

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 15-124

**RONALD H. WARD,
Claimant–Petitioner,**

v.

**DISTRICT OF COLUMBIA HOUSING AUTHORITY,
Employer–Respondent**

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2015 DEC 30 AM 9 47

Appeal from a July 23, 2015 Compensation Order by
Administrative Law Judge Fred D. Carney, Jr.
AHD No. PBL 12-055A, DCP No. 3011026526

(Decided December 30, 2015)

Harold L. Levi for Claimant
Andrea G. Comentale and Frank Mc Dougald for Employer

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

LINDA F. JORY for the Compensation Review Board.

DECISION AND REMAND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

Ronald H. Ward (Claimant) worked for the District of Columbia Housing Authority (Employer) as Police Officer. It is undisputed that Claimant had spinal degeneration and L5-S1 disc herniation as a result of a prior injury he sustained in a work-related motor vehicle accident on May 8, 2003. Claimant returned to his Police Officer duties 19 weeks later. On October 13, 2011, Claimant was sitting in a police cruiser and when he stepped out of the car, slipped and lost his balance. Claimant sought medical attention on the same day at Providence Hospital when he presented with complaints of back pain. Claimant came under the care of Dr. Easton Manderson, orthopedic surgeon. Dr. Manderson diagnosed Claimant with a lumbar sprain superimposed on lumbar degeneration disease.

On January 17, 2012, Claimant came under the care of Dr. Joshua A. Thomas, pain specialist, who opined that Claimant should work with restriction of no lifting greater than 10 lbs. Dr. Thomas noted on January 20, 2012 that an MRI of Claimant’s lumbar spine dated December 30,

2011 showed small concentric disc protrusions at L2-3 and L3-4, a moderate sized concentric disc protrusion at L4-L5, a small concentric left-sided disc protrusion at L5-S1 and multi-level disc desiccation.

On January 30, 2012, Claimant's claim was accepted by the Public Sector Workers' Compensation Program (PSWCP) for a low back strain. On March 21, 2012, Dr. Manderson released Claimant to light duty sedentary work four days a week, four hours a day with no lifting over 10 lbs.

On May 1, 2012, at the request of Employer, Claimant was examined by Dr. Mark Rosenthal, orthopedic surgeon, for an additional medical examination (AME). On February 27 2014, PSWCP issued a Notice of Termination Regarding Public Sector Workers' Compensation Indemnity Payments and Medical Benefits based on Dr. Rosenthal's opinion.

On April 10, 2014, Claimant began seeing an orthopedic surgeon, Dr. Jeffrey D. Sabloff. Dr. Sabloff did not mention a lumbar strain. Claimant continued to work under restrictions, however he has been working 8-hour days since April 2014.

A Formal Hearing occurred on June 23, 2014. The issue presented was whether Claimant continued to be temporarily partially disabled as a result of his work injuries from 2003 and 2011. Claimant sought reinstatement of his medical benefits and temporary partial disability benefits from February 17, 2014 to the present and continuing. A Compensation Order was issued on July 23, 2015 which denied Claimant's claim for relief. Claimant appealed the Compensation Order to the CRB, asserting it is neither supported by substantial evidence nor in accordance with the law.

Employer requests the CRB affirm the CO.

ISSUES ON APPEAL

1. Whether the ALJ failed to make the required preponderance of the evidence finding as to the grounds for terminating Claimant's benefits.
2. Whether the ALJ failed to make findings of fact on all material, contested issues of fact.

ANALYSIS¹

¹ The scope of review by the Compensation Review Board (CRB) and this Review Panel (hereafter, the 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. 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

Whether the ALJ failed to make the required preponderance of the evidence finding as to the grounds for terminating Claimant's benefits.

Claimant asserts that the CO articulated its obligation to apply the three-prong burden-shifting analysis in termination of benefits matters. *Mahoney v. D.C. Public Schools*, CRB No. 14-067, AHD No. PBL 14-004, DCP. No. 76000500012005-008 (November 12, 2014) (*Mahoney*). According to Claimant:

The CO went so far as to state that the last step of the *Mahoney* analysis is to weigh the evidence in the record as a whole and determine whether Employer met its burden of proving by a preponderance of the evidence that the Claimant's benefits should be modified or terminated.

While the CO articulated its obligation and began its evaluation of the evidence, it failed to complete the *Mahoney* evaluation. The CO found that Employer met its initial burden of production. It then found that Ward 'successfully produced reliable and relevant evidence that conditions have not changed to warrant a modification or termination of benefits'. Following that the CO began to weigh the evidence, stating that Ward's testimony was consistent with the reports of his physicians.

But the CO then stopped the weighing of the evidence in its tracks. It diverted for one paragraph to the wording of the Notice of Determination which preceded Ward's clinical, diagnostic and medical treatment – and then stopped, never to resume its *Mahoney* analysis.

Claimant's Brief at 7, 8.

Employer asserts the weight of the evidence demonstrates that Employer met its burden of proof in terminating Claimant's benefit. Employer further asserts that although the ALJ stated that benefits could not be awarded for conditions that were not part of the accepted claim, the ALJ did not deny Claimant benefits on that basis. Employer asserts the ALJ denied Claimant's claim for relief because there was no evidence of a causal relationship between his current condition and the October 13, 2011 injury.

This Panel agrees with Claimant's assertion that the ALJ did not complete the third step of the *Mahoney* test. The ALJ's analysis with regard to the third step consists of the following analysis:

When the party's evidence is weighed it is noted that Claimant's testimony is consistent with the reports of his treating physicians as to his treatment and the results object [sic] tests. Claimant testified he did not receive medical treatment

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.

for his back before the 2003 work injury and after returning to work in 2004 he did not receive any further treatment for his back until 2011. The reports of Drs. Manderson and Thomas support his testimony on those points. Claimant further testified he was recommended surgery and declined to undergo surgery. The reports of his treating physicians support that point as well. Claimant testified he currently works eight hours [sic] days in a sedentary job. However, his current treatment consist [sic] only of pain relieving medication the use of a TENS unit.

Employer's evidence however, illustrates that Claimant's claim was accepted for lumbar strain/sprain. The reports of Dr. Rosenthal do not indicate the presence of any strain (EE 4, 5 & 6). The reports of Claimant's treating physicians Drs. Sabloff and Hung draw no medical causal nexus between Claimant's current condition and his 2011 lumbar strain. Additionally, the May 3, 2014 MRI was interpreted as showing Claimant with degenerative disc disease, spondylosis and disc bulges. In matters that involve conditions that were not a part of the original claim and acceptance the Compensation Order Review Board has held for the employer. In the instant case even if there was a demonstrated causal relationship between Claimant's disc disease, spondylosis and disc bulges those conditions were not a part of the claim, and therefore benefits cannot be awarded here for those conditions. *Ashton v. D.C. Dept of Motor Vehicles*, CRB No. 14-007, AHD No. PBL 13-045, DCP No. 30081122563-0001 (2014) (*Ashton*).

CO at 7, 8.

The ALJ's reliance on the CRB's 2014 decision in *Ashton* to support a determination that Claimant's disc disease was not part of the claim and therefore benefits could not be awarded is misplaced. The findings of *Ashton* are considerably different from the findings made in the instant matter. We note there have been two subsequent decisions since the 2014 decision in *Ashton*, making four CRB decisions involving the same claim nevertheless, the NOD at issue in the *Ashton* matter specifically stated that Employer was accepting Claimant's claim for "Temporary aggravation of pre-existing hypertension caused by the inhalation of the noxious fumes in October 2008". The CRB reasoned:

Ms. Ashton is only entitled to benefits if the aggravation continues, and is no longer entitled to compensation once the aggravation has subsided. Employer's doctor says it does not; Claimant's doctors do not say the aggravation continues, only the pre-existing hypertension continues. The employer met its burden, but the claimant offers a red herring—her hypertension is not better. She did not prove her claim of an ongoing aggravation by a preponderance of the evidence.

Ashton v. D.C. Dept of Motor Vehicles, CRB No. 14-007, AHD No. PBL 13-045, DCP No. 30081122563-0001 (2014).

In the instant matter, the Notice of Determination that Employer submitted as Exhibit 1, indicates Employer was accepting Claimant's claim for the diagnosis of a low back strain only. While the NOD indicates that Claimant's strain was superimposed on lumbar degenerative disease, the

NOD does not limit the claim to a “temporary aggravation”, nor is there any mention that Claimant had pre-existing spondylosis and disc bulges. Thus, this Panel concludes that in order to terminate Claimant’s benefits Employer needs to show that Claimant’s spondylosis and disc bulges pre-existed the 2011 work injury and the low back strain has resolved. We note that it is undisputed Claimant had spinal degeneration and L5-S1 disc herniation as a result of a prior injury he sustained in a work-related motor vehicle accident on May 8, 2003. However, the MRI of record dated December 30, 2011 showed small concentric disc protrusions at L2-3 and L3-4 and a moderate sized concentric disc protrusion at L4-L5 and a small concentric left-sided disc protrusion at L5-S1 and multi-level disc desiccation.

Otherwise said, this is a medical causal relationship issue which the Panel finds cannot be resolved by the lack of mention of a lumbar strain in the Employer’s reports as it is unknown if the strain that occurred on October 13, 2011 contributed to the small concentric disc protrusions at L2-3 and L3-4 and a moderate sized concentric disc protrusion at L4-L5 or the multi-level disc desiccation.

The ALJ’s analysis in the first two steps of *Mahoney* contained no direct consideration of the claim on any jurisdictional ground. Then, in the third stage, rather than weighing the evidence that comprised the controversies in steps one and two, the ALJ invoked a jurisdictional ground not theretofore considered, and not raised in the notice of termination. This is error. As we conclude the ALJ failed to make the required preponderance of the evidence finding as to the grounds for terminating Claimant’s benefits, the CO is not in accordance with the law.

CONCLUSION AND ORDER

The July 23, 2015 Compensation Order is not in accordance with the law and is reversed and remanded for the ALJ to weigh the evidence in the record as a whole and determine whether Employer met its burden of proving by a preponderance of the evidence that the Claimant’s benefits should be modified or terminated.

So ordered.