**COMPENSATION REVIEW BOARD**

**CRB No. 13-100**

**IRIS D. WILLIAMS,**
**Claimant-Respondent,**

**v.**

**DISTRICT OF COLUMBIA PUBLIC SCHOOLS,**
**Employer–Petitioner.**

Appeal of a July 17, 2013 Compensation Order
issued by Administrative Law Judge Nata K. Brown
AHD No. PBL 12-209, DCP No. 760002-0001-2001-0004

Eric A. Huang, Esquire, for the Petitioner
Charles Walton, Esquire, for the Respondent

Before JEFFREY P. RUSSELL, HENRY W. MCCOY, and HEATHER C. LESLIE, *Administrative Appeals Judges*.

JEFFREY P. RUSSELL, for the Compensation Review Board.

## DECISION AND REMAND ORDER

### BACKGROUND

On October 20, 2000, Iris D. Williams, a teacher's aide, injured her right hand while attempting to pull a child who was inflicting harm upon himself from under a desk, and the child kicked her hand. Ms. Williams filed a claim for workers' compensation, which was accepted, and Ms. Williams was provided compensation and ongoing medical care for that claim pursuant to D.C. Code § 1-623.01, *et seq.*, (the Public Sector Workers' Compensation Act (PSWCA)).

Benefits were paid voluntarily from September 3, 2001 through April 13, 2012. Thereafter the employer, the District of Columbia Public Schools (DCPS) and the Public Sector Workers' Compensation Program terminated payments, premised upon an additional medical evaluation (AME) performed by Dr. Mohammad Zamani on July 13, 2011, and his numerous reports, in which he expressed his opinion that Ms. Williams was capable of returning to her pre-injury employment as a teacher's aide.

At a formal hearing conducted on December 10, 2012 before an Administrative Law Judge (ALJ) in the Department of Employment Services (DOES), Ms. Williams sought reinstatement of those benefits.

Following the hearing, a Compensation Order (CO) was issued on July 17, 2013, granting Ms. Williams request for reinstatement of her benefits.

DCPS filed an Application for Review and Memorandum of Points and Authorities in Support of Application for Review (AFR) appealing the CO to the Compensation Review Board (CRB) on August 16, 2013, seeking reversal of the award and asking that a finding of fact to the effect that Ms. Williams has sustained a permanent injury be vacated.

No response to the AFR has been filed by Ms. Williams..

## STANDARD OF REVIEW

The scope of review by the CRB, as established by the PSWCA and as contained in the governing regulations, is generally limited to making a determination as to whether the factual findings of a written 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.*, (the PSWCA), at § 1-623.28 (a), and *Marriott International v. D.C. DOES*, 834 A.2d 882 (D.C. 2003).

## DISCUSSION

Where a claim has been accepted and benefits paid under the PSWCA, in order to modify or terminate those benefits, it is the employer's burden to present substantial and recent medical evidence to support a modification or termination of benefits.[1] Once the employer has produced such evidence, the burden shifts to the claimant to produce substantial evidence that the work injury continues to be disabling. If the claimant does so, the evidence is to be weighed and the claimant must demonstrate entitlement to the requested benefits by a preponderance of the evidence. As the District of Columbia Court of Appeals (DCCA) has stated:

> In workers' compensation cases where, as here, there is no presumption of compensability, [footnote omitted] the burden of proof "falls on the claimant to show by a preponderance of the evidence that his or her disability was caused by a work-related injury." *McCabe v. District of Columbia Dep't of Employment Serves*., 947 A.2d 1191, 1199 n.6 (D.C. 2008) (en banc) (citing *Washington Hosp. Ctr. v. District*

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

*of Columbia Dep't of Employment Serves*., 744 A.2d 992, 998 (D.C. 2000)).

*D.C. Department of Mental Health v. DOES*, 15 A.3d 692 (D.C. 2011), at 698.

DCPS first argues that it produced sufficient evidence to meet its initial burden, in the form of the AME performed by Dr. M. H. Zamani, who opined that Ms. Williams was at maximum medical improvement, exhibited significant symptom magnification, suffered from "very minimal" residual injury from her work place incident, and could return to her pre-injury job. We agree that DCPS's evidence is sufficient to meet its initial burden.

The "Discussion" in the Compensation Order erroneously concludes with the sentence "Thus, Employer has failed to present substantial recent medical evidence to support termination of Claimant's disability benefits on April 13, 2012". We note that this sentence follows five paragraphs describing DCPS's evidence, then four paragraphs discussing Ms. Williams's evidence, followed by four analytic paragraphs in which the evidence is weighed.

In this process the ALJ should have made explicitly clear whether DCPS had met its initial burden and why, and assuming that it was determined the burden had been met, then discussed the countervailing evidence presented by Ms. Williams, following which she should have indicated whether Ms. Williams's evidence met the burden of demonstrating an ongoing disability, i.e., the inability to physically perform the functions of her pre-injury job. This discussion would of necessity include a description of those pre-injury duties, consideration of Ms. Williams's evidence regarding her ability to perform those duties, and an assessment of whether Ms. Williams's evidence was "substantial evidence that the work injury continues to be disabling". If so, the ALJ should then have proceeded to weigh the evidence in its totality to determine whether Ms. Williams's evidence preponderated over that of DCPS.

The totality of the findings concerning the nature of Ms. Williams's pre-injury duties are as follows:

> Her duties required her to work with small children, some with special needs, performing tasks such as writing, using scissors, and even potty training.

The evidence cited by the ALJ in the Compensation Order as supporting Ms. Williams's continued disability are: Four reports of Dr. Goodman (CE 2, 4, 6 and EE 9), Dr. Artis-Tower (CE 4), a disability slip by Dr. Anderson (CE 2), and a functional capacity evaluation performed May 20, 2010 by CAM Physical Therapy & Wellness Services.

Taken in order, these exhibits contain the following information.

CE 2, the Disability Slip, states that Ms. Williams is "totally incapacitated from 10/31/00 to present", being October 4, 2010. It states that Ms. Williams has "permanent disability" and "marked limited use of right hand post injury." There is no discussion concerning how a right hand injury is totally incapacitating to Ms. Williams.

Dr. Artis-Trower, the author of CE4, is identified on his report letterhead as practicing "Family Medicine and Psychiatry". Despite the fact that the report includes reference to both psychological

and physical limitations, the Compensation Order only addresses the physical aspects of the report. The ALJ wrote:

> On March 14, 2012, Dr. Artis-Trower opined that Claimant has physical limitations on her abilities to reach, push, pull, lift, or carry objects. Further, Claimant's severe pain compounds the physical limitations and decreased functionality associated with pain, muscle weakness, and fatigue, as do the medications she has used to address her pain.

Review of EE 9, a January 19, 2012 note or brief report from Dr. Goodman, reveals little beyond his statement that Ms. Williams has "chronic Regional Pain Syndrome", without elaboration, and that she is at maximum medical improvement.

Lastly, the ALJ referenced the Functional Capacity Evaluation (FCE), being CE 9 (also identified as Claimant's "Tab 40" and included in DCPS's exhibits as EE 9). Here is the entire paragraph dealing with the results of the FCE, with italicized emphasis added:

> Claimant also relies upon the results of the May 20, 2010 FCE. The findings indicated that her demonstrated deficits included kneeling, reaching above shoulders, balance, walking, sustained bending at waist level, sustained reaching at waist level, and squatting, *most of which were self limited*. There was more success in determining some of Claimant's allowed *minimal capabilities versus her safe limits*. Claimant tested to into the sedentary physical demand category, which would be a workplace tolerance level at which Claimant could work eight hours per day. The findings indicate that Claimant did not demonstrate the functional capacities to return to her pre-injury position as a Teacher's Assistant at this time.

Reviewing the Findings of Fact, the Compensation Order has only this to say about the type of injury Ms. Williams sustained at work:

> Claimant, a 51 year-old woman, worked for Employer as an educational aide. … On October 30, 2000, Claimant was on lunch duty, when a special needs student crawled under a lunch room table and repeatedly banged his head on the floor. Claimant grabbed his right foot with her right hand, and the student started kicking her right hand with his free leg. When she pulled him closer to her, the student also began to hit Claimant's right hand with his hand, all of which caused injury to her right hand.
> ….
>
> Claimant has a permanent disability and marked limited use of the right hand post injury. She has reached maximum medical improvement.

Compensation Order, Findings of Fact, page 2 – 3.

Not one of the medical reports upon which the Compensation Order relies addresses Ms. Williams's capacity to use scissors, to write, or to potty train children. At most, the medical reports relied upon by the ALJ imply that perhaps she is limited in her ability to use her right hand to write and use

scissors. There is no indication in any of the cited reports whether Ms. Williams is unable to use her left hand for these tasks.

Regarding the FCE, the Compensation Order is candid in acknowledging that the results did not purport to describe Ms. Williams's functional maximum capacity, but rather merely demonstrated her minimum capacity. The FCE report concludes that "Ms. Williams presented with less than full effort", and none of the "limitations" noted in the FCE report relate to Ms. Williams right hand. It contains no reference to using scissors or writing. The only notable results concerning Ms. Williams's ability to use the injured body part, her right hand, is found on page "V" of the FCE report, in which one of three reportedly positive findings for symptom magnification was related to her grip strength testing.

Thus, we are presented with a Compensation Order which finds that Ms. Williams injured her right hand when she was kicked in the hand by a student; her job required her to use scissors, write, and perform other non-specified functions involving potty training; her physicians have stated without elaboration (at least not elaborated in the Compensation Order) nothing more than she is "totally disabled" and has "limited right hand" function; and the FCE upon which the Compensation Order bases the conclusion that Ms. Williams remains incapacitated from the hand injury can not reasonably be interpreted to support that proposition. The only fair reading of the FCE report that is consistent with the characterizations of Ms. Williams's lack of effort, "self limited" functioning, symptom magnification attributable directly to the evaluation of the hand, and its disclaimer of being a reliable indicator of Ms. Williams's work capacity is that it can not be used to reliably report what Ms. Williams's level of functioning is.

DCPS argues in this appeal that the ALJ erred by failing to apply the proper framework in assessing the medical evidence. It asserts that rather than ascertaining whether DCPS had adduced sufficient evidence to meet its initial burden that the ALJ essentially jumped over that step, and weighed the evidence presented by both sides, and wrongfully concluded that DCPS had failed to demonstrate that Ms. Williams is no longer disabled from her work injury. We agree. However, that error might be considered harmless if, within the Compensation Order, it appears that the evidence relied upon by the ALJ can fairly be considered to support the ultimate conclusion that Ms. Williams has established by a preponderance of the evidence that she is incapable of returning to her pre-injury job due to her injured right hand.

As noted above, our task is to review a Compensation Order for substantial evidence compliance. "'Substantial evidence' means more than just 'a mere scintilla.' It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Children's Defense Fund v DOES, 726 A.2d. 1242 (D.C. 1999) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938).

While the record as a whole may or may not contain "substantial evidence" to support the conclusion that Ms. Williams continues to be disabled as a result of the injury to her right hand, we deem it appropriate to reemphasize that the District of Columbia Court of Appeals has stated "the agency is required to make basic findings of fact on all material issues. Only then can this court determine upon review whether the agency's findings are supported by substantial evidence and whether those findings lead rationally to its conclusions of law." *Brown v. DOES*, 700 A.2d 787,

792 (D.C. 1997) (citations omitted). "If the agency 'fails to make a finding on a material, contested issue of fact, this court cannot fill the gap by making its own determination from the record, but must remand the case for findings on that issue.'" *Mack v. DOES,* 651 A.2d 804, 806 (D.C. 1994) (quoting *Colton v. DOES*, 484 A.2d 550, 552 (D.C. 1984)).

We can no more fill in the gaps in our review of a Compensation Order than can the DCCA.

Putting aside that, as discussed above, the Compensation Order does not proceed in the proper analytic fashion, we conclude that the ALJ's failure to identify with any degree of specificity what aspects of Ms. Williams's job she is incapable of performing, upon what evidence she relies to reach that determination, and how any such limitations are related to the right hand injury, are fatal to the validity of the award.

Rather than merely reverse the Compensation Order, given the relatively large portions of the record that are not mentioned in the Compensation Order, it appears to be most appropriate to return the matter to the ALJ for further review of the evidence and consideration of the claim, and to do so in a manner consistent with the burden shifting process described above, but more importantly, in a manner that makes findings of fact on the necessary questions that must be answered, and identifies the record evidence upon which those findings are based.

## CONCLUSION AND ORDER

The findings of fact as found in the Compensation Order are not supported by substantial evidence cited therein, and the conclusion that Ms. Williams remains disabled as a result of the injury to her hand is not in accordance with the law. The Compensation Order is vacated and the matter is remanded for further consideration in a manner consistent with the aforegoing Decision and Remand Order.

FOR THE COMPENSATION REVIEW BOARD:

_____
JEFFREY P. RUSSELL
*Administrative Appeals Judge*

November 5, 2013
DATE