, 2010.

While Dr. Shammas did not indicate Claimant's pain was preventing her from returning to her pre-injury recreation specialist's duties, the ALJ referred to Claimant's testimony at the formal hearing citing to HT 75-85 and found Claimant's evidence that she underwent shoulder surgery and her testimony satisfied Claimant's burden.

We further note Claimant's Exhibits include a December 19, 2012 disability slip from orthopaedist Dr. George Agular, as well as a detailed narrative report with regard to his treatment options for Claimant which the ALJ could have found to be reliable and relevant evidence that conditions have not changed to warrant a modification or termination of benefits. Nevertheless, we find no reason to disturb the ALJ's conclusion that Claimant met her burden and therefore weighed the evidence to determine if Employer met its burden of establishing a change in condition by a preponderance of the evidence.

Employer's argument with regard to the third step of the *Mahoney* process is that the ALJ erred in crediting a surgeon who performed a surgery on a body part that was not an accepted body part, over Employer's physician. Employer's Brief at 6. This assertion, at first glance, suggests that the ALJ placed the burden of the third step on Claimant to prove by a preponderance of evidence that her benefits should be reinstated. Such an analysis would be reversible error.

We conclude that the ALJ correctly referred to Dr. Agular's report, as he found that report contradicted the opinion of Employer's physician Dr. Draper. The ALJ stated:

> Based on the record as a whole, I credit Dr. Agular's report about the conditions related to Claimant's upper back which is based on his physical observations during surgery. No other doctor had such a clear view of the objective evidence regarding the alleged injury to the human frame. I discredit Dr. Draper's view on Claimant reaching maximum medical improvement because it was inaccurate and also because his report did not reflect a thorough physical examination. Crediting Dr. Agular's report, I find that Claimant suffered from quadrilateral syndrome,

> bursitis, a subscapularis tear, teres minor atrophy, and impingement of the axillary nerve, and that the disability of the upper back has not resolved or lessened.
>
> Although Dr. Draper determined Claimant was able to perform a job that did not require her to lift more than 75 pounds because of pre-existing arthritis, it is apparent he was in error about Claimant's overall condition, particularly the nature of claimant's current upper back condition, and he failed to discuss the extent of the disability of the knee, if an. Based on the misinformation in Dr. Draper's report, I find Claimant's overall condition continues to be disabling.

CO at 8.

What the Employer is asking us to do is to reweigh the evidence in its favor, a task we cannot do. *Marriott, supra* 834 A.2d at 885. We find that there is substantial evidence in the record to support this ALJ's finding that Employer did not establish by a preponderance of evidence that claimant's condition has changed to the extent that her benefits should be terminated. We conclude that the ALJ's Conclusions of Law are supported by substantial evidence in the record.

CONCLUSION AND ORDER

The March 19, 2015 Compensation Order is in accordance with the applicable law; supported by substantial evidence and is AFFIRMED.

So Ordered