

**DISTRICT OF COLUMBIA COURT OF APPEALS**

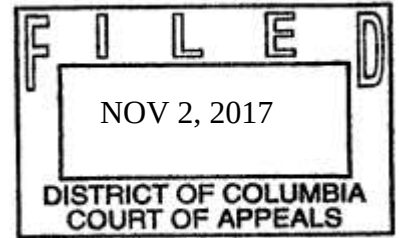
No. 16-AA-907

SHADONNA JACKSON, PETITIONER,

v.

DISTRICT OF COLUMBIA

DEPARTMENT OF EMPLOYMENT SERVICES, RESPONDENT.



On Petition for Review of an Order of the  
District of Columbia Department of Employment Services  
(CRB-48-16)

(Argued October 24, 2017)

Decided November 2, 2017)

Before THOMPSON, EASTERLY, and MCLEESE, *Associate Judges*.

**MEMORANDUM OPINION AND JUDGMENT**

PER CURIAM: Petitioner ShaDonna Jackson seeks review of a decision by the Compensation Review Board (CRB) of the District of Columbia Department of Employment Services (DOES) affirming a compensation order denying her request to reinstate her temporary total disability (TTD) and medical benefits. Petitioner argues that the CRB erred in two respects: first, by upholding the finding by the DOES Administrative Law Judge (ALJ) that the government had met its burden of producing evidence of a substantial change in petitioner’s physical condition (in particular, evidence that petitioner is no longer disabled); and, second, by accepting the ALJ’s weighing of the evidence even though the ALJ “did not consider the Government’s behavior in preventing [petitioner] from seeing her treating physician after 2011.” We affirm.

**I.**

Petitioner was formerly employed by the District of Columbia Department of Youth Rehabilitation Services (DYRS) as a youth development representative, where her responsibilities were to supervise youth in custody and to maintain order

and discipline in the DYRS facility by “using verbal and other techniques to de-escalate conflicts, fights and other disturbances[,] using physical restraint when necessary.” On December 20, 2009, petitioner fell and broke her right ankle at work while restraining a combative youth. Petitioner underwent two surgeries and participated in physical therapy to recover from the fracture.

In 2011, petitioner began receiving treatment from orthopedic surgeon Sankara Kothakota. In March 2011, Dr. Kothakota wrote that petitioner reported pain and stiffness in her right ankle but that x-rays of the foot revealed no “obvious pathology.” He observed that her fracture had “healed well,” but that the “Tinel sign is positive,” leading him to believe that she “possibl[y]” had tarsal tunnel syndrome. Dr. Kothakota recommended that petitioner continue physical therapy and begin water exercises.

In June 2011, orthopedic surgeon Louis Levitt conducted an independent medical evaluation of petitioner. Dr. Levitt found that petitioner had “mild stiffness to the right ankle as one would expect,” but “a very functional range of motion.” He found no evidence of tarsal tunnel syndrome. Dr. Levitt stated that additional treatment was unnecessary and determined that petitioner was at “maximum medical improvement” and could return to work with an orthopedic ankle. Petitioner did not return to work.<sup>1</sup>

On December 27, 2011, petitioner went to Dr. Kothakota for a follow-up appointment, claiming moderate pain in her ankle, a burning sensation in her foot, and difficulty walking. Dr. Kothakota examined her again, opined once more that her Tinel’s sign was positive, and recommended further diagnostic testing.

Despite Dr. Levitt’s opinion based on his June 2011 evaluation of petitioner, the Public Sector Workers’ Compensation Program (PSWCP) did not terminate her TTD benefits in 2011. PSWCP did, however, cease paying petitioner’s medical benefits on December 27, 2011, and petitioner did not undergo the further testing (an EMG nerve conduction study and CAT scan) or aquatic therapy recommended by Dr. Kothakota.

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<sup>1</sup> Petitioner testified at the hearing before the ALJ that the employer did not accommodate her with light-duty work and that, in light of continuing problems with her foot, she decided to resign rather than return to work.

In October 2012, Dr. Levitt examined petitioner a second time. After performing a physical examination, he noted that she walked normally, although she displayed a limp when attempting to walk on her toes and heels. She exhibited normal strength and a normal range of motion in the right foot along with a “negative Tinel sign over the region of the posterior tibial tendon,” although he noted some tenderness in the region. Regarding petitioner’s reports of ankle discomfort following extended walking and stair climbing and occasional swelling, Dr. Levitt wrote:

[I]t is not unusual for patients following an ankle fracture and surgery to have residual complaints of stiffness, occasional swelling and occasional ache with over-activity. I believe the clinical presentation by Ms. Jackson today is perfectly compatible with an individual who has sustained a fracture and has recovered from that fracture. I will also note her evaluation today is really very similar to her evaluation when seen in my office a year ago. I see no deterioration in her functionality. I feel she is at maximum medical improvement.

Dr. Levitt disagreed with Dr. Kothakota’s opinion regarding possible tarsal tunnel syndrome, stating that petitioner did not have the “clinical presentation for it” and that her physical condition was inconsistent with the diagnosis. Dr. Levitt opined that no clinical justification existed for a finding of total disability or a recommendation of further treatment and concluded that petitioner could return to work immediately. Two months later, PSWCP terminated petitioner’s TTD benefits.

After a hearing in August 2013, the DOES ALJ issued a Compensation Order in February 2016 denying petitioner’s request to reinstate her TTD and medical benefits. Applying the burden-shifting framework set forth in the CRB’s decision in *Mahoney v. District of Columbia Public Schools*, CRB No. 14-067 (D.C. Dep’t of Emp’t Servs. Nov. 12, 2014),<sup>2</sup> the ALJ concluded that both the

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<sup>2</sup> The CRB described the *Mahoney* framework as follows:

The employer first has the burden of producing current and probative evidence that claimant’s condition has sufficiently changed to warrant a modification or

(continued...)

employer and petitioner had met their burdens of production. The ALJ then weighed the evidence and determined that the employer had carried its burden of persuasion. The ALJ found that Dr. Kothakota's 2011 reports were sufficiently recent to contradict Dr. Levitt's opinions regarding petitioner's claim of continuing disability, but concluded that Dr. Kothakota's assessment was less "convincing" because it did "not offer a current analysis of [petitioner's] current condition and whether it relates to her work injury" and because it referred only to petitioner's "possible" tarsal tunnel syndrome. The ALJ found Dr. Levitt's opinions, on the other hand, to contain a detailed analysis of petitioner's condition and its impact on her ability to perform her work duties. In addition, the ALJ noted that Dr. Levitt had reviewed Dr. Kothakota's reports and offered reasons for disagreeing with Dr. Kothakota's opinion that petitioner might have tarsal tunnel syndrome and Dr. Kothakota's recommendation of further testing. Finally, the ALJ observed that Dr. Levitt's opinions were consistent with the duration of care petitioner had received for her broken ankle and with petitioner's testimony that she took only "an occasional Motrin or Advil once or twice a month" for pain.

On appeal to the CRB, petitioner argued that the government had not met its burden of producing evidence that her condition had sufficiently changed to warrant the termination of her TTD benefits, stating:

Following the 2011 report [by Dr. Levitt], the Government did not terminate Ms. Jackson's [TTD]

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(...continued)

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 clamant [sic] 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*, CRB No. 14-067, at 9.

benefits, but continued to pay them for over a year. The Government did not explain this divergent action. If the Government felt that Ms. Jackson’s clinical presentation in 2011 rendered her entitled to [TTD] benefits in spite of Dr. Levitt’s statements, then the 2012 opinion, wherein she had the same clinical presentation, is neither fresh nor indicative of a change in medical status.

In an August 10, 2016, Decision and Order, the CRB rejected this argument, noting that “[w]hy Employer failed to terminate Claimant’s benefits earlier is not a matter relevant to any issue presented in the Formal Hearing . . . .” Petitioner also argued that, in weighing the evidence, the ALJ failed to consider “the reason why Ms. Jackson was unable to produce more current [medical] evidence” — specifically, the termination of her medical benefits. The CRB did not expressly address this contention but ruled that the ALJ had adequately articulated the reasons why he found Dr. Levitt’s opinion to be more persuasive than that of Dr. Kothakota.

## II.

“Our standard of review of agency decisions in workers’ compensation cases is governed by the District of Columbia’s Administrative Procedures Act.” *Daly v. District of Columbia Dep’t of Emp’t Servs.*, 121 A.3d 1257, 1261 (D.C. 2015) (quoting *Fluellyn v. District of Columbia Dep’t of Emp’t Servs.*, 54 A.3d 1156, 1159 (D.C. 2012)) (brackets omitted). We must uphold the CRB’s decision unless it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” D.C. Code § 2-510 (a)(3)(A) (2012 Repl.); *Placido v. District of Columbia Dep’t of Emp’t Servs.*, 92 A.3d 323, 326 (D.C. 2014).

In reviewing a compensation order, the CRB must determine whether the ALJ has stated “findings of fact on each material, contested factual issue”; whether those findings are supported by substantial evidence; and whether “the conclusions of law . . . follow rationally from the findings.” *Rocha-Guzmán v. District of Columbia Dep’t of Emp’t Servs.*, No. 14-AA-612, slip op. at 5 (D.C. Sept. 28, 2017) (quoting *Stewart v. District of Columbia Dep’t of Emp’t Servs.*, 606 A.2d 1350, 1351 (D.C. 1992)). Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *District of Columbia Fire & Med. Servs. Dep’t v. District of Columbia Office of Emp. Appeals*, 986 A.2d 419, 424 (D.C. 2010) (quoting *Hutchinson v. District of*

*Columbia Office of Emp. Appeals*, 710 A.2d 227, 230–31 (D.C. 1998)). We review the CRB’s legal conclusions, including its determinations regarding the existence of substantial evidence, *de novo*. See *Rocha-Guzmán*, slip op. at 6; *Reyes v. District of Columbia Dep’t of Emp’t Servs.*, 150 A.3d 1277, 1279 (D.C. 2016).

Petitioner contends that the CRB erred in upholding the ALJ’s finding that the government had met its burden of producing evidence showing a change in petitioner’s condition. Specifically, petitioner argues that the law required the government to produce evidence showing that petitioner’s condition changed from 2011 to 2012, which the government could not do because, in his reports issued in those years, Dr. Levitt “came to the exact same conclusion” regarding petitioner’s condition. We disagree. Under the plain language of D.C. Code § 1-623.24, the test for terminating or modifying benefits is not whether the employee’s degree of alleged disability has changed from one year to the next; instead, the question is whether “[t]he disability for which compensation was paid has ceased or lessened.” *Id.* § 1-623.24 (d)(4)(A).<sup>3</sup> In addition, nothing in the statute requires the PSWCP to act within a time certain or at the earliest possible time after receiving notice of a reason to believe a change of condition has occurred. See *id.* § 1-623.24 (d)(1). Accordingly, we discern no error in the CRB’s determination.

We also reject petitioner’s argument that the CRB erred in concluding that the ALJ’s factual findings were supported by substantial evidence. In essence, petitioner asserts that the ALJ erroneously weighed the medical evidence because the ALJ did not state that he considered petitioner’s claim that she was unable to confirm that her condition remained unchanged because she could not obtain further medical treatment following the termination of her medical benefits.

While we recognize that the cost of medical consultation may be prohibitive if self-funded, petitioner does not argue that the governing statute or regulations precluded her from introducing in this proceeding medical evidence from a medical consultation obtained outside the PSWCP, and she also made no showing

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<sup>3</sup> See also *Bowser v. District of Columbia Dep’t of Emp’t Servs.*, 129 A.3d 253, 260–61 (D.C. 2015) (citing authorities to the effect that when the issue is whether there has been a change in a claimant’s condition, the relevant change is whether the claimant continues to be disabled, not whether there has been a change from an independent medical examiner’s previous assessment of the claimant’s condition).

that she was without resources to obtain a more current examination from her treating physician. Nor is there any evidence in the record that petitioner sought a utilization review of the necessity of the additional treatment and testing Dr. Kothakota recommended.<sup>4</sup> In any case, the ALJ was required to base his decision on the evidence presented, and we cannot say that the CRB abused its discretion in upholding the ALJ's determination when petitioner presented no current medical evidence tending to show that she remained disabled. We note in addition that although at the hearing petitioner testified that "[t]here has not been a day" since her workplace injury when she did not have a problem with her right foot or ankle (whether stiffness, tingling or numbness in her toe, pain, or swelling), she also testified that she is able to run for exercise about once every two weeks, for up to ten minutes on each occasion. We cannot say that the CRB was compelled to conclude that the ALJ's finding that petitioner is no longer disabled is against the weight of the evidence.

In addition, what weight, if any, to give to conflicting medical opinions was the ALJ's prerogative as the trier of fact. *See Ross v. District of Columbia Dep't of Emp't Servs.*, 125 A.3d 698, 704 (D.C. 2015) (noting that "the Council of the District of Columbia abolished the treating physician preference in public sector workers' compensation cases"). In this case, the ALJ articulated a specific reason (besides the fact that Dr. Levitt's assessment was more recent) for crediting Dr. Levitt's opinion that no further diagnostic testing was needed over Dr. Kothakota's contrary view, noting that Dr. Levitt "gave his reason for disagreeing" (i.e., that petitioner "is at maximum medical improvement" and "does not have the clinical presentation for . . . and has no physical findings consistent with tarsal tunnel syndrome").

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<sup>4</sup> See D.C. Code § 1-623.23 (a-2)(2) ("When it appears that the necessity, character, or sufficiency of medical care or service to an employee is improper or that medical care or service scheduled to be furnished must be clarified, the Mayor, employee, or District of Columbia government may initiate review by a utilization review organization or individual.") (emphasis added) and § 1-623.23 (a-2)(5) ("The District of Columbia government shall pay the cost of a utilization review if the employee seeks the review and is the prevailing party.").

Accordingly, the Decision and Order of the CRB is

*Affirmed.*

ENTERED BY DIRECTION OF THE COURT:

A handwritten signature in black ink, appearing to read "Julio A. Castillo". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

JULIO A. CASTILLO  
Clerk of the Court

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