

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



GERREN PRICE
INTERIM DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 14-044

**SAMUEL SMITH,
Claimant-Petitioner,**

v.

**DISTRICT OF COLUMBIA HOUSING AUTHORITY,
Self-Insured Employer-Respondent.**

Appeal from a March 20, 2014 Compensation Order by
Administrative Law Judge Fred D. Carney, Jr.
AHD No. PBL13-011, DCP No. 761020-0001-1999-0014

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Andrew J. Hass for Claimant
Frank McDougald for Self-Insured Employer

Before LAWRENCE D. TARR, *Chief Administrative Appeals Judge* and MELISSA LIN JONES and
HEATHER C. LESLIE *Administrative Appeals Judges*.

LAWRENCE D. TARR for the Compensation Review Board; MELISSA LIN JONES *concurring*.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

Mr. Samuel Smith was a painter with the District of Columbia Housing Authority (“Employer”).
On August 1, 1997, he injured his back moving some sheets of drywall.

Following a formal hearing in May 2000, Mr. Smith was awarded ongoing temporary total
disability compensation benefits. *Smith v. D.C. Housing Authority*, OHA No. PBL00-027, OBA
No. 367122 (September 15, 2000). On August 14, 2012, the Public Sector Workers’
Compensation Program issued a Notice of Intent to Terminate Public Sector Workers’
Compensation Payments, and Mr. Smith requested a second formal hearing.

The second formal hearing was held in February 2013, and an administrative law judge (“ALJ”)
issued a Compensation Order dated March 20, 2014. *Smith v. D.C. Housing Authority*, OHA No.
PBL13-011, ORM No. 761020-0001-1999-0014 (March 20, 2014) (“*Smith II*”).

The ALJ concluded Mr. Smith no longer is entitled to wage loss benefits and no longer requires medical treatment for his work-related injury because any remaining back impairment Mr. Smith has is a result of degenerative conditions which are not causally connected to his August 1, 1997 accident and injury.

On appeal, Mr. Smith contends the ALJ (1) failed to properly apply the burdens of production and proof in public sector workers' compensation disability cases, (2) did not properly apply the treating physician preference by among other things failing to properly weigh the credibility of the physician reports, and (3) misstated evidence.

These arguments are detailed below, and based upon these arguments, Mr. Smith requests the Compensation Review Board ("CRB") reverse the March 20, 2014 Compensation Order.

In response, Employer asserts Mr. Smith's arguments lack legal merit and merely reflect disagreement with the ALJ's findings of fact and conclusions of law. Employer also asserts that the medical records in evidence do not support Mr. Smith's testimony-based contentions.

Because the ALJ provided record-based factors for rejecting Dr. Patricia Wright's opinions and because the ALJ applied the proper burden of proof, Employer requests the CRB affirm the Compensation Order.

ANALYSIS¹

Mr. Smith first asserts "[t]he ALJ [] failed to articulate a clear standard for the burden of proof required by the Employer to demonstrate that Mr. Smith had a change in his work-related disability." Memorandum of Points and Authorities in Support of Petitioner's Application for Review, p. 7. The CRB disagrees.

In *Mahoney v. D.C. Public Schools*, CRB No. 14-067, AHD No. PBL 14-004, ORM/PSWCP No. 76000500012005-008 (November 12, 2014) the CRB recently clarified the burden-shifting scheme to be applied in public sector workers' compensation cases wherein the government has accepted the claim:

[O]nce 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.

¹ The scope of review by the CRB is limited to making a determination as to whether the factual findings of the appealed 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. *See* D.C. Comprehensive Merit Personnel Act of 1978, as amended, D.C. Code § 1-623.01 *et seq.*, at § 1-623.28(a) ("Act"). Consistent with this standard of review, the CRB is constrained to uphold a Compensation Order that is supported by substantial evidence, even if there also is contained within the record under review substantial evidence to support a contrary conclusion and even if the CRB might have reached a contrary conclusion. *Marriott International v. DOES*, 834 A.2d 882, 885 (D.C. 2003).

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 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.

Id. at pp. 8-9.

Pursuant to the September 15, 2000 Final Compensation Order, Employer paid Mr. Smith temporary total disability compensation benefits. Having paid disability compensation benefits for work-related injuries, in accordance with *Mahoney*, 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." *Id.* at p. 8. The ALJ ruled Employer satisfied this burden:

It is well-settled in this jurisdiction that once the WC accepts an injured worker's claim as compensable, and benefits have been paid, Employer must adduce persuasive evidence sufficient to substantiate a modification or termination of an award of benefits. *TOOMER v. D.C. DEPARTMENT OF CORRECTIONS*, CRB No. 05-202, OHA No. PBL98-048A, DCP No. LT5-DOC001603 (May 2, 2005).

Claimant contends he i[s] entitled to continuing wage lost and medical benefits for impairments caused by the back injury he sustained in the performance of his duties for Employer on August 1, 1997. Claimant relies on his testimony, the reports of Drs. Patricia Wright, general practitioner Bruce A. Monaghan, orthopedic surgeon and Barbara Van Horn, family doctor, Dr. Steven Hughes, orthopedic surgeon, a functional capacity evaluation and other reports to support his contention. Employer contends that Claimant's current impairments if any are not causally related to the work injury of August 1, 1997. Employer relies on the reports of Dr. Hughes, Dr. Robert Smith, orthopedic surgeon, Dr. Menachem, M. Meller, orthopedic surgeon, Dr. Louis E. Levitt, orthopedic surgeon, Dr. Michael J. Mandarino, orthopedic surgeon and documents from Claimant's DCP file.

Therefore, WC has the burden of persuasion to demonstrate a change of Claimant's medical condition. If WC meets its burden, Claimant must then demonstrate through reliable, relevant, and probative medical evidence that Claimant continues to have a disability that is causally related to the accepted injury.

On August 14, 2012, WC issued a Notice of Intent to Terminate Public Sector Worker's Compensation Payments. The notice stated in pertinent part that:

“An Additional Medical Evaluation (AME) was scheduled for June 14, 2012, with Dr. Steven Hughes. Dr. Hughes concluded that your current complaints are not causally related to the accident sustained on August 1, 1997 and the treatment to date was not medically necessary and appropriate after December of 1997. Dr. Hughes also concluded that you are able to work in a full duty position and the prognosis for full recovery is excellent relative to the resolved soft tissue injury he sustained in 1997, no further treatment is medically necessary and you have reached (MMI) maximum medical improvement. The report was sent to the treating for review and comment.”

Dr. Hughes['] reports indicate that he examined Claimant on June 14, 2012. He opined that Claimant has no disability at all and is capable of returning to work full duty. Dr. Hughes indicates that he has examined Claimant previously for this injury on August 29, 2002, February 5, 2004 and May 6, 2008. (EE 2)

Employer also introduced the February 18, 2001 report of Dr. Meller. In his report Dr. Meller stated that Claimant suffered with stenosis, degenerative disc disease and facet hypertrophy which Dr. Meller opined, pre-dated the August 1, 1997 work injury. (EE 4) He further opined that Claimant needed no further medical treatment for this injury.

Employer introduced on its behalf as well, the December 30, 2002, IME report of Dr. Smith, orthopedic surgeon. (EE 3) Dr. Smith indicated that he examined Claimant on December 30, 2002 and found Claimant to be alert, oriented and in no acute distress. He further noted Claimant's normal gait. He noted Claimant had no complaints involving his neck or upper extremities and there was no deformity, atrophy, trigger points or spasm in the lumbar spine. He noted Claimant's non-anatomic remarks. Dr. Smith opined that Claimant could return to work as a painter and his low back strain/sprain had resolved completely.

Employer offered in evidence the reports of Dr. Levitt, and Dr. Mandarino, both orthopedic surgeons who opined the Claimant's disability resulting from the August 1, 1997 work injury had resolved and Claimant was capable of returning work as a painter.

Employer has produced evidence that Claimant's work related injury had resolved since SMITH, 2000, the last Compensation Order. The burden now shifts to Claimant to show by a preponderance of evidence that he continues to be totally disabled for a temporary period of time.

Smith II, supra, at pp. 5-6.

The facts set forth in the ALJ's ruling are supported by substantial evidence in the record, and there is no basis for overturning the conclusion that Employer met its burden.

Because Employer satisfied its burden, the ALJ shifted the burden to Mr. Smith to produce "reliable and relevant evidence that conditions have not changed to warrant a modification or termination of benefits." *Mahoney, supra* at 9. When reviewing the evidence to determine if Mr. Smith met his burden, the ALJ considered Mr. Smith's testimony as well as the medical reports of Dr. Wright, Dr. Robert Smith, and Dr. Steven S. Hughes:

Claimant testified at formal hearing that since the injury he has trouble walking, sitting and standing for prolonged periods of time. He described a tingling that goes down his leg to his foot. (HT 53) He testified he fell the week prior to his formal hearing while coming down a hill when his leg gave way. (HT 54) He testified he goes to the VA Hospital (hereinafter, VA) twice a month to get injections for his back pain and he sleeps on a heating pad. Claimant testified he receives treatment by Dr. Wright at the VA prior to the work injury and in fact he has treated with her approximately 20 years. (HT 55) Claimant testified that after the August 1, 1997 incident he saw Dr. Wright every couple of months and he currently sees Dr. Wright every 3 or 4 months. (HT 56)

Claimant testified that on or about June 14, 2012, he reported to Dr. Hughes for an IME. Claimant testified that he recalled being examined by Dr. Hughes on prior occasions. (HT 62-64) Claimant testified on his June 14, 2012 visit with Dr. Hughes the examination lasted no more than 10 minutes. That Dr. Hughes had him take off his shirt, touch his toes, raise his hands, stand on his toes, and sent him home. (HT 64-68) Claimant testified he currently wears a back brace. Claimant testified he would like to go back to work but he can't because of his pain. He testified it hurts, when he stands walks or sits for an extended period of time. (HT 72-74) He has had no injuries to his back since the August 1997 work injury. (HT 93)

Claimant relies on the medical reports of Dr. Wright to support his position. (CE 1) Dr. Wright reports that Claimant has been an outpatient of hers at the VA since 1996. She reports that Claimant had no prior injury to his back. Dr. Wright states in her 2008 report that an MRI of Claimant's lumbar spine dated July 16, 2008, was interpreted as showing, scoliosis, multilevel degeneration, forminal [*sic*] stenosis. Dr. Wright indicates that:

"Mr. Smith has gone through physical therapy on several occasions, used a TENS unit wears a back brace, walks with a cane, uses a heating pad and analgesic ointments as well as take pain medications. The pain has continued and therefore he has been unable to work since the initial injury.

It is clear that Mr. Smith lower back pain started with the injury on the job with lifting dry wall and having that heavy weight dropped on him to support alone. He certainly had a lumbar strain but also the disc herniation could as well happen at that time.

Certainly over the years he now also has degenerative disc disease.

I feel given the course of his history with the back pain his prognosis is poor.”

Dr. Smith who has treated Claimant for nearly 20 years as a primary care provider opined also that Claimant has lumbar degeneration and stenosis. Dr. Wright has not indicated that Claimant will require any identified restorative treatment to help resolve his lumbar impairments. Therefore, I have to find that Dr. Wright has no plan for Claimant’s complete recovery and is only providing palliative treatment to Claimant at this time. It is further noted [that] Dr. Wright is a primary care provider and not a specialist in orthopedic surgery or neuro-surgery. As of yet, Dr. Wright has not referred Claimant to an orthopedic or neurologist for evaluation or surgery. Thus, it is determined that Claimant is only receiving palliative treatment from Dr. Wright since the prior compensation order. It is further noted that immediately after the 2000 Compensation Order Claimant did not receive any medical treatment until 2001.

Having found Claimant is only receiving palliative treatment it is determined that Employer has presented evidence sufficient to show a change in Claimant’s condition since the 2000 Comp Order. That change being that Claimant has reached maximum medical improvement as opined by Dr. Hughes. Dr. Hughes opined Claimant suffered with diffused degenerative disc disease of the lumbar spine and a remote history of a lumbar strain in 1997. He noted symptom magnification, right Gastrocnemius;[] Parepresis. Dr. Hughes opined Claimant’s current symptoms are not causally related to the accident of 08/01/97 and the treatment to date was medically necessary and appropriate after December 1997. Dr. Hughes opined Claimant could return to work full duty and that no further treatment was necessary for Claimant’s 15 year old injury.

Smith II, supra, at pp. 6-8.

The ALJ found Mr. Smith did not meet his burden.²

² If anything, the ALJ erred by placing the burden back on Employer at this stage of the analysis:

Therefore I conclude that the evidence presented by Employer is sufficient to meet the burden demonstrating by a preponderance of the evidence that Claimant has had a change in his work related disability since the 2000 Comp Order.^[2]

The ALJ correctly recited the burden earlier in the Compensation Order; “[i]f WC meets it[s] burden, Claimant must then demonstrate through reliable, relevant, and probative medical evidence that Claimant continues to have a disability that is causally related to the accepted injury.”² Because it is clear the ALJ did not find Mr. Smith had met

Mr. Smith objects to the weight the ALJ gave Dr. Wright's opinion because the ALJ purportedly did not identify persuasive or adequate reasons for rejecting this treating physician's opinions. In *D.C. Public Schools v DOES and Proctor, Intervenor*, 95 A.3d 1284 (2014). the Court of Appeals reviewed a 2010 statutory amendment repealing the treating physician preference in public sector claims and ruled

[t]he legislative history manifests a clear and unmistakable intent on the part of the Council to accord equal weight to the testimonies of both treating and non-treating physicians in public-sector cases brought under the [District of Columbia Comprehensive Merit Personnel Act].

Id. at 1288.

Thus, there is no treating physician preference to apply in this case. Nonetheless, the ALJ rejected Dr. Wright's opinion because "Dr. Wright did not provide any more than a tangential link between the August 1997 work injury and Claimant's herniated lumbar disc, Dr. Wright has not referred Claimant to a specialist and has not provided any further restorative treatment to Claimant in recent years." *Smith II, supra*, at p. 8.

The ALJ gave specific reasons for rejecting Dr. Wright's opinions, and those reasons are supported by substantial evidence in the record; therefore, any application of a treating physician preference is harmless error, there is no requirement that the ALJ apply "the *Proctor* factors," and the CRB is without authority to reweigh the evidence in Mr. Smith's favor. *Marriott, supra*.

Although Mr. Smith contends that based upon his own testimony³ the ALJ made a factual error in stating Dr. Wright has not referred him to a specialist, there is no indication in the medical

his burden, placing the burden on Employer to prove Mr. Smith is not entitled to benefits is a higher burden than placing the burden on Mr. Smith to prove he is entitled to ongoing benefits; therefore, this error is harmless.

³ Mr. Smith relies upon the following testimony:

Q. And could you just briefly tell me what that – what happened in that examination, what was – what the examination entailed with Dr. Wright?

A. Well, it's like she always do a physical check-up on me, had me lay on the bed – I mean, on the – on the – like the cot.

Q. It's like a cot?

A. Yeah. And tell me to take my shirt off and she feel my back and ask me where is the pain. And then she ask me – to have me move my legs, you know, lift my legs up or whatever.

And then she get on her computer, and then she'll tell me to get up, put my, you know, shirt back on and send me to the lab or ask me how was my pain. Well, the nurse always asks you how your pain is. And I, you know, tell her the medicine helps a little, but, you know, she'll send me to, like – I have to go to a neurologist tomorrow. I have – she set me up for an appointment to go see a neurologist or something, yeah, And, you know, I

documentary evidence that such a referral was made. In the absence of documentary support, the CRB will not reject the ALJ's ruling in favor of unclear testimony from which the ALJ did not draw a specific inference that Dr. Wright had referred Mr. Smith to a specialist.

Mr. Smith, in essence, requests the CRB weigh the evidence differently than did the ALJ, but the CRB lacks authority to undertake such a task. *Marriott, supra*. An ALJ is constricted to resolve the issues before him based upon the oral testimony and the documentary exhibits in the record. There is no indication in this case that the ALJ did anything but that, and on appeal, it is not for the CRB to reweigh the evidence by drawing inferences the ALJ did not draw. So long as there is substantial evidence in the record to support the ALJ's findings of fact and conclusions of law, the CRB is constrained to affirm the Compensation Order, even if other findings of fact and conclusions also may have been supported by substantial evidence. *Id.*

For example, the ALJ's finding that Mr. Smith did not receive medical treatment in 2000 and 2001 is supported by the medical exhibits (or lack thereof); Mr. Smith's vague testimony which "suggests that he visited Dr. Wright multiple times in 2000 and 2001" (Memorandum of Points and Authorities in Support of Petitioner's Application for Review, p. 9) is not sufficient for the CRB to overturn the ALJ's finding.⁴

Finally, Mr. Smith objects to the ALJ's classification of Dr. Wright's causal relationship opinion as tangential. Regarding Mr. Smith's condition, Dr. Wright opined

It is clear that Mr. Smith[']s lower back pain started with the injury on the job with lifting dry wall and having that heavy weight dropped on him to support alone. He certainly had a lumbar strain but also the disc herniation could as well

have to get my medication tomorrow anyway, so as far as that she's pretty much, you know, staying on top of the things that I need to do. She stays on me anyway, so –

Hearing Transcript pp. 58-60.

⁴ Mr. Smith relies upon the following testimony:

Q. How frequently – how frequently do you have check-ups with Dr. Wright?

A. Between every three to four months.

Q. And has that – have you been treated by her every three to four months since the August 1st, 1997?

A. No, it was more – it was more recent back then. I was seeking her, like, maybe every two months or something.

Q. So, in the time frame after – or immediately after the August 1st, 1997, incident, you were seeing her every couple of months?

A. Yes.

Q. And now you're currently seeing her every three or four months?

A. Yes.

Hearing Transcript p. 56.

happened at that time. Certainly over the years he now also has degenerative disc disease. (Claimant's Exhibit 3).

By the doctor's own words, Mr. Smith's lumbar strain certainly is past ("had"), his disc herniation is only possibly related ("could as well happen") to his on-the-job accident, and he definitively has degenerative disc disease. Dr. Wright's own language lends itself to the ALJ's characterization that the doctor's opinion is not sufficiently definite to result in an award of ongoing benefits.

CONCLUSION AND ORDER

The ALJ properly applied the burdens of production and persuasion, and because he rejected the opinions of the treating physician, there is no error in applying the treating physician preference which has been abrogated in public sector workers' compensation cases. The March 20, 2014 Compensation Order is supported by substantial evidence, is in accordance with the law, and is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

/s/ Lawrence D. Tarr

LAWRENCE D. TARR

Chief Administrative Appeals Judge

January 28, 2015

DATE

MELISSA LIN JONES *concurring*:

Based upon principles of *stare decisis*, this majority rightly relies upon *Mahoney* for the current interpretation of the burdens of production and proof in public sector workers' compensation cases; however, *Mahoney* was not without dissent:

[A]s the majority points out,

once a claim for benefits has been accepted by the District of Columbia government's administrator of the Act, and has paid benefits for that claim, the burden of proof which normally rests with a claimant to establish a causal relationship between a condition and the claimant's employment is shifted to the employer to demonstrate a change of conditions has occurred sufficient to terminate or otherwise reduce those benefits.^[5]

This burden, however, is not one of proof but an "initial burden," as the majority also notes but discounts:

⁵ *Williams v. D.C. Department of Parks and Recreation*, CRB 08-026, AHD No. PBL 07-029, PBL/DCP No. 761013-0001-2005-0007 (Dec. 13, 2007), nt. 2.

It is well-settled in this jurisdiction that once the DCP [footnote omitted] (the agency-employer) accepts an injured worker's claim as compensable, the DCP bears the initial burden to demonstrate a change in the injured worker's medical condition such that disability benefits need to be modified or are no longer warranted and must be terminated. [Footnote omitted.] The evidence used to modify or terminate benefits must be current and fresh in addition to being probative and persuasive of a change in medical status. [Footnote omitted.]

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. [Footnote omitted.] 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.^[6]

As the District of Columbia Court of Appeals echoed in *Mahoney v. DOES*, (a public sector workers' compensation case involving Mr. Otis Mahoney, not Respondent), "The CRB stated that it agreed that the District had the initial burden to 'present [] persuasive medical evidence to terminate Mahoney's benefits' after which the 'burden then shifted back to [the claimant] to provide proof of an employment related impairment following the termination of benefits.'"⁷

Contrary to the majority's analysis, this situation is unlike the burden requirements in a private sector modification case. Although *Washington Metropolitan Area Transit Authority v. DOES*, (a private sector case) states, "the burden is on the party asserting that a change of circumstances warrants modification to prove the change,"⁸ it is important not to overlook that same case

⁶ *Gaston Jenkins v. D.C. Department of Motor Vehicles*, CRB No. 12-098, AHD No. PBL11-049, DCP No. 761019000120060005 (August 8, 2012) (Emphasis added.); see also *Wentworth M. Murray*, 7 ECAB 570 (1955) (Based on the medical evidence, once termination of compensation payments is warranted, the burden shifts to the claimant to show by the weight of the reliable, probative and substantial evidence that any disability is causally related to the employment and results in a loss of wage-earning capacity).

⁷ *Mahoney v. DOES*, 953 A.2d 739, 742 (D.C. 2008).

⁸ *Washington Metropolitan Area Transit Authority v. DOES*, 703 A.2d 1225, 1231(DC. 1997).

also states “The burden may shift once the moving party establishes his case.”⁹ That shift is paramount here where the prior caselaw says the “initial burden” is on the government. That initial burden is one of production, not proof; only if the government meets that initial burden does the burden of proof shift to the claimant to prove compensability.¹⁰ Then, only once compensability has been established is the medical evidence weighed to determine the nature and extent of the claimant’s disability, not entitlement or compensability but the type or amount of benefit owing.

Instead of the majority’s modification analogy, once the government has accepted a claim, the posture is analogous to a private sector case wherein the employer has voluntarily paid benefits and the presumption of compensability has been invoked. In other words, accepting the claim in essence “invokes the presumption” because the government’s investigation has led to the conclusion that a claim is compensable; therefore, the initial burden to terminate or modify benefits is on the government to prove through substantial evidence that a change is warranted, and if the government is successful, the burden returns to the claimant to prove entitlement to ongoing benefits by a preponderance of the evidence:

the Employees’ Compensation Appeal Board (ECAB) has consistently held that once the employer has accepted a claim for disability compensation and actually paid benefits, the employer must adduce sufficient medical evidence to support a modification or termination of benefits. See Chase, ECAB No. 82-9 (July 9, 1992); Mitchell, ECAB No. 82-28 (May 28, 1983); and Stokes, ECAB No. 82-33 (June 8, 1983). In addition, the Board has held that the medical evidence relied upon to support a modification or termination of compensation benefits, as well as being probative of a change in medical or disability status, shall be fresh and current.

Therefore, while there is no statutory presumption de jure in favor of the claimant’s claimed injury being work-related, under this Act unlike the private sector workers’ compensation Act, D.C. Code §36-321, the foregoing cited case precedent appears to have established a de facto presumption once a claim has been accepted and benefits paid.¹¹

⁹ *Id.*

¹⁰ Although prior caselaw states the standard is “substantial evidence,” it is clear from *McCamey v. DOES*, 947 A.2d 1191 (D.C. 2008) that where, as in public sector cases, there is no presumption of compensability, the ultimate burden falls on the claimant to prove by a preponderance of the evidence that a claim is compensable.

¹¹ *Williams v. D.C. Department of Corrections*, OHA No. PBL93-077B, ODC No. 8921 (June 29, 2001). Admittedly, this quote is from a Compensation Order with no precedential value, but it is cited as an appropriate explanation of the burden, not as precedent for the burden.

If at any point, the evidence is in equipoise, the party with the burden loses.

For these reasons, the dissent disagrees 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 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.

Rather, the dissent takes the position that if the government has accepted a claim for disability compensation benefits, the initial burden to terminate or modify benefits is on the government to prove through substantial evidence that a change is warranted; if the government is successful, the burden returns to the claimant to prove by a preponderance of the evidence entitlement to ongoing benefits as well as the nature and extent of any disability.¹²

As a member of the dissent in *Mahoney*, I write this concurring opinion to recognize that *Mahoney* is the law and must be applied in this case, but I still do not agree with the reasoning in *Mahoney*.

/s/ Melissa Lin Jones
MELISSA LIN JONES
Administrative Appeals Judge

¹² *Mahoney v. D.C. Public Schools*, CRB No.14-067, AHD No. PBL 14-004, ORM/PSWCP No. 76000500012005-008 (November 12, 2014) (dissent at pp. 11-14).