

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB 15-076

**RONALD MAHONEY,
Claimant-Petitioner,**

v.

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

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
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Appeal from an April 30, 2015 Compensation Order on Remand
by Administrative Law Judge Gwenlynn D'Souza.
AHD No. PBL 14-004, DCP No. 76000500012005-008

(Issued October 1, 2015)

Harold L. Levi for Claimant
Eric Adam Huang for Employer

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

HEATHER C. LESLIE, *Administrative Appeals Judge*, for the Compensation Review Board.

DECISION AND REMAND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

The facts and procedural history are set out in the *en banc* decision, *Mahoney v. D.C. Public Schools*, CRB No. 14-067 AHD No. PBL 14-004, DCP No. 76000500012005-008, 1-4 (November 12, 2014) (Jones, M. and McCoy, H. *dissenting*) (*Mahoney*):

Claimant Ronald Mahoney has worked for Employer for many years and has had several accidents. As found by the ALJ:

Prior to the October 19, 2004, work injury, Claimant sustained multiple work related injuries. I find in 1968, Claimant sustained the first work related injury when he was involved in a motor vehicle accident. His claim was accepted and Claimant was treated

with traction at Hadley Hospital and he remained off work until 1977. March 29, 1979, Claimant sustained injury to his lumbar spine. On June 14, 1984, Claimant sustained a back injury which WC accepted. I find Dr. Rida N. Azer, orthopedic surgeon, treated Claimant for his 1984 injury and diagnosed Claimant with degenerative disease and acute lumbar strain. I find Claimant was again treated conservatively by Dr. Azer with physical therapy, home exercise and rest from work. Claimant was out from work from June 16, 1984 until July 30, 1984, for the June 14, 1984, work injury. I find that on June 21, 1985, Claimant sustained cervical and lumbar strains in the performance of his duties. I find Claimant was off work from June 24, 1985 until August 12, 1985 with wage loss and medical benefits.

CO at 2.

The present matter concerns an October 19, 2004 accident at work. On that day, Claimant was working for Employer as a transportation supervisor. Claimant injured his back when he slipped and fell down some steps while exiting the trailer in which his office was located. Employer accepted Claimant's workers' compensation claim and paid him temporary total disability and medical benefits from the date of injury until November 15, 2012.

The medical record established that Claimant received emergency room treatment and then came under the care of several doctors associated with Greater Metropolitan Orthopedics. Dr. Edward Rabbitt diagnosed a lumbosacral strain with probable radiculopathy and herniated nucleus pulposus and treated Claimant until mid-2006. His associate, Dr. Alan Schreiber, began treating Claimant in mid-2006 and diagnosed stenosis secondary to degenerative spondylosis and facet hypertrophy and recommended surgery. Another doctor at Greater Metropolitan Orthopedics, Dr. Jeffrey Sabloff reported Claimant had early degeneration but no evidence of disk herniation so no surgery was performed.

Claimant had to discontinue treatment with the doctors at Greater Metropolitan Orthopedics when Employer advised Claimant that those doctors no longer were authorized panel doctors. Claimant then came under the care of another orthopedic surgeon, Dr. Easton Manderson. Dr. Manderson diagnosed discogenic disease, spondylosis, bulging discs at L2, L3 and L5-S1, and bilateral neuroforaminal stenosis with disc osteophytes.

Claimant stopped treating with Dr. Manderson in December 2012 when he no longer was an authorized panel doctor. On February 4, 2013, Claimant came under the care of Dr. Lori E. Nelson. Dr. Nelson also diagnosed lumbar degenerative disease, stenosis and spondylosis.

On May 31, 2001 and September 5, 2013, Employer had Claimant examined by Dr. Mark Scheer for Additional Medical Examinations (AME). In 2001, Dr. Scheer opined that Claimant's problems were not caused by the work-related accident but were either age-related or due to pre-existing conditions.

After his 2013 AME Dr. Scheer opined that Claimant's then current medical condition was not causally related to a work accident. After receipt of this report, Employer notified Claimant his benefits would be ended as of September 5, 2013. Claimant sought reconsideration and upon further review, Employer upheld its decision to end benefits. Benefits were ended as of November 15, 2014. Thereafter, Claimant filed for a formal hearing.

A formal hearing was held in February 2014 and the ALJ issued his CO on April 23, 2014, reinstating Claimant's benefits. In reaching his decision, the ALJ utilized a three-step burden shifting analysis:

Once a claim for disability compensation has been accepted and benefits paid, in order to prevail at a formal hearing, Employer must adduce persuasive evidence sufficient to substantiate the modification or termination of an award of benefits. The holding of the Employees' Compensation Appeals Board (ECAB) is often recited: that once government-employer has accepted a claim of disability compensation, and has actually paid benefits, employer must adduce persuasive medical evidence sufficient to substantiate a modification or termination of an award of benefits. In addition, ECAB has held the evidence relied upon to support a modification or termination of compensation benefits must be current and fresh in addition to being probative and persuasive of a change in medical status.

* * *

The WC's burden is one of production and requires an evaluation of the WC's evidence standing alone without resort to evaluating or weighing the injured worker's evidence in conjunction thereto for if the DCP fails to sustain its burden, the injured worker prevails outright. However, if the DCP meets its burden, then the burden shifts to the injured worker to show through reliable, relevant, and substantial medical evidence that her physical condition has not changed and that benefits should continue. If the injured worker meets her burden, the medical evidence is weighed to determine the nature and extent of disability, if any.

CO at 4-5. (Citations omitted).

The ALJ held

Based upon a review of the record evidence as a whole, I find and conclude Employer has failed to present substantive evidence of a change in Claimant's condition sufficient to modify benefits.¹

CO at 7.

Employer timely appealed. On review, Employer argues that the ALJ's award should be reversed for several reasons; the ALJ improperly applied the burden-shifting scheme for public sector cases involving modification or termination of a claimant's benefits, the ALJ's finding that Claimant continues to suffer from a work-related injury is not supported by substantial evidence, and the ALJ improperly applied the treating physician preference.

Claimant timely filed an Opposition. Claimant first argues that the ALJ's decision should be affirmed because Employer did not meet its burden at the first step of the burden-shifting analysis. Claimant, while acknowledging inconsistencies in the reported cases, further argues that under any analysis, the ALJ's decision reinstating benefits is supported by substantial evidence. Lastly, Claimant asserts the ALJ properly gave evidentiary preference to the treating physicians.

After reviewing the arguments and applicable case law, the CRB issued, *en banc*², the above quoted Decision and Remand Order on November 12, 2014. In *Mahoney*, the CRB outlined the burden shifting scheme to be applied as follows:

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 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

¹ It appears the ALJ inadvertently used the word "substantive" when he meant to use "substantial."

² The CRB decided *en banc* because:

The letter advising the parties of *en banc* review noted there have been inconsistent panel decisions regarding the burden-shifting analysis in public sector cases for the modification or termination of benefits for a claim that has been accepted by the Employer. For example, compare *Smith v. D.C. Department of Public Works*, CRB 13-160 (June 3, 2014) with *Workcuff v. D.C. Housing Authority*, CRB No. 12-187(1) (August 30, 2013).

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 at 8-9.

On April 30, 2015, a Compensation Order on Remand (COR) was issued which denied Claimant's claim for relief concluding that Employer had met its burden of proof in justifying the termination of Claimant's benefits on September 5, 2013.

Claimant timely appealed. Claimant argues:

As we show, the COR failed to apply the Mahoney burden-shifting standards correctly just as the CO before it had failed to do. As we show, despite holding in favor of Employer, the COR found Mahoney to be a credible witness who suffered pre-existing back conditions which were the result of multiple, accepted work-related back injuries. As we further show, in spite of properly reciting that the ultimate burden of proof was Employer's to demonstrate grounds for termination by a preponderance of the evidence, the COR found the Employer's Independent Medical Examiner opinion upon which it terminated Mahoney's benefits to have relied on incorrect assumptions and to contain inconsistent reasoning regarding the cessation of an aggravation of Mahoney's pre-existing lumbosacral condition and radicular symptoms. Given its inconsistent and inaccurate reasoning, the COR also found the IME to be deficient for failing to know the full extent of Mahoney's 1968, 1979, 1984 and 1985 accepted work-related back injuries and medical history as the source of his pre-existing and now-degenerative back condition. Nevertheless, after discrediting Employer's evidence, the COR held without supportable justification that Employer had proven by a preponderance of the evidence that it was justified in terminating Mahoney. In doing so, the COR set a new standard of uncertainty, confusion, and obfuscation, finding Mahoney's lumbar and radicular conditions "plateaued somewhere between 2007 and 2010" after which he experienced intermittent pain on exertion which, by 2012, was constant, but that the effects of his pre-2004 work-related dicogenic [sic] disease in 2011 and 2013 exceeded the effects of his further work-related aggravation of those effects in 2004.

As a result of the glaring deficiencies and inconsistencies in Employer's IME, we submit that Employer failed to meet its burden of proof by a preponderance of the evidence, if not also its initial, substantial evidence burden, and we further submit the COR is neither supported by substantial evidence in the record nor is it in accord with District of Columbia law.

Claimant's argument 2-3.

Employer opposes the appeal, contending it satisfied its burden of proof at both the initial stage and the final stage and that the COR is supported by the substantial evidence in the record and in accordance with the law.

STANDARD OF REVIEW

The scope of review by the CRB is limited to making a determination as to whether the factual findings of the Compensation Order on Remand are based upon substantial evidence in the record and whether the legal conclusions drawn from those facts are in accordance with the applicable law. Section 1-623.28(a) of the District of Columbia Government Merit Personnel Act of 1978, as amended, D.C. Official Code § 1-623.1 *et seq.* (“Act”). Consistent with this standard of review, the CRB must uphold a Compensation Order that is supported by substantial evidence, even if there is substantial evidence in the record to support a contrary conclusion, and even where the CRB might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

DISCUSSION

Claimant first argues the ALJ erred in determining that Employer had produced current and probative evidence that Claimant’s condition has sufficiently changed to warrant a modification or termination of benefits. . In determining whether Employer had satisfied the first step in the analysis set forth in *Mahoney, supra*, the ALJ noted:

Starting with the first step of the *Mahoney* analysis, Employer must produce current and probative evidence that Claimant's condition sufficiently changed to warrant a termination of benefits. D.C. Code § 1-623.24(d)(4) provides, in part, that an award for compensation may be terminated in the event the disabling condition is no longer related to the employment. Employer posited the May 31, 2011 and April 8, 2013 reports of Dr. Sheer, which indicated, that after a physical examination of Claimant, Dr. Sheer opined that Claimant suffered from a resolved aggravation of preexisting lumbosacral degenerative disease/stenosis and radiculopathy to the right lower extremity, but Claimant had permanent restrictions of no climbing, crawling, repetitive bending, twisting, and no lifting, pushing, or pulling greater than 10 pounds due to his preexisting degenerative disc disease and stenosis. (EE 3, EE 4) Dr. Sheer alluded that the symptoms of the aggravation ceased when the radiculopathy ceased in September 2007. Having presented the report of Dr. Sheer which indicates that Claimant's current symptoms are caused by his preexisting condition and not the aggravation of the underlying condition or any residuals of the October 19, 2004 work injury, Employer satisfied its initial burden.

COR at 8-9. (Footnote omitted.)

Claimant argues the inconsistencies and incorrect assumptions attributed to Dr. Scheer’s opinion by the ALJ in the third step of the analysis should also be applied at the first step and thus, the analysis should have stopped at that point because Employer’s failure to meet its burden of production. We reject this argument.

Claimant relies on *Gaston-Jenkins v. D.C. Dep't of Motor Vehicles*, CRB No. 13-021, AHD No. PBL 11-049 (April 24, 2013). We find this case to be inapposite as the ALJ in that case found the Employer failed to satisfy the first burden, compared to the case at bar where the Employer failed to satisfy the third step in the burden shifting analysis. As the CRB noted in the first Decision and Remand Order,

The DCP's burden is one of production and requires an evaluation of the DCP's evidence standing alone without resort to evaluating or weighing the injured worker's evidence in conjunction thereto for if the DCP fails to sustain its burden, the injured worker prevails outright.

Rosa Gaston-Jenkins v. DC Dep't of Motor Vehicles, CRB No. 12-098, AHD No. PBL 11-049 (August 8, 2012)

The ALJ determined that Employer had satisfied its initial burden. The ALJ found Dr. Scheer's opinion that Claimant's current condition and work restrictions are unrelated to the work injury. Dr. Scheer's opinion is current and probative evidence that Claimant's condition has sufficiently changed to warrant a modification or termination of benefits, thus satisfying the first step in the *Mahoney* analysis.

With Employer having met its initial burden, the burden then shifted to Claimant to produce reliable and relevant evidence that conditions have not changed to warrant a modification or termination of benefits. The ALJ determined Claimant met this burden and this finding has not been appealed. With the Claimant's rebuttal burden met, the ALJ correctly noted the evidence is then 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.

When weighing the evidence to determine if Claimant's benefits should be modified or terminated the ALJ stated:

Employer posited the opinion of Dr. Sheer who relied upon incorrect assumptions and inconsistent reasoning in reaching his conclusion that the aggravation ceased altogether around September 2007. Dr. Sheer noted Claimant's initial condition was an aggravation of preexisting lumbosacral degenerative disease, stenosis, and radiculopathy to the right lower extremity. (EE 3, EE 4) Dr. Sheer attributed Claimant's current condition to preexisting lumbar degenerative disease and stenosis and not the October 19, 2004 accident. (CE 3, CE 4) In his report, Dr. Sheer noted that Claimant came under the care of Dr. Schreiber who initially recommended surgery but the radiculopathy "resolved". (EE 4 at 4) Contrary to Dr. Sheer's report, Dr. Schreiber noted on July 25, 2008, Claimant's leg pain was "under control" when deciding not to perform surgery. (CE 3 at 34)

Based on a review of the record, I disagree with Dr. Sheer's finding that the radicular symptoms ceased by September 7, 2007. Rather the record reveals Claimant's radicular symptoms between October 19, 2004 and the end of 2007 lessened, and his symptoms between 2007 and 2010 were intermittent upon

exertion. (CE 3) By June 27, 2012, Claimant complained of back pain that was constant, with resulting leg pain in his feet when he sits too long. (CE 9 at 000537)

Dr. Sheer's reasoning is inconsistent because he initially expected only an increase in symptoms. Dr. Sheer initially noted, "With the degree of pre-existing degenerative disc disease and stenosis, one would expect his symptoms to remain relatively stable with periods of increase in intensity." (EE 4) He later noted, "I would have expected with a degree of preexisting degenerative disease and stenosis, his symptoms would increase and decrease in intensity over time." (EE 3)

Dr. Sheer applies this inconsistent reasoning without knowing the full extent of Claimant's degenerative disc disease as of October 19, 2004, particularly the prior diagnosis of the condition in 1984. (CE 12) Dr. Sheer was unaware that Claimant had degenerative disc disease for many years prior to the injury, and was able to function on the job. In the past, Claimant's 1984 aggravation of degenerative disc disease resolved within months. (CE 11) Claimant's 1985 lumbosacral strain also resolved within months to the point that Claimant had some pain at the extremes of motion of the lumbar spine. (CE 12) In comparison, the symptoms of Claimant's 2004 back injury continued for years. I attribute little weight to Dr. Sheer's opinion because he assumes Claimant's condition would resolve without knowing that Claimant had repetitive back trauma, his assumption about the last record of radiculopathy is incorrect, and his reasoning related to causation is inconsistent.

COR at 10.³

The COR then characterizes the opinion of Dr. Manderson, Claimant's treating physician, as vague summarizes the medical treatment of Dr. Smith, Dr. Schrieber, and the result of objective testing.

Claimant argues,

Having rejected the Scheer IME as unreliable, inaccurate, inconsistent and incorrect, the COR's holding that Employer's evidence preponderates is nothing if not unclear, inaccurate, and inconsistent.

Claimant's argument at 19.

Employer counters by saying that the "record evidence, as a whole, does support that Claimant's current condition is due to natural causes and the effect of the aggravation has been overtaken by the Claimant's naturally worsening condition." Employer's argument at 9.

³ Throughout the COR, the ALJ mistakenly refers to Dr. Scheer as "Dr. Sheer".

We must agree with Claimant. The third step in the Mahoney analysis, places the burden on Employer to prove, by a preponderance of the evidence, that Claimant's benefits should be modified. The ALJ rejected the medical opinions of Dr. Scheer, the only medical opinions presented by Employer in support of its contention that Claimant's benefits should be modified. Having rejected Employer's evidence, Employer cannot be said to have sustained its burden of proof.

Because the only result can be that Employer had failed in its burden, we are forced to remand the case with instructions to the ALJ to award Claimant's claim for relief and reinstate temporary total disability benefits and medical benefits.

CONCLUSION AND ORDER

The April 30, 2015 Compensation Order on Remand is VACATED and this matter REMANDED to the Administrative Hearings Division for entry of an order awarding Claimant his claim for relief.

So ordered.