GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

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COMPENSATION REVIEW BOARD

CRB 14-113

REAPHEAL MCARTHUR,
Claimant-Respondent,

v.

DISTRICT OF COLUMBIA DEPARTMENT OF CORRECTIONS,
Employer-Petitioner.

Appeal from an August 29, 2014, 2014 Compensation Order
Administrative Law Judge Fred D. Carney, Jr.
AHD No. PBL 12-035, DCP No. 76012-0001-1999-0008

Harold L. Levi for Claimant
Eric H. Huang for Employer

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

JEFFREY P. RUSSELL, for the Compensation Review Board.

DECISION AND REMAND ORDER

BACKGROUND AND FACTS OF RECORD

Claimant was injured on January 22, 1995 while employed as a cook for Employer, the District of Columbia Department of Corrections. The injuries were to his low back, and occurred when he tried to control a rolling cart. He filed a claim for benefits under the disability provisions of the District of Columbia Comprehensive Merit Protection Act, now known as the District of Columbia Public Sector Workers' Compensation Act, D.C. Code §§ 1-623.21, *et seq.*, (the PSWCA).

The claim was accepted and Employer paid temporary total disability benefits and provided medical care, primarily through Dr. Hampton Jackson. Employer had Claimant evaluated by an independent medical evaluator (IME) in 2008, and based on the results thereof, Claimant's benefits were terminated. He sought reinstatement of those benefits at a formal hearing before Administrative Law Judge (ALJ) Nata Brown in the Department of Employment Services (DOES), who on May 30, 2008 issued a Compensation Order reinstating those benefits.

Employer had Claimant examined for the purposes of another IME on December 9, 2011 by Dr. Robert Franklin Draper. Following that examination, Dr. Draper issued three IME reports, dated December 9, 2011, December 11, 2011 and February 10, 2012, in which he opined that Claimant's current low back condition, although disabling Claimant from his pre-injury job, is no longer causally related to the 1995 work injury, but rather represents a progression of the Claimant's pre-existing degenerative arthritis as a result of his advancing age. Based on that IME, Employer terminated Claimant's benefits.

As a result of Dr. Draper's opinions, Employer issued a Notice of Determination (NOD) on May 12, 2012, terminating Claimant's benefits as of January 13, 2012. In the NOD, Employer stated "payments have been terminated effective January 13, 2012, due to your returning to work on January 14, 2012.... Your Supervisor Lt. Audrey confirmed that you returned to work on January 14, 2012 and also confirmed your retirement date to be March 2, 2012."

Claimant requested reconsideration, and Employer issued a Final Decision on Reconsideration (FDR) June 1, 2012, confirming the NOD.

Claimant filed an application for formal hearing with DOES and presented his claim for reinstatement of benefits at a formal hearing before ALJ Fred D. Carney, Jr., in the Department of Employment Services' Administrative Hearings Division on November 20, 2013, following which the ALJ issued a Compensation Order dated August 29, 2012, in which Claimant's benefits were ordered to be reinstated.

This case is before the Compensation Review Board (CRB) on the appeal filed by Employer, challenging the August 29, 2014 Compensation Order. We vacate the Compensation Order and remand the matter for further consideration.

ANALYSIS

Employer contends that:

I. The ALJ did not properly articulate the burden shifting procedure,
II. The ALJ did not articulate whether Claimant's evidence satisfied his burden,
III. The Claimant's evidence did not satisfy his burden,
IV. The ALJ improperly applied the treating physician preference, and
V. The ALJ's evaluation of the Employer's evidence, and subsequent weighing of the Claimant's evidence over Employer's evidence, was incorrect and not supported by substantial evidence.

Memorandum of Points and Authorities Supporting Petitioner's Application for Review, (Employer's Brief), p. 5.

Claimant filed "Respondent's Opposition to Employer's Application for Review of Compensation Order" (Claimant's Brief), arguing that the ALJ did in fact articulate and conform his analysis to the proper burden-shifting analysis, "finding as a whole that Employer failed to prove a change of condition in [Claimant's] condition sufficient to warrant the termination of his [benefits]" (Claimant's Brief, p. 8), and that the ALJ's determinations that Claimant "met his second-step burden of production and that Employer failed to produce substantial evidence of a change in [Claimant's] medical condition are supported by substantial evidence in the record" (Claimant's Brief, p. 13.)

Regarding the assertion that the ALJ improperly utilized the treating physician preference, Claimant argues that despite making reference to such a preference, the ALJ did not in fact apply the preference because "the ALJ made the necessary finding that Employer's medical reports failed to prove a change in [Claimant's] medical condition." Claimant's Brief, p. 16.

Subsequent to the issuance of the Compensation Order, the CRB issued an en banc Decision and Remand Order in *Mahoney v. D.C. Public Schools*, CRB No. 14-067, AHD No. PBL 14-004, ORM/PSWCP No. 76000500012005-008 (November 12, 2014),. In the decision, the CRB ruled:

> In conclusion, we find 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 is no longer 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 [for modification or termination] 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 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*, pp. 9 – 10.

Although *Mahoney* was issued after the issuance of the Compensation Order under review, Claimant noted in his brief that it was pending at the time of this appeal, and argues that the Compensation Order conforms with what Claimant anticipated would be the outcome. Thus, we shall examine the Compensation Order to ascertain whether it conforms to *Mahoney* in its essential analysis.

Quoting again from *Mahoney*:

> 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 [for modification or termination] fails and the injured worker's benefits continue unmodified or terminated.

The first portion of the analysis in the Compensation Order is a review of Dr. Draper's opinions, in which the ALJ discusses how Dr. Draper "did not find anything on the MRI which he felt was causally related to the accident", and that he "had bulging discs and degenerative disc disease which is *all* causally related to the aging process" (emphasis added). Compensation Order, p. 5.

This is the only evidence cited by the ALJ concerning causal relationship. The remainder of his discussion at this point in the Compensation Order dealt with Dr. Draper's acknowledgment that Claimant's low back condition precludes his returning to the pre-injury job. Nonetheless, the ALJ determined that, from this evidence, "Employer ha[s] produced evidence that Claimant's work disability has resolved [and thus] Employer has met its initial burden of production to produce substantial evidence of a change in conditions." Compensation Order, p. 5.

We note that nothing in the ALJ's *summary* states that Dr. Draper is of the opinion that anything has *changed* since Claimant began receiving compensation benefits, other than the inference that his condition has deteriorated due to the aging process. At no point does the ALJ assert or find that Dr. Draper ever expressed the opinion that at some time following the original onset of disability, there was ever a time that Claimant had improved sufficiently to return to work in the pre-injury job.

Therefore, we must conclude that the ALJ's cited evidence is insufficient as a matter of law to meet Employer's burden under *Mahoney*. Thus, the ALJ's analysis should have ended there.

But he did not. Rather, he proceeded to state that "Now the burden shifts to Claimant to present evidence that would constitute a preponderance of the evidence that he continues to suffer with a disability or condition resulting from his employment that causes him a wage loss." Compensation Order, p. 5.

What *Mahoney* says, however, is "If the employer meets its initial burden, then the claimant has the burden of producing reliable evidence that conditions have not changed to warrant a modification or termination of benefits."

The ALJ did not make an independent initial finding on this issue. Rather, he reviewed the entire record as a whole, first discussing Claimant's testimony at the instant formal hearing to the effect that he had performed the heavy work as a cook for 11 years prior to sustaining the injury without problems, and that the initial Compensation Order found that diagnostic studies in 1995 following the injury revealed bilateral S1 and right sided L5 radiculopathy, and a ruptured L4-5 disc. The ALJ correctly found that those findings are now the "law of the case" and not subject to revision. Compensation Order, p. 6.

The ALJ then discussed the final report of now-deceased Dr. Hampton Jackson, dated January 10, 2012, responding to Dr. Draper's IME, in which Dr. Jackson refers to the original diagnostics concerning the abnormalities detected post-injury. He also discussed records from a Dr. Shockley, who also treated Claimant and obtained an MRI and EMG on August 6, 2012, both of which demonstrated some objective abnormalities. The ALJ questioned Dr. Draper's views because they were not corroborated by any "clinical evidence of record", particularly regarding the existence of a pre-existing condition, and failed entirely to refer to or acknowledge the existence of a ruptured disc dating back to 1995. Then, the ALJ cited and applied treating physician preference, and concluded that Claimant's evidence was superior to and outweighed that of Employer.

The application of the preference was error, inasmuch as the District of Columbia Court of Appeals ruled, in *District of Columbia Public Schools v. DOES,* 95 A.3d 1284 (D.C. 2014), the preference has been abolished by statute and continuing to apply it is reversible error.

These errors, in combination, are such that we have determined that the decision should be vacated, and the matter remanded to the ALJ for further consideration, reviewing the evidence and considering it according to the process outlined in *Mahoney*, and if the final step is reached requiring a weighing of the record as a whole, the ALJ is not to apply the treating physician preference.

CONCLUSION AND ORDER

The ALJ's analysis of the claim did not conform to analytic process in *Mahoney* and the application of the treating physician preference was not in accordance with the law. Accordingly, the reinstatement of Claimant's benefits is vacated and the matter is remanded for further consideration under *Mahoney* and without application of a treating physician preference.

FOR THE COMPENSATION REVIEW BOARD:

JEFFREY P. RUSSELL
Administrative Appeals Judge

February 26, 2015
DATE