

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 15-008

**SUKESH CHOPRA,
Claimant-Respondent,**

v.

**DISTRICT OF COLUMBIA DEPARTMENT OF CORRECTIONS
Self-Insured Employer-Petitioner.**

Appeal from a December 18, 2014 Compensation Order on Remand
by Administrative Law Judge Fred D. Carney, Jr.
AHD No. PBL 12-023A, DCP No. 7610320001-1999-0059

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2015 MAY 1 PM 12 21

William J. Howard for Claimant
Andrea G. Comentale for Employer¹

Before LINDA F. JORY, MELISSA LIN JONES, and HEATHER C. LESLIE, *Administrative Appeals Judges.*

LINDA F. JORY, for the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

Claimant worked for Employer as a secretary at the Lorton Reformatory. As a prison secretary, Claimant was required to walk and sit as well as climb stairs while carrying files. Claimant sustained work-related injuries to both knees on September 4, 1987, when she slipped and fell. Claimant's x-rays in 1987 revealed bilateral degenerative arthritis. Claimant continued to work and she fell again in 1989. Claimant stopped working in 1990 due to bilateral knee pain and has not worked since. In addition to her primary care physician, Dr. Amy Nobu, Claimant came under the care of Dr. Robert Heilen. Claimant underwent a right total knee replacement and a left total knee replacement performed by Dr. Heilen in 1994.

Claimant's claim was accepted by the Public Sector Workers' Compensation Program (PSWCP). By the year 2000, Claimant had reached maximum medical improvement of her bilateral knee injuries. Employer had Claimant examined by Dr. David Johnson on March 1, 2012. Based on

¹ Margaret Radabaugh represented and appeared on behalf of the Employer before the Administrative Hearings Division.

Dr. Johnson's report, PSWCP issued a Notice of Intent to Terminate Public Sector Workers' Compensation Payments on June 14, 2012 and following Claimant's request for reconsideration, a Final Decision on Reconsideration issued on August 9, 2012. Claimant's benefits were terminated on July 14, 2012 and the matter went to a formal evidentiary hearing on February 11, 2013. Claimant's benefits were reinstated by a November 5, 2013 Compensation Order (CO) which was appealed to the Compensation Review Board (CRB). In a Decision and Remand Order (DRO), the CRB vacated the CO as it determined:

The ALJ never made any actual findings regarding whether Ms. Chopra's current condition remains medically-causally related to her on-the-job accident; it is not enough to rely on principle when medical evidence is needed to prove a point. In addition, the ALJ fails to analyze whether Ms. Chopra's current disability is causally related to a compensable injury; it is not enough to find a permanent impairment based upon aggravation without setting forth some medical evidence of causation relied upon to reach that conclusion. Finally, the ALJ fails to rule on Ms. Chopra's current work capacity; it is not enough to say she cannot return to her regular duties without ruling on what duties (if any) she can perform. Without such findings, the CRB is without the ability to adequately review this Compensation Order.

Chopra v. District of Columbia Department of Corrections, CRB No. 13-153, AHD No. PBL 12-023A, DCP NO. 761032-0001-1999-0059 (March 2014) (DRO).

The administrative law judge (ALJ) issued a Compensation Order on Remand (COR) on December 18, 2014, which granted Claimant's request for reinstatement of her benefits.

Employer timely appealed. Employer asserted that the CO should be reversed as the ALJ's conclusion that Claimant cannot return to her pre-injury, sedentary position as a secretary is not supported by substantial evidence. Claimant opposed Employer's appeal, asserting the ALJ applied the law correctly and relied on substantial evidence in reaching his conclusions.

ANALYSIS²

Subsequent to the issuance of the DRO, the CRB clarified the burden-shifting scheme to be applied in public sector workers' compensation cases wherein the government has accepted the

² 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 §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.

claim 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 explained:

[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.

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.

The ALJ correctly referred to the CRB's *en banc* decision in the COR and found both Employer and Claimant met their burdens of production. Specifically, the ALJ found the report of Dr. David Johnson equated to "substantial, recent, current and probative evidence that Claimant's condition has sufficiently changed to warrant a modification or termination of benefits". We find no error in the ALJ's determination that Employer met the initial burden of production with this report.

Although the ALJ determined Claimant met her burden, the ALJ incorrectly stated the standard was by a preponderance of evidence. The ALJ explained:

At the time the remand was ordered, the CRB ordered the level of production and persuasion at the second step to be preponderance of the evidence. The second step has since been modified to provide for a burden of production of substantial evidence without any requirement of persuasion by Claimant, and a third step requiring a burden of persuasion by the Employer was added. *Compare* CHOPRA, CRB No. 13-153, MAHONEY CRB No. 14-067.

COR at 5 n4.

While we agree with the ALJ's analysis of the evidentiary burdens before and after the CRB issued *Mahoney*, holding Claimant to a greater weight does not alter the outcome as we conclude there is substantial evidence in the record to support a determination that Claimant has submitted reliable and relevant evidence that her conditions have not changed to warrant a modification or

termination of benefits and her ongoing knee problems remain causally related to her work injuries. We further note the ALJ included in a footnote the following:

Under the *Mahoney* test, which requires the Employer to prove justification of termination of benefits by a preponderance of the evidence, Claimant would have also prevailed because she has provided more than reliable and relevant evidence test (sic) and the weight of the evidence by the employer was very weak.

COR at 7 n7.

We agree with the ALJ.

Claimant's Exhibit packet contains a letter dated January 22, 2013 from Dr. Amy Nobu which states:

This letter is written in support of Mrs. Sukesh Chopra's disability status.

She has been my patient from 12/18/1989 to 9/23/1992, 3/31/2000 to 7/19/2000 and 6/13/2006 to present.

Her disability started after suffering from multiple falls at work dated 8/12/1987, 8/25/1988, 2/21/1989, and 12/11/1989. She had been under the care of Dr. Robert Heilen, orthopedic physician. I cared for her medical needs as a primary care physician.

Since 1989/90. Our physical findings primarily showed combinations of bilateral acute internal knee injuries and chronic osteoarthritis as a result of her traumatic injuries.

. . .

Unfortunately, she continued to manifest arthritic deformities of the knee joints, limitations of range of movements, difficulty with weight bearing, difficulty with stair climbing, prolonged standing or sitting.

As a part of my patient history, I inquired as to Mrs. Chopra's usual and customary work activities when she was last employed as an administrative assistant. She described being required to sit, stand, walk, and lift as a part of her job requirement. Upon consideration of her current medical condition which was caused by injuries to her knees, in my opinion, she is not able to work due to her physical limitations, multiple medical problems, and advanced age, especially after so many years of absence from work.

CE 2.

Notwithstanding this report, which this Panel finds to be reliable and relevant evidence that Claimant is unable to return to work as a result of her knee problems and that her knee problems

are related in part to her multiple falls at work, the ALJ again referred to the outdated reports of Dr. Heilen and medical reports submitted by Employer to meet Claimant's burden. We find the ALJ's reference to outdated reports to be harmless error in light of existence of the report of Dr. Nobu.

The ALJ correctly shifted the burden to Employer pursuant to step three of *Mahoney* and determined that:

Based on the evidence of record it is determined that a preponderance of the evidence indicates Claimant suffered injuries to her knees that resulted in her bilateral knee surgeries. The injuries and surgical treatment aggravated her pre-existing degeneration. Claimant's bilateral knee impairment are found to be permanent. Given the nature of her physical impairments, Claimant cannot return to her regular duties of retrieving and transporting files.

COR at 7.

This Panel finds Dr. Johnson's report is not sufficient to meet Employer's burden of a preponderance of evidence that that Claimant's condition has sufficiently changed to warrant a modification or termination of benefits. Dr. Johnson reported the following:

Impression: Multiple falls aggravating preexisting osteoarthritis of both knees resulting in bilateral total knee replacements in 1994.

Comments: I do not believe that the patient's medical condition is causally related to the incident of September 4, 1987 alone. She may have had preexisting osteoarthritis with a long and repeated history of falls and the injury of 1987 was yet one more fall that aggravated symptomatically her preexisting osteoarthritis. A fall on September 4, 1984 is not likely to produce the need for a total knee replacement without sever preexisting osteoarthritis being present already.

I see no contraindication from an orthopedic standpoint why the patient would be unable to return to work as a secretary at this time. The only restrictions would be for squatting, repetitive climbing and kneeling. These restrictions are secondary to the presence of total knee replacements which were performed because of the preexisting osteoarthritis that had been aggravated by multiple falls. She is a candidate for vocational rehabilitation if her secretarial job is not available for her at this time.

EE 3.

As the Claimant indicated, Dr. Johnson concedes that the total knee replacements were performed because Claimant's pre-existing osteoarthritis was aggravated by her multiple falls. This Panel finds that the only statement that could establish a change in Claimant's condition which may warrant the termination of Claimant's benefits is the statement that Claimant could work as a secretary notwithstanding restrictions on squatting, climbing, and kneeling. However, Dr. Johnson does not indicate he is aware of the demands of a secretary at the Lorton facility,

which Claimant described at the formal hearing and the ALJ found was not contradicted. Specifically, the ALJ explained:

Claimant testified she is unable to work as a secretary in the prison because she can barely walk, has difficulty sitting for extended periods of time, has difficulty climbing stairs, she cannot carry files and she is in constant discomfort. (HT 34 & 42). Claimant testified the building she worked on the second floor of a two story building. The building did not have an elevator so Claimant had to use the stairs during the work day to execute her duties. (HT 39-40). Claimant testified she had to squat while searching for files. (HT 40).

Claimant further testified that Dr. Johnson did not ask her about the physical demands of her job as a secretary and did not question her about the building in which she worked.

COR at 6, 7.

The CRB does not reweigh evidence so long as there is substantial evidence in the record to support the ALJ's finding. Although we may have reached a conclusion contrary to that of the ALJ on this issue, we cannot substitute our judgment for that of the ALJ. *Marriott, supra* 834 A.2d at 885. We conclude that the ALJ's Conclusions of Law are supported by substantial evidence in the record.

CONCLUSION AND ORDER

The December 18, 2014 Compensation Order is supported by substantial evidence and is accordance with the law and is hereby AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:



LINDA F. JORY
Administrative Appeals Judge

May 1, 2015
DATE