

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA MARÍA MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 13-009

SPECIAL SWANSON
Claimant– Respondent,

v.

DISTRICT OF COLUMBIA DEPARTMENT OF CORRECTIONS,
Employer - Petitioner

An Appeal from a December 21, 2012 Second Compensation Order on Remand by
Administrative Law Judge David L. Boddie
AHD No. PBL. 11-024, DCP No. 761032000120000-0005

Special Swanson, *Pro Se*
Justin Zimmerman, Esquire, for the Employer

Before: HEATHER C. LESLIE, JEFFREY RUSSELL, *Administrative Appeals Judges* and LAWRENCE D.
TARR, *Chief Administrative Appeals Judge*

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

DECISION AND REMAND ORDER

OVERVIEW

This case is before the Compensation Review Board (CRB) on the request for review filed by the Employer - Petitioner (Employer) of the December 21, 2012, Second Compensation Order on Remand (COR) issued by an Administrative Law Judge (ALJ) in the Office of Hearings and Adjudication of the District of Columbia Department of Employment Services (DOES). In that COR, Claimant's request for reinstatement of disability benefits from May 7, 2011 to the present and continuing was granted.

FACTS OF RECORD AND PROCEDURAL HISTORY

The Claimant was employed as a correctional officer by the Employer. On August 27, 2000, the Claimant injured her lower back and right hip when she slipped and fell at work. The Claimant's claim was accepted by the Employer and she received disability benefits from September 28, 2000 through May 7, 2011. The Claimant underwent multiple independent medical evaluations (IME) at the request of the Employer.

The Claimant underwent several IME's with Dr. Kevin F. Hanley.¹ On May 22, 2007, Dr. Hanley took a history of the Claimant's injury, reviewed her past medical history, and performed a physical examination. Dr. Hanley opined the Claimant did not suffer from any residuals from her work injury and had reached maximum medical improvement. Dr. Hanley indicated that the Claimant could work without restrictions. On September 3, 2008, the Claimant again saw Dr. Hanley for an IME. Dr. Hanley again opined that the Claimant's condition had resolved and that she did not require any medical treatment.

On February 10, 2011, the Claimant underwent an IME with Dr. Paul Wright. Dr. Wright took a history of the Claimant's injury and medical treatment. Dr. Wright also performed a physical examination. Dr. Wright diagnosed the Claimant with 1) a contusion to the right hip and low back area related to the work fall, 2) advanced musculoskeletal deconditioning, 3) somatization disorder, and 4) psychoaffective disorder. Dr. Wright opined there was no objective evidence of any orthopedic injury from the work related accident and that from an orthopedic standpoint, she was able to work full duty without restrictions. Dr. Wright did opine that unless other diagnosis were addressed, it was not likely that the Claimant would return to any type of gainful employment.

Relying on the above IME's, the Employer terminated the Claimant's workers compensation benefits effective April 8, 2011. The Claimant timely requested a reconsideration of this decision, which was subsequently denied. The Claimant then requested a Formal Hearing.

A full evidentiary hearing was held on August 13, 2011. At that hearing, the Claimant sought reinstatement of temporary total disability benefits from May 7, 2011 to the present and continuing. The Employer contested the nature and extent of the Claimant's disability. A Second Compensation Order on Remand (COR)² was issued on December 21, 2012.³ In that COR, the ALJ found the Claimant was permanently and totally disabled and was entitled to further medical treatment to all the conditions identified by Dr. Wright in his IME. The ALJ awarded the Claimant permanent total disability benefits from May 7, 2011 to the present and continuing.

The Employer timely appealed on January 22, 2013. The Employer argues that the ALJ erred in finding a reduction in force can constitute a basis for continuing disability. The Employer also argues the ALJ erred in placing the burden on the Employer of proving the availability of alternative employment before terminating the Claimant's benefits and, finally, the COR is not supported by the substantial evidence in the record when determining the Claimant still suffered from a work related injury.

¹ There is reference to an IME performed by Dr. Hanley on July 13, 2001. However, this IME was not submitted as part of the exhibits.

² We must note at this juncture that prior to the COR, a Compensation Order was issued by a different ALJ on December 27, 2011 wherein the Claimant's claim for relief was denied. The Claimant timely appealed to the CRB. The CRB vacated the CO in its entirety finding the Claimant had not been afforded the opportunity to agree to the assignment of a new judge. Thereafter, a Compensation Order on Remand issued, which re-assigned the case back to the original hearing judge. The Second Compensation Order on Remand followed.

³ The ALJ dated the COR as December 21, 2011. It is clear based on the record and the certificate of service, as well as the parties representations, that this is in error and should reflect a date of December 21, 2012.

The Employer simultaneously, with the application for review, filed a Motion to Stay the Compensation Order.

The Claimant opposed the Employer's application for review on February 4, 2013, arguing in essence that the COR is supported by the substantial evidence in the record and is in accordance with the law.

STANDARD OF REVIEW

The scope of review by the CRB, as established by 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 on Remand 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), and *Marriott International v. DOES*, 834 A.2d 882 (D.C. 2003).

Consistent with this standard of review, the CRB is constrained 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.

ANALYSIS

The Employer first argues that the ALJ erred in awarding disability benefits because of a reduction in force. The Employer points to language wherein the ALJ concludes that while her work injuries were not preventing her return to work, per the opinion of the IME physicians, as "there is no work for her to return" she continues to suffer a total wage loss. CO at 10. We agree with the Employer.

D.C. Code § 1-623.02, states,

The District of Columbia shall pay compensation as specified by this subchapter for the disability or death of an employee resulting from personal injury sustained while in the performance of his or her duty, unless the injury or death is: (1) caused by willful misconduct of the employee; (2) caused by the employee's intention to bring about the injury or death of himself or herself or of another; or (3) proximately caused by the intoxication of the injured employee.

Thus, a Claimant is entitled to compensation when the disability is due to a work injury. If a Claimant's job is terminated due to a reduction in force, the Claimant may still be entitled to compensation benefits. Where a Claimant, at the time of his lay-off is unable to perform his usual employment due to a work-related injury, and remains under medical restrictions to perform modified duty, the Employer's liability for disability benefits continues. If the Claimant is not under any restrictions and can work full duty when the lay-off occurs, then any wage loss thereafter is not due to any disability, but to economic factors. Upon remand, if the ALJ determines the Claimant can return to work full duty, without restrictions, then the Claimant is not entitled to compensation as the wage loss from that point is not because of her injury, but because of a reduction in force.

Addressing the Employer's second argument, the Employer argues the ALJ erred in determining that the Employer had failed to show suitable, alternative employment pursuant to *Logan v. DOES*⁴, a case applicable to private sector workers' compensation claims. We agree.

We note initially that it is well settled in the public sector that once a claim for disability compensation has been accepted and benefits paid, to prevail at a formal hearing, the employer has the burden to prove a change in condition to support the modification or termination of benefits.⁵ Upon such a showing, the burden of production shifts to Claimant to show through reliable, relevant and substantial medical evidence that her physical condition has not changed such that a modification or termination of benefits is warranted.⁶ If such a showing is made, the burden then shifts back to Employer.

A review of the COR shows that initially the ALJ acknowledged that the Employer had the burden of presenting substantial and recent medical evidence to support a modification or termination of benefits. COR at 5. The ALJ then finds the Employer satisfied this initial burden. After having summarized the Employer's evidence at length, the ALJ states,

Upon review and consideration of the evidence in the record, I accept and accord the greater weight to the medical opinions of the Employer's IME physician, Dr. Wright, who opined that the Claimant has reached maximum medical improvement from her August 27, 2000, work injuries, and that from an orthopedic standpoint, there would be no benefit from further treatment.

COR at 9.

It is at this juncture the COR becomes less clear. The ALJ seems to qualify the above statement, finding that maximum medical improvement was reached to the "passage of time and neglect" and that the Employer failed to offer her alternative employment as her pre-injury job was no longer available. COR at 10. We are uncertain whether or not this qualification means the ALJ ultimately found the Employer failed in presenting evidence warranting a modification or termination of benefits. The ALJ never explicitly states either way.

Even more problematic, the ALJ then goes to reference *Logan, supra*, and states,

I find that the Claimant has established a *prima facie* case of total disability by her testimony of an inability to return to work in her usual occupation. I further find, based upon the evidence in the record that there is not evidence presented by the Employer of any other employment available that she is capable of performing.

⁴ 805 A.2d 237, 242 (D.C. 2002).

⁵ *Jones v. D.C. Superior Court*, CRB No. 10-003, AHD No. PBL09-026, DCP No. 7610460001199-0002 (March 10, 2011) citing *Lightfoot v. D.C. Department of Consumer and Regulatory Affairs*, ECAB No. 94-25 (July 30, 1996).

⁶ *Jones v. D.C. Superior Court*, CRB No. 10-003, AHD No. PBL 09-06 (March 10, 2011) quoting *Perry v. D.C. Department of Child and Family Services*, CRB No. 07-074, AHD No. PBL06-038, DCP/ODC No. 761010-8-2003-3 (May 29, 2007).

COR at 11.

This is in error. The burden shifting scheme outlined in *Logan* is not applicable to the case at bar and it was in error for the ALJ to apply this reasoning to the facts of this public sector case. As initially stated when adjudicating public sector cases where the Claimant is seeking reinstatement of disability benefits in a previously accepted claim, the ALJ must initially determine whether or not the Employer presented reliable and current evidence to support a modification or termination of benefits. The burden then shifts to the Claimant to show that Claimant's condition has not changed such that a modification or termination of benefits is warranted. If the Claimant satisfied the test at this juncture, then the burden reverts back to the Employer.

We have stated previously that the CRB cannot affirm a Compensation Order that "'reflects a misconception of the relevant law or a faulty application of the law.'" *WMATA v. DOES and Payne, Intervenor*, 992 A.2d 1276, 1280 (D.C. 2010) (quoting *Georgetown Univ. v. DOES and Ford, Intervenor*, 971 A.2d at 915). *D.C. Department of Mental Health v. DOES and Callier, Intervenor*, 744 A.2d 992 (D.C. 2011). Such is the case here. We are forced to remand the case with directions to the ALJ to apply the burden shifting standard applicable to public sector cases outlined above.

The Employer also argues that the finding of a continuing work related injury was not supported by substantial evidence. Employer's argument at 12. The Employer specifically takes issues with the ALJ finding "'an absence of medical reports or evidence to support [the claimant]'" and excused this lack of evidence by falsely accusing the employer of failing to approve or grant the claimant medical treatment recommended in 2002." COR at 10. The Employer argues that the ALJ ignored comments by both Dr. Hanley and Dr. Wright who relayed a history of treatment which included injections and physical therapy.

A review of the COR reveals the following discussion:

The Claimant presented compelling testimony that she continues to experience problems and symptoms from her work injury. And although there is an absence of medical reports or evidence to support her testimony, that she has received no ongoing active medical treatment for her injuries, the evidence is consistent, as the Claimant testified, and IME reports of the Employer indicate, her failure or inability to present such evidence is due to the fact that no approval for medical treatment was granted by the Employer, even when recommended by their own IME physician.

...

I accept the IME report of Dr. Wright, which opines that the Claimant has reached maximum medical improvement from her work injuries, although it has been as a result of the passage of time and neglect, rather than because she received the type of medical care and treatment that is contemplated and which she had a right to receive pursuant to D.C. Code § 1-623.03.

COR at 10.

In contrast to the ALJ's finding above, the IME opinions of Dr. Hanley in 2007 and 2008 do recite a history of physical therapy and injections. While Dr. Hanley in 2007 indicates that the Claimant had not received any treatment for 3 years prior, he did opine that further orthopedic treatment is not necessary, an opinion shared by Dr. Wright who went further to state that "treatment of non-existent orthopedic conditions would only lead to continued chronicity." Moreover, a review of Dr. Wright's report shows at no time, contrary to the ALJ's summation above, did the doctor opine that the Claimant reached maximum medical improvement due to the passage of time and neglect. We agree with the Employer that the ALJ's statements are not supported by the substantial evidence in the record. Upon remand, the ALJ is reminded,

If there is evidence in the record to support the ALJ's conclusions, the ALJ remains free to cite that evidence in support of those conclusions. If, however, there is no evidence in the record to support the ALJ's conclusions, the ALJ exceeds the scope of authority in rendering medical opinions.⁷

Finally, we must point out that the claim for relief sought by the Claimant was reinstatement of temporary total disability benefits from May 7, 2011 to the present and continuing. Hearing transcript at 7 and 18-19. The ALJ exceeded the scope of his authority in awarding permanent total disability benefits as well as payment of related medical expenses, as these benefits were not requested by the Claimant. Upon remand, the ALJ is to either award or deny the Claimant's claim for relief; reinstatement of temporary total disability benefits.

Similarly, the sole issue for the ALJ to adjudicate was the nature and extent of the Claimant's disability, if any as it relates to the low back and right hip. Medical causal relationship of any other conditions the Claimant currently suffers from was not at issue. However, the ALJ states,

I find that the conditions diagnosed by Dr. Wright, the Employer's IME physician, in considering and addressing the nature and extent of the Claimant's disability, as it relates to her work injury of August 27, 2000, are causally related to the work injury by description and definition due to a lack of the provision of medical treatment.

COR at 11.

We vacate this portion of the award as medical causal relationship was not a contested issue before the judge.⁸

As we have rendered an opinion on the merits of the case, the Employer's Motion to Stay is rendered moot.

⁷ *Daly v. R. J. Reynolds*, CRB No. 12-023, AHD No. 10-193A, OWC No. 655062 (April 3, 2012). See also *Seals v. The Bank Fund Staff Federal Credit Union*, CRB No. 09-131, AHD No. 144, OWC No. 653446 (May 20, 2010).

⁸ It is well settled in this jurisdiction that, in order to conform to the requirements of the D.C. Administrative Procedures Act (DCAPA), D.C. Code § 2-501 *et seq.* (2006), for each administrative decision in a contested case, (1) *the agency's decision must state findings of fact on each material, contested factual issue*, (2) those findings must be based on substantial evidence, and (3) the conclusions of law must follow rationally from the findings.⁸ (Emphasis added).

CONCLUSION AND ORDER

The December 21, 2012 Second Compensation Order on Remand is not supported by the substantial evidence in the record or in accordance with the law. That portion of the Second Compensation Order on Remand which awards permanent total disability benefits is VACATED. That portion of the award which awards causally related medical benefits to conditions not initially accepted by the Employer is VACATED. We remand the case for further consideration of whether the Claimant's claim for relief, reinstatement of temporary total disability benefits from May 11, 2011, consistent with the above discussion.

FOR THE COMPENSATION REVIEW BOARD:

HEATHER C. LESLIE
Administrative Appeals Judge

May 21, 2013
DATE