

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR



F. THOMAS LUPARELLO
DIRECTOR

COMPENSATION REVIEW BOARD

CRB 14-064

**WILLIAM WORKCUFF,
Claimant-Respondent,**

v.

**DISTRICT OF COLUMBIA HOUSING AUTHORITY,
Employer-Petitioner.**

Appeal from an April 18, 2014 Compensation Order on Remand
by Administrative Law Judge Karen R. Calmeise
AHD No. PBL 13-148, DCP No. 761001000120020006

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2014 DEC 23 AM 11 11

Harold L. Levi for Claimant
Eric Adam Huang for Employer

Before: JEFFREY P. RUSSELL, MELISSA LIN JONES, and HEATHER C. LESLIE, *Administrative Appeals Judges*

JEFFREY P. RUSSELL for the Compensation Review Board; MELISSA LIN JONES *concurring*.

DECISION AND ORDER

This case is before the Compensation Review Board (CRB) on the appeal filed by Employer, District of Columbia Housing Authority, challenging the April 18, 2014 Compensation Order on Remand (COR) issued by an Administrative Law Judge in the Administrative Hearings Division of the District of Columbia Department of Employment Services (DOES). In the COR, the ALJ granted Claimant's request for an Award restoring his temporary total disability benefits. For the reasons stated below, we affirm COR.

BACKGROUND AND FACTS OF RECORD

On February 21, 2002, Mr. William A. Workcuff injured his back while working for the District of Columbia 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. *Workcuff v. D.C. Housing Authority*, OHA No. PBL03-020A, MS-HCD002589 (January 14, 2004).

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 administrative law judge ("ALJ") issued a Compensation Order dated October 25, 2012. Mr. Workcuff's disability compensation benefits were reinstated from November 30, 2007 to the date of the formal hearing and continuing. *Workcuff v. D.C. Housing Authority*, OHA No. PBL12-022, DCP No. 761001000120020006 (October 25, 2012).

Employer appealed the October 25, 2012 Compensation Order on the grounds that the ALJ applied the incorrect standard of proof and the ALJ erred by excluding probative evidence. On August 9, 2013, the Compensation Review Board ("CRB") vacated the Compensation Order and remanded the matter. *Workcuff v. D.C. Housing Authority*, CRB No. 12-187, OHA No. PBL12-022, DCP No. 761001000120020006 (August 9, 2013).

The ALJ issued a Compensation Order on Remand on October 28, 2013. Mr. Workcuff's claim for relief was granted because "Employer has failed to show that there has been a change in Claimant's condition. Claimant continues to be [] temporarily totally disabled and is entitled to reinstatement of temporary total disability benefits." *Workcuff v. D.C. Housing Authority*, OHA No. PBL12-022, DCP No. 761001000120020006 (October 28, 2013), p. 7.

The Compensation Order on Remand was appealed to the CRB, in which appeal Employer contended the ALJ did not clearly articulate the burden of proof she used to review the evidence. Furthermore, Employer contended the ALJ's analysis of the Claimant's evidence was insufficient and did not clearly articulate whether the Claimant satisfied his burden. Employer also argued that the ALJ's analysis of Dr. Robert Gordon's IME opinion was not supported by substantial evidence and that it had no obligation to demonstrate available work existed. Employer requested the CRB vacate the Compensation Order on Remand.

In response, Mr. Workcuff asserted the ALJ properly reviewed and considered the totality of the evidence and complied with the directives in the August 9, 2013 Decision and Remand Order. Mr. Workcuff also argued the proper burden of proof rested with Employer:

Once a claimant has met his or her burden of proof and Petitioner has accepted a claim and paid the claimant benefits. . . the process changes dramatically. As Section 1-623.24 and relevant case law show, the ultimate burden now rests with Petitioner to show a requisite change of condition by medical evidence sufficient to substantiate a modification or termination.

While Petitioner did not "accept" Respondent's claim here in the first instance, the [Compensation Order on Remand] acknowledges that the Recommended Decision awarded Respondent wage loss and medical benefits judicially and Petitioner subsequently paid Respondent those benefits from 2002 to 2012 (CE-3; COR, p. 4). There is no question, then that [*D.C. Department of Mental Health v. D.C. Department of Employment Services*, 15 A.3d 692 (D.C. 2011)] and [*Washington Hospital Center v. D.C. Department of Employment Services*, 744

A.2d 992 (D.C. 2000)] (as is [*McCamey v. D.C. Department of Employment Services*, 947 A.2d 1191 (D.C. 2008)]) are inapplicable as Petitioner bears the ultimate burden of proof to establish by a preponderance of the evidence that it had grounds to justify the termination of Respondent's benefits.

Mr. Workcuff requested the CRB dismiss the appeal because

[w]hile the [Compensation Order on Remand] perhaps need not have gone as far as it did, the ALJ gave a clear, concise and detailed justification for rejecting the AME medical evidence in favor of the testimony and medical evidence introduced by Respondent which is unassailable. Whether or not evidence in the record might have persuaded the CRB to reach the same conclusion independently, the evidence, including but not limited [to] the Gordon report and the addendum which the ALJ previously omitted, was unquestionably sufficient to support the findings of fact which the ALJ made in the [Compensation Order on Remand].

The [Compensation Order on Remand] considered all of Petitioner's medical evidence. It did not impose any impermissible limitations or conditions or any requirements or considerations in the IME. At the same time it did not release the IME from providing support with a competent review and recitation of pertinent medical records and diagnostic studies. The [Compensation Order on Remand] simply held that weighing all of the evidence, Dr. Gordon's report and addendums did not meet Petitioner's burden of proof and it demonstrated why not. As we have shown, the fact trier's evaluations made in this respect cannot be reversed unless they are found to be clearly erroneous.

Furthermore, Mr. Workcuff claimed the ALJ's consideration of Employer's failure to offer a light duty position is irrelevant, harmless error.

The CRB rejected most of Employer's arguments. However, it did find error in the manner in which the ALJ employed the "burden shifting" process in cases where the employer seeks to terminate ongoing benefits.

The CRB determined that once the government-employer had accepted and paid a claim for disability benefits, the employer had the burden of proving by a preponderance of the evidence that conditions have changed such that the claimant was no longer entitled to the benefits. The CRB stated that 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. The CRB ruled that if the employer fails to present this evidence then the claim fails and the injured worker's benefits continue unmodified.

The CRB then stated that 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. The CRB then held that 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. The April 23, 2014 Compensation Order was vacated and remanded to the Administrative Hearings Division for proceedings consistent with the CRB decision, with the CRB writing:

Employer's argument that the ALJ's analysis of whether Mr. Workcuff satisfied his burden gives us greater pause. Once Employer satisfied its burden of production, the burden of proof shifted to Mr. Workcuff "to show by a preponderance of the evidence that his . . . disability was caused by a work-related injury" [footnote omitted]. Although assessing whether a claimant satisfies a burden of proof by a preponderance of the evidence necessarily requires the ALJ consider and weigh all the evidence in the record, the ALJ ultimately ruled

[b]ased upon a further review of the record evidence as a whole, I find Employer has failed to show that there has been a change in Claimant's condition. Claimant continues to be [] temporarily totally disabled and is entitled to reinstatement of temporary total disability benefits.

Because the burden was not on Employer at this point in the adjudication, the law requires we remand this matter for the ALJ to assess whether Mr. Workcuff's current back condition is related to the injury he sustained on February 21, 2002 and whether that back condition results in a compensable disability.

DRO at 5-6.

On April 23, 2014, the ALJ issued another Compensation Order on Remand, in which the Claimant's benefits were once again restored. The Employer again appealed the Compensation Order on Remand to the CRB, asserting that the ALJ's "explanation is totally inadequate and cannot be upheld", which appeal the Claimant opposed.

For the reasons set forth below, we affirm the Compensation Order on Remand.

DISCUSSION

Turning first to the specific basis of the appeal, that the below-quoted portion of the COR is "inadequate", we must respectfully disagree. Petitioner's argument on appeal can be summarized succinctly by referring to this quotation in its Memorandum of Points and Authorities in Support of Employer's Application for Review (Petitioner's Memorandum):

Here, the ALJ correctly stated Employer's burden and Claimant's burden. However, *the ALJ still does not articulate what the Claimant has shown that satisfies his burden.* Instead, after reiterating that Employer's doctor's opinion was rejected, states [sic] "[a]bsent the Employer's IME, the remaining evidence presented, the treating physician's records of continuing medical treatment through 2011, continued restrictions to light duty work, and Claimant's credible testimony that he continues with painful back and leg symptoms supports

Claimant's claim that he is totally disabled from his pre-injury work duties." COR p. 4 para. 3. This explanation is totally inadequate and cannot be upheld.

Petitioner's Memorandum, p. 16 (emphasis added).

The quotation is a distillation of a more expansive discussion and analysis by the ALJ, who also wrote:

As an initial matter, I hereby adopt and fully incorporate by reference the findings of fact recited in the October 25, 2012, Compensation Order, and the Compensation Order on Remand dated October 28, 2013.

I find that Claimant's testimony at the hearing was credible, based upon his demeanor and the consistency of his testimony when compared other record evidence.

In the 2004 Recommended Order, it was determined that the [work incident] caused Claimant's previously asymptomatic condition to be symptomatic. As a result, he was restricted to light duty work because he could not perform the heavy lifting required of his job as a maintenance mechanic [citing *Workcuff v. D.C. Housing Authority*, OHA No. PBL 03-020A, ODC No. MS-HCDC002589 (*Recommended Decision* January 14, 2004) at 6¹.] To support his claim for reinstating the temporary total wage loss benefits, Claimant presented his testimony and the medical reports of the first treating physician, Dr. Alan Schreiber, and the second treating physician, Dr. Hampton Jackson, orthopedic surgeon. Claimant testified that, since the 2004 Formal Hearing, while under the treatment with Dr. Hampton Jackson, he underwent diagnostic rests and he continued to experience back pain. (HT 97). Claimant also testified that his painful back symptoms and radiculating pain in his leg have not abated through the date of the 2012 Formal Hearing. (HT 97).

The prescribed light duty restrictions recommended by Dr. Schreiber and physicians at the VA hospital as presented at the 2011 Formal Hearing were never retracted.

At the behest of Employer, Claimant underwent an Additional Medical Examination [AME] on August 18, 2011 conducted by Dr. Robert Gordon, orthopedic surgeon. (EE 1 and 2).

¹ At the time of the Recommended Decision, the practice in DOES was for a Hearing Examiner to issue a "Recommended Decision", which would be reviewed by an Assistant Director of DOES, in the person of the head of the Labor Standards, and if found to be legally sufficient, the issuance of a form order approving the Recommended Decision. Although the record before us does not contain the approval order, there is no dispute in this case that the *Recommended Decisions* of January 14, 2004 was approved and became a Compensation Order.

As of September 7, 2012, the date of the Formal Hearing, Claimant continues to complain of back pain, continues to receive medical treatment for his back pain and has not been released to return to work as a maintenance mechanic.
COR, page 2 – 3.

The ALJ proceeded, in the Analysis:

[In the hearing leading to the prior COR of October 28, 2013] Employer produced evidence [Dr. Gordon's AME report] that supported a reasonable basis for terminating claimant's benefits.

...

As Employer has produced evidence that supports a reasonable basis for terminating Claimant's benefits, Claimant bears the burden to show, by a preponderance of the evidence, that he is entitled to ongoing payments of temporary total disability benefits due to the injury he sustained on February 21, 2002. The undersigned rejected Dr. Gordon's opinion, and the [rejection of that] opinion was upheld on appeal. Absent Employer's [rejected] IME, the remaining evidence presented, the treating physician's records of continuing medical treatment through to 2011, continued restrictions to light duty work, and Claimant's credible testimony that he continues with painful back and leg symptoms supports Claimant's claim that he is temporarily totally disabled from his pre-injury work duties.

I find, by a preponderance of the evidence that Claimant is temporarily totally disabled and is entitled to ongoing disability benefits due to the injury he sustained on February 21, 2002.

COR, p. 3 -4.

We must respectfully disagree with Employer's characterization of the ALJ's stated basis for her decision. This discussion and analysis is accurate when compared to the record, and is sufficient to support the ALJ's decision as a matter of substantial evidence.

We are not unmindful that it is not entirely clear from the Compensation Order on Remand what analytic procedure was employed in coming to the final conclusion. In a recent decision, the CRB has clarified the proper analytical framework under which an employer's request to terminate a claimant's benefits is to be reviewed:

In conclusion, we find 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.

Mahoney v. D.C. Public Schools, CRB No. 14-067, AHD No. PBL 14-004, ORM/PSWCP No. 76000500012005-008 (*en banc* decision, AAJs Melissa Lin Jones and Henry W. McCoy, *dissenting*).

While it is possible to read the analysis in the Compensation Order on Remand to be inconsistent with the process as outlined in *Mahoney*, in that the ALJ may have prematurely weighed the evidence as a whole, in this case, as the ALJ points out, there is the procedural fact that the ALJ's prior consideration and rejection of Dr. Gordon's opinion was specifically addressed and affirmed by the CRB in the prior appeal (which pre-dated *Mahoney*). Thus, this aspect of the ALJ's "weighing" has already been reviewed and affirmed, and any error in the analytic framework that may have occurred is harmless.

CONCLUSION AND ORDER

The Compensation Order on Remand is supported by substantial evidence, and is affirmed.

FOR THE COMPENSATION REVIEW BOARD:

/s/ Jeffrey P. Russell
JEFFREY P. RUSSELL
Administrative Appeals Judge

December 23, 2014
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.^[2]

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

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.^[3]

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

² *Williams v. D.C. Department of Parks and Recreation*, CRB 08-0262, AHD No. PBL 07-029, PBL/DCP No. 761013-0001-2005-0007 (Dec. 13, 2007), nt. 2.

³ *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).

proof of an employment related impairment following the termination of benefits.”⁴

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,”⁵ it is important not to overlook that same case also states “The burden may shift once the moving party establishes his case.”⁶ 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.⁷ 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

⁴ *Mahoney v. DOES*, 953 A.2d 739, 742 (D.C. 2008).

⁵ *Washington Metropolitan Area Transit Authority v. DOES*, 703 A.2d 1225, 1231(DC. 1997).

⁶ *Id.*

⁷ 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.

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.⁸

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.^[9]

⁸ *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.

⁹ *Mahoney v. D.C. Public Schools*, AHD No. PBL 14-004, ORM/PSWCP No. 76000500012005-008 (November 12, 2014) (dissent at pp. 11-14).

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*.

Melissa Lin Jones

MELISSA LIN JONES

Administrative Appeals Judge