GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR

LISA MARÍA MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 12-187

WILLIAM A. WORKCUFF,
Claimant–Respondent,

v.

DISTRICT OF COLUMBIA HOUSING AUTHORITY,
Employer-Petitioner.

Appeal from a Compensation Order by
Administrative Law Judge Karen R. Calmeise
AHD No. PBL12-022, DCP No. 761001000120020006

Eric Adam Huang, Esquire for the Petitioner
Harold L. Levi, Esquire for the Respondent

Before MELISSA LIN JONES, HENRY W. MCCOY and JEFFREY P. RUSSELL, *Administrative Appeals Judges*.

MELISSA LIN JONES for the Compensation Review Board.

DECISION AND REMAND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

On February 21, 2002, Mr. William A. Workcuff injured his back while working for the D.C. Housing Authority ("Employer") as a maintenance mechanic. In a Compensation Order dated January 14, 2004, Mr. Workcuff was awarded ongoing temporary total disability compensation benefits and medical benefits.[1]

On October 27, 2011, the Public Sector Workers' Compensation Program issued a Notice of Intent to Terminate, and on April 6, 2012, it issued a Final Decision on Reconsideration; Mr. Workcuff's disability compensation benefits were terminated. Following a formal hearing, an

[1] *Workcuff v. D.C. Housing Authority*, OHA No. PBL03-020A, MS-HCD002589 (January 14, 2004).

administrative law judge ("ALJ") issued a Compensation Order reinstating Mr. Workcuff's disability compensation from November 30, 2007 to the date of the formal hearing and continuing.[2]

On appeal, Employer argues the ALJ applied the incorrect standard of proof in this public sector case:

> [T]he ALJ employed the incorrect standard of evidence, "a preponderance of the evidence that a change in condition has occurred," as opposed to the correct public sector standard, "substantial and recent medical evidence to support a modification of benefits." [Footnote omitted.] One of the ALJ's findings is also incorrect and not supported by substantial evidence. Also, the ALJ mischaracterizes what is required of the Employer to establish its initial burden, and incorrectly requires the Employer to provide a "clear and full narration of the Claimant's medical and claim history" before the burden can be shifted.[3]

Employer also argues the ALJ erred by excluding probative evidence, namely Dr. Gordon's August 30, 2012 addendum issued after the Final Decision on Reconsideration. For these reasons, Employer requests the Compensation Review Board ("CRB") reverse the October 25, 2012 Compensation Order.

In opposition, Mr. Workcuff asserts Employer's ultimate burden of proof is a preponderance of the evidence, but Dr. Gordon's reports do not support employer's initial burden for terminating Mr. Workcuff's benefits. Mr. Workcuff contends the ALJ fully assessed the weight of the evidence and reached the appropriate conclusion. Finally, Mr. Workcuff argues the exclusion of Employer's Exhibit 5 is harmless error in that it provided no new analysis, conclusion, facts, or opinions. Mr. Workcuff requests the CRB dismiss the Application for Review.

ISSUES ON APPEAL

1. Did the ALJ apply the correct burden of persuasion and burden of proof?

2. Did the ALJ apply proper reasons for rejecting Dr. Gordon's opinion?

3. Is the finding that Dr. Gordon failed to review Mr. Workcuff's records from the VA Hospital supported by substantial evidence?

4. Did the ALJ properly exclude Employer's Exhibit 5 from the record?

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[2] *Workcuff v. D.C. Housing Authority*, AHD No. PBL12-022, DCP No. 761001000120060006 (October 25, 2012).

[3] Memorandum of Points and Authorities Supporting Petitioner's Application for Review, p. 2.

ANALYSIS[4]

In a public sector case, once a claim for disability compensation has been accepted and benefits have been paid, the government must adduce persuasive evidence sufficient to substantiate a modification or termination of an award of benefits.[5] Pursuant to the January 14, 2004 Compensation Order, Employer paid Mr. Workcuff temporary total disability compensation benefits from February 21, 2002 until April 6, 2012; therefore, having paid disability compensation benefits due to work-related injuries, Employer initially must present substantial and recent medical evidence to support a modification or termination of benefits payable as a result of disability caused by those injuries.[6]

Although the ALJ states this standard at the start of the analysis, when actually evaluating Employer's evidence, the ALJ applied the wrong burden:

> On its face, the Employer's AMA [*sic*] opinion that the Claimant's low back injury has resolved and that his ongoing complaints are not causally related to the work injury; could minimally support a decision to terminate the Claimant's benefits. However, upon closer review I find the Employer's medical opinion lacks significant probative evidence to support such a termination.[7]

By the ALJ's own assessment, Dr. Gordon's opinion is recent medical evidence to support a termination of benefits. Although the ALJ ultimately may find reasons to reject Dr. Gordon's opinion when weighing the evidence in the record as a whole, at this stage, the burden of production shifts to Mr. Workcuff. Because the ALJ failed to apply the proper burden, the conclusion that "[b]ased upon a review of the record evidence as a whole, I find and conclude Employer failed to show by a preponderance of the evidence that a change in condition has occurred which would warrant, under the Act, a modification or termination of the January 2004 award of Compensation" is not in accordance with the law and must be vacated.

Furthermore, the ALJ's reasons for rejecting Dr. Gordon's opinion are not supported by substantial evidence. The ALJ rejected Dr. Gordon's opinion because

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[4] 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). 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).

[5] *Lightfoot v. D.C. Department of Consumer and Regulatory Affairs,* ECAB No. 94-25 (July 30, 1996); *Scott v. Mushroom Transportation*, Dir. Dkt. No. 88-77 (June 5, 1990). Although the Employees' Compensation Appeals Board was abolished in 1998, its rulings remain persuasive in deciding disability cases.

[6] *Jones v. D.C. Department of Corrections,* Dir. Dkt. No. 07-99, OHA No. PBL97-14, ODC No. 312082 (December 19, 2000).

[7] *Workcuff v. D.C. Housing Authority*, AHD No. PBL12-022, DCP No. 761001000120060006 (October 25, 2012), pp. 4-5.

> Dr. Gordon notes that the Claimant treated with a Dr. Schreiber shortly after work injury [*sic*] when he pulled the drain pipe cable and twisted his back. Dr. Gordon goes on to comment that the Claimant "switched to the office of Dr. Hampton Jackson" "instead of continuing under the care of Dr. Schreiber". (EE 1 pg 1) However Dr. Gordon made no mention, or seems not to be aware, that the Claimant's claim of a work related injury was denied by the Employer in June 2002 and that the Claimant was denied further treatment with Dr. Schreiber. (HT 92) Claimant was directed to select a new physician, Dr. Jackson, from a list of providers offered by the Employer. (CE 92)
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> I also find that Dr. Gordon's opinion fails to include any review or analysis of the Claimant's medical records from his treatment at the VA Hospital in 2002 and 2003. (CE 6) Furthermore, Dr. Gordon's characterization that the Claimant, following the work injury and initial medical treatment by Dr. Schreiber simply "did not return to work for over nine years" is incorrect. It was adjudicated that the Claimant was unable to return to work as a maintenance mechanic, he was awarded temporary total wage loss benefits continuing from February 21, 2002, and Employer had not offered the Claimant any work to accommodate his restrictions. (CE 3) Also, by his admission; Dr. Gordon did not have the benefit of review of MRI scans. (EE 1, pg 2) Although his reliance on the reports and not the scans, may not have affected Dr. Gordon's opinion, his reference to the absence of the scans and his lack of reference to over a year of medical treatment at the VA gives me reason to find that the physician's analysis lacks a full review of the Claimants [sic] medical treatment and condition.[8]

The ALJ's finding that Dr. Gordon did not review Mr. Workcuff's records from the VA Hospital is not supported by the record. Between 2002 and 2003, Mr. Workcuff was examined by several health care providers at the VA Hospital including Dr. Stephen W. Gentry.[9] In his August 18, 2001 Additional Medical Evaluation, Dr. Gordon specifically refers to Dr. Gentry and his impression of Mr. Workcuff's MRI of his lumbar spine.[10] Even though Dr. Gordon did not mention the records from the VA Hospital by reference to that facility, his reference to Dr. Gentry reveals he clearly did review at those records.

Additional proof that Dr. Gordon reviewed Mr. Workcuff's records from the VA Hospital is contained in Employer's Exhibit 5; however, the ALJ improperly excluded that evidence from the record. At the formal hearing, the ALJ excluded this exhibit because

> [a]nything that comes after [the Final Decision on Reconsideration] is not something for me to consider.

[8] *Workcuff v. D.C. Housing Authority*, AHD No. PBL12-022, DCP No. 761001000120060006 (October 25, 2012), p. 5.

[9] Claimant's Exhibit 6.

[10] Employer's Exhibit 1.

> The final decision was April 6, 2012. The decision had to be based on evidence that was in or considered prior to that date. Anything after that date must be excluded. All right?
>
> So I am going to exclude Exhibit 5.
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> * * *
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> I have taken Exhibit 5 off the record for consideration in my decision, based on the date of the addendum, because it does - - it is post-dated the final decision of reconsideration and any evidence that should be presented should be dated - - has to be something that has been presented or analyzed prior to the date of the termination.
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> The burden is on the employer, but what I'm saying is that anything after that, there may be medical records up to today's date, but I'm going to consider what happened up until April 6, 2012, what his condition is.[11]

However,

> although called "appeals," the proceedings before the Office of Hearings and adjudications are, in actuality, *de novo* proceedings and it is irrelevant whether the termination of benefits is rationally based or not. "The [ALJ] is to make an independent decision based on the evidence at the hearing." [Footnote omitted.] Evidence at the hearing can, and often time does, include documents authored after the Employer terminated the Claimant's benefits. The Claimant fails to cite any authority for the proposition that the Employer's evidence at the Formal Hearing should be limited to only that relied upon in terminating the Claimant's benefits. We decline to follow this rationale. Employers, as well as the claimants, can submit evidence they feel is relevant to their case, including medical documents authored after the Employer issues an intent to terminate benefits.[12]

Thus, the law requires Employer's Exhibit 5 be admitted into the record and considered on remand.

Finally, the ALJ repeatedly discounted Dr. Gordon's opinion:

> Dr. Gordon made no mention, or seems not to be aware, that the Claimant's claim of a work related injury was denied by the Employer in June 2002 and that the Claimant was denied further treatment with Dr. Schreiber. (HT 92) Claimant was directed to select a new physician, Dr. Jackson, from a list of providers offered by the Employer.
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> * * *

[11] Hearing Transcript, pp. 41, 45.

[12] *Njomo v. D.C. Department of Youth Rehabilitation Services*, CRB No. 12-106, AHD No. PBL11-002, DCP No. 3009114587-0001 (August 9, 2012).

> Dr. Gordon's characterization that the Claimant, following the work injury and initial medical treatment by Dr. Schreiber simply "did not return to work for over nine years" is incorrect. It was adjudicated that the Claimant was unable to return to work as a maintenance mechanic, he was awarded temporary total wage loss benefits continuing from February 21, 2002, and Employer had not offered the Claimant any work to accommodate his restrictions.[13]

Dr. Gordon was restricted to issuing a medical opinion based upon his expertise, not one based upon legal issues. The facts as Dr. Gordon stated them are true: Mr. Workcuff switched physicians from Dr. Schreiber to Dr. Jackson; Mr. Workcuff did not return to work. His lack of inclusion in the legal proceedings and outcomes is no basis for discounting his opinion, especially when he was reciting the history provided by Mr. Workcuff:

> The patient said despite that diagnosis [of back strain], which based on his examination and my review of the records provided was the appropriate one, he has never returned to work over nine years later. He said instead of continuing under the care of Dr. Schreiber, he switched to the office of Dr. Hampton Jackson with whom I am quite familiar.[14]

Consequently, the ALJ's reasons for rejecting Dr. Gordon's opinion are improper.

CONCLUSION AND ORDER

The burdens of persuasion and of proof were not properly applied in this case. In addition, the finding that Dr. Gordon failed to review Mr. Workcuff's records from the VA Hospital is not supported by substantial evidence, and the ALJ improperly excluded Employer's Exhibit 5 from the record. Finally, the ALJ did not apply proper reasons for rejecting Dr. Gordon's opinion. Consequently, the October 25, 2012 Compensation Order is not in accordance with the law, is not supported by substantial evidence, and is VACATED. This matter is REMANDED for further consideration consistent with this Decision and Remand Order.

FOR THE COMPENSATION REVIEW BOARD:

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MELISSA LIN JONES
Administrative Appeals Judge

August 9, 2013
DATE

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[13] *Workcuff v. D.C. Housing Authority*, AHD No. PBL12-022, DCP No. 761001000120060006 (October 25, 2012), p. 5.

[14] Employer's Exhibit 1.