

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 16-048

**SHADONNA JACKSON,
Claimant–Petitioner,**

v.

**DEPARTMENT OF YOUTH REHABILITATION SERVICES
Employer–Respondent.**

Appeal from a February 29, 2016 Compensation Order
by Administrative Law Judge Fred D. Carney
AHD No. PBL 13-043, DCP No. 30091203605-0001

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2016 AUG 10 AM 11 19

(Decided August 10, 2016)

David M. Snyder for Claimant¹
Lindsay M. Neinast for Employer

Before LINDA F. JORY, GENNET PURCELL, and JEFFREY P. RUSSELL, *Administrative Appeals Judges.*

LINDA F. JORY for the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

Shadonna Jackson (Claimant) worked for District of Columbia Department of Youth Rehabilitation Services (Employer) as a youth development representative. It is undisputed that she injured her right ankle on December 20, 2009 when she fell while trying to restrain a youth. There is also no dispute that following the accident, Claimant underwent two surgical procedures to the knee, including an open reduction and internal fixation surgery and removal of the ankle hardware in 2010. The parties also agree that Claimant has not returned to work and has been receiving disability compensation payments from the date of the accident until being terminated on December 19, 2012. This termination was premised on the October 16, 2012 additional medical evaluation (AME) of Dr. Louis Levitt, orthopedic surgeon.

¹ Matthew Peffer represented Claimant at the formal hearing.

A Formal Hearing occurred on August 27, 2013. At that hearing, Claimant sought reinstatement of her medical benefits and temporary total disability (TTD) benefits from December 20, 2012 to the present and continuing. A Compensation Order was issued on February 29, 2016 wherein the Administrative Law Judge (ALJ) found Employer had proven by a preponderance of the evidence that Claimant is no longer disabled as a result of her work injuries and denied Claimant's claim for reinstatement of TTD.

ISSUE ON APPEAL

Is the February 29, 2016 CO supported by substantial evidence and in accordance with the law?

ANALYSIS

The scope of review by the Compensation Review Board (CRB) and this Review Panel (the Panel) as established by the District of Columbia Comprehensive Merit Personnel Act of 1978, as amended D. C. Code § 1-623.01 *et seq.*, (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 §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 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.

Claimant asserts:

The Government did not meet its initial burden to modify or otherwise suspend Ms. Jackson's temporary total disability benefits and the CO failed to consider all of the evidence. Although the Government presented evidence from Dr. Levitt in the form of a report from 2012, the CO failed to consider that this report was the functional equivalent of Dr. Levitt's 2011 report. In both reports, Dr. Levitt stated that Ms. Jackson required no additional treatment and could return to her pre-injury employment. Moreover, in his 2012 report, Dr. Levitt specifically stated that "I will also note her evaluation today is really very similar to her evaluation when seen in my office a year ago. I see no deterioration in her functionality." EE 6. Following the 2011 report, the Government did not terminate Ms. Jackson's temporary total disability benefits, but continued to pay them for over a year. The Government did not explain this divergent action. If the Government felt that Ms. Jackson's clinical presentation in 2011 rendered her entitled to temporary total disability benefits in spite of Dr. Levitt's statements, then the 2012 opinion, wherein she had the same clinical presentation, is neither fresh nor indicative of a change in medical status. As such, the CO failed in its analysis at this initial stage.

Claimant's brief at 6, 7.

We reject Claimant's assertion that Employer felt Claimant's symptoms in 2011 rendered her entitled to disability benefits therefore Dr. Levitt's 2012 report, which does not differ from his 2011 report, is not indicative of a change in medical status. Why Employer failed to terminate Claimant's benefits earlier is not a matter relevant to any issue presented in the Formal Hearing and any consideration of that question would entail undue speculation.

The ALJ correctly referred to the CRB's *en banc* decision in *Mahoney v. D.C. Public Schools*, CRB No. 14-067, (November 12, 2014)(*Mahoney*) and found both Employer and Claimant met their burdens of production.

Specifically, the ALJ found with the report of Dr. Levitt, Employer met its burden of producing current and probative evidence that Claimant's condition has sufficiently changed to warrant a modification or termination of benefits". *Mahoney, supra*. We find no error in the ALJ's determination that Employer met the initial burden of production with the 2012 report. We further find no error in the ALJ's determination that Claimant met her evidentiary burden with her testimony and report of her treating physician Dr. Kothakota.

As the CRB instructed in *Mahoney*:

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.

Mahoney supra at 8, 9.

Claimant does not refer to the *Mahoney* test but instead asserts:

. . . Ms. Jackson does not request that this Board re-weigh the evidence, but that it instead vacate and reverse the CO's determination because it is not based on the substantial evidence of record and it misapprehends the evidence. Specifically, the CO found that Dr. Levitt's evidence was the most persuasive at least in part because "The only reports that are current enough to contradict that of Employer's regarding Claimant's continuing disability are the reports of Dr. Kothakota [sic] . . . Therefore the reports lack probative value because they do not offer a current analysis of Claimant's current condition and whether it relates to her injury." CO at 7. What the CO failed to consider, however, is the reason why Ms. Jackson was unable to produce more current evidence; specifically, as noted earlier in the CO, the Employer had denied Ms. Jackson the right to continue seeing Dr. Kothakota to pursue the treatment recommendations that he had made. CO at 3. The CO is therefore penalizing Ms. Jackson for not introducing more recent evidence while simultaneously finding that she was unable to do so because of the

specific action (or inaction) on the part of the Employer. If this finding is permitted to withstand a proper application of the law, then it encourages the Government to simply deny medical treatment for injured workers, and then obtain a more recent report from a doctor of the Government's choosing to then terminate benefits without giving the injured worker an opportunity to rebut this evidence. This would be a serious due process violation to injured workers.

Moreover, even though the CO noted that Dr. Levitt had considered and rejected Dr. Kothakota's opinions, it failed to consider the fact that Dr. Kothakota had also considered and rejected Dr. Levitt's opinions which were rendered in 2011 and were the functional equivalent of his 2012 opinions. Although the CO found that Ms. Jackson's testimony about her present condition and inability to work was both relevant and reliable, it did not explain why, then it credited Dr. Levitt's opinions that her condition had resolved over her testimony and Dr. Kothakota's opinions. *See* CO at 7.

Claimant' brief at 7, 8.

We disagree with Claimant as this Panel concludes the ALJ did provide sufficient rationale for his conclusion that Dr. Levitt's opinion outweighed the opinion of Dr. Kothakota. The ALJ explained:

At the hearing Claimant testified she resigned from Employment because she did not think she was ready to return to full duty. Claimant testified she continues with pain in the area of her work injury but she takes medication only once a month. When considering the evidence as a whole it is determined that the evidence is greater on the side of Employer. Employer's medical evidence indicates that Claimant's residuals are the natural progression of her injury healing. Dr. Levitt opined Claimant could return to work without any formal treatment other than home exercise. Dr. Levitt went into detail comparing Claimant's current condition to her ability to perform her duties. Dr. Levitt also reviewed the reports of the treating physician and gave his reason or disagreeing. Therefore I found that Dr. Levitt's report is more convincing when considering the length of care Claimant has received and the testimony that Claimant only takes an occasional Motrin or Advil once or twice a month.

CO at 7.

CONCLUSION AND ORDER

For the reasons explained herein, we find the February 29, 2016 Compensation Order is supported by substantial evidence in the record and is in accordance with the law and is **AFFIRMED**.

So ordered.