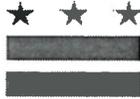


GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
ACTING DIRECTOR

CRB No. 14-125

**ALEXIS PARKER,
Claimant-Respondent,**

v.

**DISTRICT OF COLUMBIA DEPARTMENT OF HEALTH,
Employer--Petitioner.**

Appeal from a October 8, 2014 Compensation Order by
Administrative Law Judge Fred Carney
AHD PBL No. 10-052A, OWC/DCP No. 76101000220070-0002

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2015 MAR 16 PM 1 29

Harold Levi for the Claimant
Frank Mc Dougald for the Employer

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

HEATHER C. LESLIE, for the Compensation Review Board; MELISSA LIN JONES, *concurring.*

DECISION AND REMAND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

The Claimant was employed as a Community Relations Specialist. On April 17, 2007, Claimant sustained injuries to her left shoulder, left leg, and back when she was moving furniture. Claimant came under the treatment of Dr. Rita Azer for her shoulder and Dr. Hampton Jackson for her back. Claimant also sought treatment with Dr. John Cohen and Dr. Gilbert Nelms for carpal tunnel syndrome (CTS). Claimant underwent multiple objective testing and conservative treatment. Claimant's claim was accepted by the Employer.

Employer sent Claimant to several additional medical evaluations (AME) with Dr. Marc Danzinger, the last AME occurring on November 15, 2011. At each AME, Dr. Danzinger took a history of Claimant's injury and treatment, performed a physical examination and reviewed medical records. Dr. Danzinger opined that Claimant only suffered from a lumbar strain and left shoulder contusion from the slip and fall. Dr. Danzinger further opined, beginning in 2008, Claimant was at maximum medical improvement and that any further treatment after 2008 was not because of Claimant's work injury. Dr. Danzinger stated Claimant could return to work fully duty, without restrictions.

Claimant's benefits were terminated based on Dr. Danzinger's AME on March 16, 2012 in a Notice of Determination (NOD) dated February 16, 2012. The Claimant appealed this termination.

A full evidentiary hearing was held on October 11, 2012. At that hearing, the Claimant sought reinstatement of medical benefits from the date of termination onwards. The Employer contested whether Claimant's current condition is medically causally related to the work injury. A Compensation Order (CO) was issued on October 8, 2014. In that CO, the ALJ awarded the Claimant the requested claim for relief.

Employer appealed. Employer argues on appeal the CO is not supported by the substantial evidence in the record. Specifically, Employer argues that the reasons the ALJ rejected the opinion of Dr. Danzinger is not supported by the substantial evidence in the record.

Claimant opposes the appeal, arguing the CO is supported by the substantial evidence in the record and 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. D. C. Department of Employment Services*, 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

Prior to addressing Employer's arguments, we note there seems to be some confusion about what issues were properly before the ALJ. At the Formal Hearing, there was discussion between the ALJ and Claimant's counsel on what benefits were terminated in the NOD and if that termination included a termination of wage benefits. Employer argues on appeal that at the hearing, "the Administrative Law Judge made it abundantly clear that the only issue being considered was the termination of Claimant's medical benefit." Employer's argument at 4. Claimant, in a footnote, after arguing that the NOD's termination included medical and wage loss benefits, states, "before hearing the testimony and considering the evidence Judge Carney considered that argument, but it is clear that the CO rejected the argument." Claimant's argument at 2.

A review of the CO does not shed any light on whether the award included wage loss benefits as the claim for relief and award section only reference "benefits." CO at 2 and 8. However, while such lack of clarity in the CO is unfortunate, a review of the hearing transcript reveals the ALJ,

after hearing a summary of Claimant's injury, return to work after the 2007 injury, and a subsequent accident that was not accepted yet by the Employer and not before the ALJ, stated:

I am not going to make findings or conclusions on the wage loss. It is not properly before me.

Hearing transcript at 16-17.

It is clear based on this language that the CO's award of benefits was only medical benefits. We will review the CO to see if the award of reinstatement of medical benefits was supported by the substantial evidence in the record and in accordance with the law.

When the Employer seeks to terminate previously accepted benefits in public sector cases, a burden shifting scheme is utilized by the ALJ. As we recently stated in *Mahoney v. D.C. Public Schools*, CRB No. 14-067, AHD No. PBL 14-004, 8-9 (November 12, 2014), the burden shifting scheme is as follows:

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.

Employer does not take issue with the finding it produced evidence that would warrant a termination in benefits, thereby satisfying the first step in the above analysis, nor with the conclusion that the Claimant had satisfied the second step, but contests the ALJ's handling of the third step in the burden shifting scheme. Employer argues that the reasons outlined by the ALJ for rejecting the opinion of Dr. Danzinger are not based upon the substantial evidence in the record. Specifically, Employer takes issue with the ALJ's statement that Dr. Danzinger "failed to provide a date and time when Claimant's work injury resolved" and "did not provide any other explanation for Claimant's onset of carpal tunnel syndrome after the work injury." CO at 8.

We agree with Employer.

The ALJ stated:

Here Employer met the first prong of the test by introducing the additional medical reports of Dr. Danzinger which appeared to be adequately reliable, probative and substantive. Dr. Danzinger opined Claimant required no further medical treatment for her 2007 work injury. Claimant met her burden by showing through substantial medical evidence that her neck, left shoulder, left lower extremity and low back were and continues to be symptomatic. The results of the MRI's, EMGs, *etc.*, of Claimant's spine and left shoulder show continued abnormalities which require further medical treatment. Dr. Danzinger dismissed Claimant's test results as signs of aging. Yet he fails to provide a date or time when Claimant's work injury resolved. Dr. Danzinger does not provide any other explanation for Claimant's onset of carpal tunnel syndrome after the work injury. The medical evidence presented by Claimant indicates Claimant's carpal tunnel symptoms are related to the 2007 work trauma and that Claimant will require continued treatment. The Act provides at DC Code § 1-623.3 that:

"The District government shall furnish to an employee who is injured while in the performance of duty the services, appliances, and supplies prescribed or recommended by a qualified physician, who is approved by the Mayor or his or her designee pursuant to subsection (d) of this section, which the Mayor considers likely to cure, give relief, reduce the degree or period of disability, or aid in lessening the amount of the monthly compensation."

Because the medical reports of Dr. Danzinger are not particularly persuasive when compared the reports of Drs. Azer, Jackson, Cohen and Nelms, I find Employer failed to meet the its final prong of the test to prove by preponderance of evidence that the termination of benefits was justified.

CO at 8.

We conclude that the ALJ's conclusion that Dr. Danzinger did not give a date or time when Claimant's injury resolved does not flow rationally from the evidence in the record. We agree with Employer's argument that Dr. Danzinger stated in his November 2011 AME,

She remains at maximum medical improvement and I would date this back to the first visit when I saw her on 7/8/08 and nothing has changed over the three years since that time.

Dr. Danzinger specifically states that "there is no objective clinical symptomatology related to her work related injury and any and all treatment should have concluded in 2008 and there is not

role for any treatment now.” Employer’s exhibit 1. Thus, contrary to the ALJ’s statement, Dr. Danzinger did give a time when, in his opinion, Claimant’s work injury resolved.

We also find problematic the ALJ’s summary and conclusions relating to Claimant’s carpal tunnel syndrome. As the ALJ states earlier in his CO, “there is little evidence as to how the trauma of 2007 resulted in the degenerative changes, carpal tunnel syndrome and cervical radiculopathy noted in Claimant’s medical reports.” CO at 7. However, the ALJ then states, in the above quoted passage, “that the medical evidence presented by Claimant indicates Claimant’s carpal tunnel symptoms are related to the 2007 work trauma and that Claimant will require continued treatment.” We cannot reconcile these two inconsistent statements. Upon remand, if the ALJ finds that the Claimant’s carpal tunnel syndrome is medically casually related to the work injury, the ALJ is to identify the medical records relied upon.

We should point out that the CRB makes no ruling on the merits of this claim. However, because the reasons given by the ALJ do not flow rationally from the medical evidence presented, we must remand this case so that the ALJ can properly analyze the case before us and determine whether the CO is supported by the substantial evidence in the record and is in accordance with the law. If the ALJ continues to reject the opinion of Dr. Danzinger, the reasons set forth must rationally flow from the evidence of record.

CONCLUSION AND ORDER

The October 8, 2014 Compensation Order VACATED and REMANDED consistent with the above discussion.

FOR THE COMPENSATION REVIEW BOARD:

HEATHER C. LESLIE
Administrative Appeals Judge

March 16, 2015
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. *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.

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. *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).

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 proof of an employment related impairment following the termination of benefits.’” *Mahoney v. DOES*, 953 A.2d 739, 742 (D.C. 2008).

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,” *Washington Metropolitan Area Transit Authority v. DOES*, 703 A.2d 1225, 1231(DC. 1997), it is important not to overlook that same case also states “The burden may shift once the moving party establishes his case.” *Id.* 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. 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. 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 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. *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.)

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.

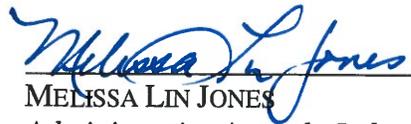
If the employer meets its initial burden, then the claimant has the burden of producing reliable and relevant evidence that conditions have not changed to warrant a modification or termination of benefits. If this burden is met, then the evidence is weighed to determine whether employer met its burden 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.

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
Administrative Appeals Judge