COMPENSATION REVIEW BOARD

CRB No. 13-111

FREDERICK RUSSELL,
Claimant–Petitioner,

v.

DISTRICT OF COLUMBIA WATER and SEWER AUTHORITY,
Self-Insured Employer-Respondent

Appeal from an August 15, 2013 Compensation Order issued by
Administrative Law Judge Gerald D. Roberson
AHD No. 08-041B, OWC No. 635243

Matthew Peffer, Esquire, for the Petitioner
Douglas A. Datt, Esquire, for the Respondent

Before: JEFFREY P. RUSSELL, MELISSA LIN JONES, *Administrative Appeals Judges*, and LAWRENCE D. TARR, *Chief Administrative Appeals Judge.*

JEFFREY P. RUSSELL for the Compensation Review Board.

DECISION AND REMAND ORDER

BACKGROUND

Frederick Russell was injured in a work related vehicle accident on November 28, 2006. His employer is the District of Columbia Water and Sewer Authority (WASA).

At a formal hearing which commenced on September 12, 2012 and concluded October 9, 2012, before an Administrative Law Judge in the Department of Employment Services (DOES), Mr. Russell sought an award of permanent total disability benefits from January 1, 2009 through the date of the hearing and continuing, and in the alternative, an award of temporary total disability benefits for that same period.[1]

Although it was undisputed that Mr. Russell was unable to return to his pre-injury employment, WASA opposed the claim on the grounds that all of Mr. Russell's treating physicians had opined

[1] While the Joint Prehearing Statement and Stipulation Form filed in connection with the Application for Formal Hearing included "causally related medical care" as part of the claim for relief, at the time of the formal hearing Mr. Russell declaimed any claim for consideration of medical care. See, *Russell v. D.C. WASA*, AHD No. 08-041A, OWC No. 635243, September 12, 2012 Hearing Transcript, page 8.

that Mr. Russell had reached maximum medical improvement and authorized a return to work with restrictions, and WASA contended, it produced evidence, through the testimony and reports of a vocational rehabilitation counselor who had prepared a labor market survey, of the availability of jobs as Mr. Russell could compete for and likely obtain, i.e., evidence of the availability of suitable alternative employment in the relevant labor market.

WASA contended further that Mr. Russell had failed to co-operate with vocational rehabilitation efforts designed to return him to work, and sought an order suspending such benefits to which the ALJ might determine Mr. Russell was otherwise entitled.

On January 31, 2013, the ALJ issued a Compensation Order (CO 1). In CO 1, the ALJ denied the claim for permanent total disability benefits, based upon his finding that WASA's labor market evidence and the opinions of the treating physicians failed to establish that Mr. Russell could not perform "any employment"[2], which the ALJ determined met the statutory definition of permanent total disability in D.C. Code § 32-1508 (1). The ALJ also concluded that Mr. Russell had not failed to co-operate with vocational rehabilitation, and that he was temporarily totally disabled from January 1, 2009 through July 27, 2012. He based this last conclusion and the award of a closed period of temporary total disability upon his finding that as of July 27, 2012, the vocational rehabilitation counselor employed by WASA first "identified some positions commensurate with Claimant's age, education, work experience, and physical restrictions." CO 1, page 11.

Neither party appealed CO 1. We will not comment upon whether the ALJ's analysis and awards in CO 1 represent a proper application of the law; we have no authority to vacate or otherwise order the alteration of the CO 1.

Despite the fact that Mr. Russell's award for temporary total disability contained in CO 1 was closed ended, WASA continued to pay temporary total disability benefits until March 18, 2013.[3]

On March 19, 2013, Mr. Russell filed an Application for Formal Hearing (AFH) with the hearings section of DOES, identifying as the issue in dispute "authorization for doctors [sic] appointments and treatment". There was no reference to any request for disability benefits in that AFH. On March 22, 2013, Mr. Russell filed another AFH, seeking reinstatement of the terminated disability payments, and identifying the issues to be presented at the formal hearing as "Modification of the January 31, 2013 Compensation Order for temporary total disability and/or Permanent partial disability wage loss pursuant to 32-1508 (viii)."

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[2] The pertinent sentence reads "In all other cases permanent total disability shall be determined only if, as a result of the injury, the employee is unable to earn any wages in the same or other employment."

[3] WASA explains in its Memorandum of Points and Authorities in Opposition to the Application for Review that it continued to make these payments because it never received a copy of CO 1 until it attended an informal conference at the Office of Workers' Compensation (OWC) on other issues in this case and was provided with a copy of CO 1 for the first time. In its Memorandum, WASA gives March 18, 2013 as the date of the OWC conference, while the Compensation Order under review gives March 9, 2013 as the date of the commencement of the claim for relief. Given other facts in the procedural history, particularly that Mr. Russell filed an AFH on March 19, 2013 seeking authorization for additional medical care, we accept March 18 as the date that benefits were terminated.

On June 3, 2013, a jointly executed Joint Prehearing Statement and Stipulation Form was filed in the hearings section by Mr. Russell, in which claims were raised for permanent partial (non-schedule) and/or temporary total disability from March 9, 2013 to the present and continuing, and for causally related medical care. Mr. Russell was said in that document as seeking "modification of the January 31, 2013 Compensation Order for temporary total disability and/or Permanent partial disability wage loss pursuant to 32-1508 (viii), Authorization for doctors appointments and treatment".

A formal hearing was scheduled to convene before a new ALJ on July 17, 2013. However, on that date, although the parties submitted numerous exhibits which were made part of the record of proceedings, and both parties argued their positions extensively, no testimony was taken. Rather, the ALJ decided to treat the event as a proceeding under *Snipes v. DOES,* 542 A.2d 832 (D.C. 1988). In *Snipes*, the District of Columbia Court of Appeals ruled that a party is not entitled to a formal hearing seeking modification of an existing compensation order unless the party seeking the modification produces evidence that there is "reason to believe that there has been a change of conditions effecting the fact or degree of disability or the amount of compensation" to which a claimant is entitled. If such evidence is proffered, the party seeking a modification is entitled to a formal hearing at which the ultimate issue as to whether there has in fact been such a change is addressed.

On August 15, 2013, the ALJ issued a "Compensation Order" (CO 2). CO 2 stated in the recitation of the Claim for Relief that "Claimant seeks to modify the January 31, 2013 Compensation Order [….] to request temporary total disability benefits from March 9, 2013 [sic] through the present and continuing and/or permanent partial disability wage loss, and authorization for medical appointments and treatment." CO 2, page 3. CO 2 identified but a single issue: "Whether the outstanding January 31, 2013 Compensation Order in this case should be modified based upon a change in Claimant's condition." As formulated, this issue description does not reveal what the nature of the dispute is between the parties concerning either the disability compensation or medical benefits sought.

In CO 2, the ALJ concluded that "Claimant has not met his burden under *Snipes* […] to warrant a modification of the January 13, 2013 Compensation Order", and ordered that "Claimant's claim for relief be denied." CO 2, page 10.

Mr. Russell appealed CO 2 to the Compensation Review Board (CRB), which appeal WSASA opposed.

We affirm the denial of the claim to reinstate disability compensation benefits. We vacate the denial of the claim for medical care and remand for further consideration.

DISCUSSION

We start by pointing out that the formulation of the issue in CO 2 conflates a "preliminary review of the evidence to determine whether a formal hearing is warranted" to modify a prior Compensation Order, with the resolution of the question as to whether the requested modification itself is

warranted. That is, having made clear in the proceedings on July 17, 2013 that it was a *Snipes* hearing that was being conducted, the ALJ should have identified the issue as whether Mr. Russell had adduced sufficient evidence that there is reason to believe that there has been a change in Mr. Russell's condition concerning the fact or degree of disability or the amount of compensation payable therefore to warrant the conduct of a formal hearing on that question. Further, the issue as formulated omits any reference to the claim for medical care, which WASA opposed on the grounds of lack of causal relationship of two conditions (a cervical injury and a talonavicular joint injury) to the work injury.

This mischaracterization of what the issues were resulted in two errors in CO 2, one being harmless, the other not.

Snipes provides a framework within which DOES may decline to permit a formal hearing, and it deals only with disability compensation, not medical benefits.

There is no harmful error in failing to hold a *Snipes* hearing, if the formal hearing actually is held. That is, if an ALJ, in the guise of a *Snipes* proceeding, completely skips the analysis of whether there is a "reason to believe" that a claimant's condition has changed, and accepts all the evidence that the parties submit or seek to submit on the issue, and concludes after a thorough review of that evidence that there has been no such showing, that is the procedural equivalent to finding that there is enough evidence to pass the "reason to be believe" threshold, then conducting a hearing, then ultimately determining that the party who bore the burden of demonstrating the change at the formal hearing had "failed to meet their burden of demonstrating" that such a change occurred by a preponderance of the evidence.

Otherwise put, a *Snipes* hearing or proceeding[4] exists primarily as a tool to promote administrative efficiency and prevent needless expenditure of legal, medical and administrative resources where there is no reason to believe that a modification in the amount of benefits a claimant is receiving is called for, and conducting a formal hearing would be a waste of time and resources.

In the case before us, although the language used throughout the compensation order sometimes reflects a lack of distinction between the preliminary review on the one hand and the actual weighing and consideration of the evidence on the other, under the circumstances of this case it is apparent that what the ALJ actually did was skip the "preliminary review" altogether, and proceeded to weigh the evidence regarding whether any change in Mr. Russell's condition has occurred effecting the fact or degree of his disability, or the amount of compensation to which he is entitled.

Had this been conducted in a manner in which either party was "surprised" and found themselves unprepared for a full formal hearing on that issue, there would clearly be harmful error. In this case, however, the matter proceeded pursuant to a Scheduling Order issued advising that there was to be a

[4] Nothing in *Snipes* or the Act requires that there be a "hearing" to determine whether there will be a hearing. What is required is "a preliminary review of the evidence" to ascertain whether a hearing is necessary. If the formal hearing actually occurs, requiring that an ALJ first conduct a preliminary review of the evidence to see if one is needed becomes a pointless exercise.

formal hearing to resolve the issues raised in the AFHs, the ALJ received into evidence that which was offered by both parties (except for excluding certain proffered materials on grounds unrelated to whether the proceeding was a *Snipes* proceeding or a formal hearing), and although Mr. Russell did not testify at the proceeding, he was offered the opportunity to do so and declined. See, HT 34 – 35.

Following the hearing, the ALJ issued a lengthy, detailed and well reasoned compensation order in which he reviewed and discussed virtually all of the proffered medical evidence, which included not only medical records, but multiple depositions from various treating physicians, and determined that despite the fact that there have been some new complaints to new parts of the body which have led to a request for additional medical care, there was no evidence that there has been any change in Mr. Russell's physical capacity for work since the prior formal hearing. In so concluding, the ALJ referenced each treating physician's acknowledgement or statement that there is no change in their opinion concerning Mr. Russell's restrictions.

We are mindful of the fact that nowhere in CO 2 does the ALJ state what the proper standard is for assessing whether there has in fact been a change of conditions effecting the fact or degree of disability or the amount of compensation payable, or upon whom the burden rests in a modification proceeding. The burden is upon the party seeking the modification to establish the existence of the changed circumstances, and to do so by a preponderance of the evidence. See, *WMATA v. DOES,* 703 A.2d 1225 (D.C. 1997). The lesser burden of a "reason to believe" such a change has occurred is also placed upon the party seeking a formal hearing for the purpose of ascertaining whether there has in fact been such a change. See, *White v. DOES*, 793 A.2d 1255 (D.C. 2003). However, given that the standard that the ALJ appears to have applied, the "reason to believe" standard, is the lowest of all possible standards that he might have applied, and is lower than the preponderance standard which is applicable, the failure to apply the higher standard is harmless error. By logical necessity the ALJ's finding that Mr. Russell failed to meet the lower standard implies that he also failed to meet the higher.

Mr. Russell argued before the ALJ and repeats in this appeal his position that the request for renewed disability compensation is not a request for a modification of the CO 1, but constitutes a new claim for a new class of benefits. In this regard, he argues that CO 1 does not constitute a denial of temporary total disability from and after the closed period for which benefits were awarded in that compensation order. We disagree.

First, Mr. Russell himself characterized the proceeding as a modification request in the Joint Prehearing Statement and Stipulation Form referred to above. Second, the claim for relief presented at the first formal hearing was for benefits through the date of the hearing and continuing, but the award was for a closed period that ended before the date of the hearing. The only reasonable reading of CO 1 is that, in closing the period of temporary total disability on an earlier date, the ALJ was denying the remainder of the request, concluding that Mr. Russell was no longer disabled as a result of the injury from and after the end point of the award. The failure to appeal that determination made that the law of the case, and now requires a showing of changed conditions for a modification.

Mr. Russell also argues that the mere fact that he is now seeking additional medical care is a sufficient showing under the "reason to believe" standard, entitling him to a formal hearing. Again, we must disagree.

First, the ALJ's determination that there has been no change in Mr. Russell's condition effecting the fact or degree of disability was based upon the medical opinions of the treating physicians to the effect that there has been no change in their opinions concerning Mr. Russell's level of functioning. It is that unchanged capacity for physical activity that underpins the denial of the modification request. The mere fact that a claimant may need additional medical care does not mean that of necessity the claimant has experienced a change in conditions effecting the fact or degree of disability or the amount of disability compensation payable.

Second, as we have previously noted, what the ALJ did in this case was the functional equivalent of finding that such a showing had been made, then weighing the evidence and finding it wanting.

However, that does not mean that the ALJ did not err in the manner in which CO 2 disposed of the claim for additional medical care. From the discussion of the claim for medical care commencing on page 8 of CO 2, and concluding on page 10 with the following sentences:

> Unfortunately, a physician has not offered an opinion regarding whether the neck injury and the talonavicular joint condition stem from the November 28, 2006 motor vehicle accident. Therefore, Claimant has not established the threshold test of a change of condition under *Snipes* […] to warrant a modification of the January 31, 2013 Compensation Order.

This passage evinces not only the harmless misunderstanding of the nature of a *Snipes* proceeding or evidentiary review, but it also represents a determination that the medical care will not be awarded because there was no medical opinion of causal relationship of these newly arising conditions to the work injury. This is error, because, as the District of Columbia Court of Appeals held in *Walden v. DOES*, 759 A.2d 186 (D.C. 2000), the presumption of medical causation applies to alleged changes in medical conditions where there has been a previous finding of an initial work related injury. In other words, although in this case the finding that there is no evidence that the newly raised medical claims affect Mr. Russell's claim for a modification of his disability compensation is supported by substantial evidence, Mr. Russell raised a separate claim for treatment related to these new conditions, and he is entitled to the presumption that these conditions stem from the work injury under *Walden*, and more pointedly, under *Whittaker v. DOES*, 668 A.2d 844 (D.C. 1995).

Accordingly, the matter must be remanded for further consideration of Mr. Russell's claim for additional medical care for these claimed injuries, which claim should be considered in light of the presumption that they are medically causally related to the work injury.[5]

[5] We note that WASA did not raise the defense of reasonableness and necessity of the requested care, and did not offer a utilization review report indicating that any care being sought is unreasonable or unnecessary, so the only issue that the ALJ needs to consider is whether that care is medically causally related to the work injury.

Because *Snipes* has no application in connection with claims for medical care, on remand, the ALJ must ascertain whether the parties seek to adduce additional evidence on the matter, and the request must be considered as a new claim for benefits, and not as a modification.

CONCLUSION AND ORDER

The ALJ's finding that Mr. Russell has failed to adduce evidence establishing that his condition has changed since the prior formal hearing in a fashion that effects the fact or degree of his disability or the amount of compensation payable therefor is supported by substantial evidence and denial of a modification of the prior Compensation Order is in accordance with the law and is affirmed. The denial of the claim for additional medical care premised upon a lack of medical causal relationship without affording Mr. Russell the presumption that the conditions for which the care is sought are causally related to the work injury is not in accordance with the law, and is vacated. The matter is remanded for further consideration of the medical claims in a manner consistent with the aforegoing Decision and Remand Order.

FOR THE COMPENSATION REVIEW BOARD:

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JEFFREY P. RUSSELL
Administrative Appeals Judge

December 3, 2013
DATE