GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR

LISA MARÍA MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 13-093

NEPTUNE O. CARRINGTON,
Claimant–Respondent,

v.

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,
Employer-Petitioner.

Appeal from a Compensation Order by
Administrative Law Judge Nata K. Brown
AHD No. PBL12-041, DCP No. 30100942563-0001

Eric Huang, Esquire for the Petitioner
Krista DeSmyter, Esquire for the Respondent

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

MELISSA LIN JONES for the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

On September 14, 2010, Ms. Neptune O. Carrington worked for the District of Columbia Public Schools ("Employer") as a bus operator. On that day, Ms. Carrington's bus broke down. When a tow-truck driver was securing the bus, he asked Ms. Carrington to remain in the bus to push the brake and to put the bus in neutral. Ms. Carrington was sitting in the driver's seat while the bus was being lifted. A cable snapped; the bus crashed to the ground; and Ms. Carrington injured her left knee.[1]

Ms. Carrington first sought treatment at Providence Hospital where she was diagnosed with a left leg contusion. She was held out of work until September 20, 2010.

[1] Ms. Carrington was pregnant at the time.

Dr. Christopher M. Magee examined Ms. Carrington on October 13, 2010 at Employer's request. Dr. Magee requested permission from Ms. Carrington's obstetrician for a hip x-ray; he also prescribed Darvocet N-100 and continued to certify Ms. Carrington as unable to work.

Almost 3 weeks after Ms. Carrington delivered her baby, Dr. Magee examined her again. Dr. Magee recommended an MRI of Ms. Carrington's lumbar spine and an MRI of Ms. Carrington's left knee; he prescribed Naprosyn 500 and did not release Ms. Carrington to work.

Ms. Carrington continued to treat with Dr. Magee. She eventually underwent arthroscopy of her left knee, physical therapy, a Cortisone injection, and left knee manipulation under anesthesia.

Employer sent Ms. Carrington to Dr. Randall J. Lewis for an independent medical evaluation on December 19, 2011. Dr. Lewis opined Ms. Carrington could return to work as a bus driver with limitations and issued a Return to Work Preliminary Report releasing Ms. Carrington to light duty on December 20, 2011.

In December 2011, Ms. Carrington was seen for post-manipulation follow-up with Dr. Zohar X. Alam. Dr. Alam prescribed Naprosyn 500 and Percocet 5/325.

On January 19, 2012, Dr. Alam agreed with Dr. Lewis' opinions as set forth in his independent medical evaluation report. At that time, Dr. Alam also prescribed more physical therapy.

After 2 sessions, payment for Ms. Carrington's physical therapy was cut-off by the Office of Risk Management, and she was no longer authorized to treat with Dr. Alam. As a result, Ms. Carrington sought additional treatment for her knee complaints from Dr. Torrie Robinson, her primary care physician; Dr. Robinson referred Ms. Carrington to pain management, physical therapy, an orthopedic surgeon, and a psychiatrist.[2]

Ms. Carrington could not get an appointment with the pain management specialist Dr. Robinson had recommended so she sought treatment with Dr. Netsere Tesfayohannes, an anesthesiologist. Dr. Tesfayohannes prescribed Percocet 10/325 and Skelaxin. The Percocet alleviated Ms. Carrington's knee pain, but it made her drowsy and incoherent; the Skelaxin made her dizzy and nauseated.

On May 8, 2012, Employer sent Ms. Carrington a letter advising her that a modified duty position had been created for her and that she was to report to the Parent Call Center on May 16, 2012. Before she reported to work, Ms. Carrington typed a letter to the supervisor, Ms. Kim Davis; the letter listed Ms. Carrington's medications and the effects they have on her.

When Ms. Carrington reported to the light duty position, "[s]he was still taking the medications prescribed to her by Dr. Tesfayohannes, which made her sleepy and drowsy, and prevented her from performing all of the requirements of the job."[3] Ms. Davis witnessed Ms. Carrington

[2] The psychiatrist prescribed Elavil and Effexor, but there is no indication in the record that Ms. Carrington's psychological treatment is causally related to her September 14, 2010 accident or that she has presented a claim for a psychological injury to the Office of Risk Management.

[3] *Carrington v. D.C. Public Schools*, AHD No. PBL12-041, DCP No. 30100942563-0001 (June 24, 2013), p. 4.

sleeping on the job, and by the third day, Ms. Davis arranged a telephone call with Mr. Drew Morton, Human Resources Specialist. During that call, Ms. Carrington told Mr. Morton about her medications. She left work after that call and did not return.

Ms. Carrington's benefits were terminated on June 1, 2012, and she requested a formal hearing to adjudicate her entitlement to ongoing wage loss benefits as well as authorization for medical treatment. In a Compensation Order dated June 24, 2013, an administrative law judge ("ALJ") granted Ms. Carrington's claim for relief because Ms. Carrington was unable to perform the light duty job.

Employer appeals the June 24, 2013 Compensation Order because the ALJ allegedly misconstrued the issue for resolution. Employer also contends that because Drs. Lewis and Alam agreed Ms. Carrington could return to work with restrictions, the ALJ erred in ruling Ms. Carrington is entitled to wage loss benefit and incorrectly rejected its medical evidence by concluding the light duty position offered to Ms. Carrington was not suitable alternative employment. Finally, Employer asserts the ALJ failed to properly apply the burdens of production and proof in this public sector case. For these reasons as detailed below, Employer requests the Compensation Review Board ("CRB") reverse the Compensation Order.

Ms. Carrington responds that the ALJ appropriately exercised jurisdiction over this claim and properly applied the burden-shifting framework required in public sector workers' compensation cases to resolve the issue of Ms. Carrington's entitlement to temporary total disability compensation benefits. After determining Employer had met its initial burden, the ALJ analyzed the reliability and credibility of Ms. Carrington's evidence to see if she had presented sufficient evidence to prevail; when weighing the evidence, the ALJ determined Dr. Lewis' opinion was flawed. Ms. Carrington requests the CRB affirm the Compensation Order.

ISSUES ON APPEAL

1. Did the ALJ err by describing the issue for resolution as "the nature and extent of Claimant's disability"?

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

3. Did the ALJ err by ruling the modified duty position offered by Employer is not suitable, alternative employment?

PRELIMINARY MATTER

MOTION TO STAY

Employer contends the ALJ misconstrued the issue for resolution in this case and the findings in the Compensation Order are not supported by substantial evidence. Because in Employer's opinion the ALJ incorrectly granted Ms. Carrington benefits, Employer requests a stay on the grounds that "the erroneous payment of benefits from the compensation fund pursuant to an ALJ's order cannot be recovered[in the absence of fault on the part of the claimant; t]herefore,

when the District's appeals or reviews are successful, the financial damage imposed on the District is always an irreparable injury."[4]

Ms. Carrington opposes Employer's motion on the grounds that Employer has not demonstrated irreparable injury. The CRB agrees with Ms. Carrington.

Pursuant to 7 DCMR § 260.3, "The Board shall only stay a compensation order on the grounds that the employer would suffer irreparable injury by complying with it." If the government does not establish it would suffer irreparable injury by complying with a Compensation Order, a motion to stay will be denied.[5] The Director long ago established that an allegation of irreparable injury warranting the issuance of a stay requires an imminent threat to the solvency of the moving party;[6] an inability to obtain reimbursement if the Compensation Order is reversed does not suffice to demonstrate irreparable injury.[7]

Although Employer takes exception to the CRB's prior holdings concerning stays in public sector cases, the appropriate venues for voicing those exceptions are the D.C. Court of Appeals and the City Council. Based upon the language of the regulations as interpreted by existing caselaw, Employer's Motion for Stay is DENIED.

ANALYSIS[8]

Employer argues the ALJ misconstrued the issue for resolution as the nature and extent of Ms. Carrington's disability. Employer asserts the correct issue is "whether the Program was authorized to terminate the Claimant's benefits due to her voluntary return to light duty work."[9] Employer's semantic dispute is unfounded.

The issue for resolution in this case is Ms. Carrington's entitlement to reinstatement of temporary total disability compensation benefits following her abandonment of a position that

[4] Motion to Stay Compensation Order, p. 1.

[5] *Lyles v. D.C. Department of Mental Health*, CRB No. 11-099, AHD No. PBL09-00A, DCP No. 30090343260-0001 (March 16, 2012).

[6] *Mehalic v. Omni Shoreham Hotel*, Dir. Dkt. No. 98-76, H&AS No. 97-483, OWC No. 512281 (November 12, 1998).

[7] *Downing v. D.C. Public Schools*, CRB No. 12-004, AHD No. PBL11-015, DCP 30090824958-0001 (April 4, 2012).

[8] The scope of review by the CRB is limited to making a determination as to whether the factual findings of the Order are based upon substantial evidence in the record and whether the legal conclusions drawn from those facts are in accordance with applicable law.[8] Section 1-623.28(a) of the District of Columbia Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Code § 1-623.1 *et seq.* ("Act"). Consistent with this standard of review, the CRB is constrained to uphold a Compensation Order on Remand 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).

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

Employer classifies as suitable, alternative employment. The essence of this issue, in fact, is the nature (is her disability temporary or permanent) and the extent (is her disability total or partial) of Ms. Carrington's disability. Because this is a public sector case, there is a defined protocol regarding the burden of production and the burden of persuasion, but fundamentally, the issue to be addressed is the nature and extent of Ms. Carrington's disability, and there is no fault in the ALJ's describing the issue for resolution as such.

Moreover, Employer's argument that the ALJ's jurisdiction "is limited to a review of the decision made by the Program [pursuant to *Marsden*[10]]"[11] is patently wrong; *Marsden* in no way "dictates that the reviewing tribunal is limited to reviewing the decision made by the Program, and cannot go beyond the decision to reach the merits of the case or any other issue beyond the Program's decision."[12] Quite to the contrary, in *Marsden*, the claimant requested reconsideration from the Office of Risk Management after the deadline for making such a request had passed. A Final Determination[13] issued rejecting Ms. Marsden's request for reconsideration as untimely, and an ALJ conducted a hearing on the merits of Ms. Marsden's claim even though there was no jurisdiction to hear the merits of the case because the claimant had not exhausted her administrative remedies.

Furthermore, the administrative process carried out by way of a formal hearing on the merits is not an appeal of the Final Determination; it is a *de novo* proceeding:

> although called "appeals," the proceedings before the Office of Hearings and [A]djudications 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." 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.[14]

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[10] *Marsden v. DOES*, 58 A.3d 472 (D.C. 2013).

[11] Memorandum of Points and Authorities Supporting Petitioner's Application for Review, p. 15.

[12] *Id.*

[13] The term "Final Determination" is used generically to refer to any final decision rendered by the Public Sector Workers' Compensation Program.

[14] *Njomo v. D.C. Department of Youth Rehabilitation Services*, CRB No. 12-106, AHD No. PBL11-002, DCP No. 3009114587-0001 (August 9, 2012) (The claimant argued on appeal that the government's evidence should be limited to the information utilized to terminate benefits in the final determination.). See also *Aronson v. D.C. Department of Mental Health*, CRB No. 08-42, AHD No. PBL06-050A, DCP No. 761012-0001-2002-0016 (February 26, 2008).

An ALJ is not limited to "reviewing the decision made by the Program" and is permitted to "go beyond the decision [in the Final Determination] to reach a conclusion regarding the merits of the case."[15]

With these tenets of workers' compensation law as a foundation, we turn to Employer's argument that the ALJ did not properly apply the burdens of production and persuasion in this case. In a public sector case, if a claim for disability compensation has been accepted and benefits have been paid, Employer must adduce persuasive evidence sufficient to substantiate a modification or termination of an award of benefits.[16] Employer paid Ms. Carrington temporary total disability compensation benefits from October 9, 2010 through May 15, 2012; therefore, having paid disability compensation benefits for Ms. Carrington's work-related injury, 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 that injury.[17]

Employer alleges that when assessing whether Employer had satisfied its initial burden, the ALJ impermissibly relied on Ms. Carrington's evidence to evaluate the strength of Employer's evidence, but at the formal hearing, the ALJ conceded that Employer had satisfied its initial burden for terminating Ms. Carrington's disability compensation benefits by offering Ms. Carrington modified duty:

> Mr. Huang: Very well. And then I'll also mention for the record that it is the Government's position, as Judge correctly read on the record, that this is - - that the Program was authorized to [terminate Ms. Carrington's benefits]. And it is confusing to this Government attorney what ORM should have done differently given the services that they had and the timing of the events.
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> Judge Brown: Well, there's no - - yes, once the Claimant returned to work, then - - and it was a full-time job, then the Program had the right to terminate the benefits. The question now is after - - the issue comes after her return to work. It's all of the things that happened after she returned to work.
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> Mr. Huang: So to be clear, then the Judge does acknowledge the fact the Program did have the authorization to terminate benefits once she returned to work? Or what you're saying is that - -
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> Judge Brown: For that reason, yes. But then after those - - she worked for three days.
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> Mr. Huang: Yes.

[15] Memorandum of Points and Authorities Supporting Petitioner's Application for Review, p. 15.

[16] *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.

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

> Judge Brown: And then after three days she didn't work.
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> Mr. Huang: Correct.
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> Judge Brown: And so it's that time period where there are contested issues. After the last day - - after May 18th, then the Government has one position and the Claimant has another position.[18]

In the face of this determination, it became Ms. Carrington's burden to prove her entitlement to benefits, and in order to assess the reliability of Ms. Carrington's evidence, the ALJ conducted a thorough review of the record. When assessing the weight to be given to Ms. Carrington's evidence, the ALJ compared it to the evidence in the record as a whole. Thus, the ALJ properly applied the burdens inherent in this case to arrive at the conclusion that Ms. Carrington is entitled to ongoing benefits.

Employer takes exception to the ALJ's ruling that Dr. Lewis' report is flawed, but as the ALJ explained:

> Dr. Lewis' IME report is flawed. He opined that Claimant had reached MMI, although he thought that she could regain further motion of the involved knee with persistent exercises and activity. In addition, Dr. Lewis opined that Claimant could return to the position of driver, but with all of the limitations that he imposed, she could not, in fact, drive a bus. In fact, due to the restrictions, Employer assigned her to a desk job where she sat most of the day. Further, Dr. Lewis made no mention made of the medications that Claimant was taking at that time, though she had been prescribed medication by her treating physician since her injury. Later that day, Dr. [Dexter W.] Love prescribed a refill of Percocet, which certainly affected Claimant's ability to work.[19]

The ALJ's conclusion that Dr. Lewis' report is flawed is supported by precisely the reasons she provided, and we cannot disturb those findings supported by the record or the conclusion drawn from those findings.

Finally, Employer asserts that the ALJ erred by rejecting the modified duty position because that position fits within Ms. Carrington's physical as restrictions articulated by Dr. Lewis and Dr. Alam. Employer places great weight on the fact that Ms. Carrington's Percocet "was prescribed by Dr. Tesfayohannes, not by a panel physician, primary care physician, or anyone to whom Claimant was referred by either,"[20] but Employer's argument misconstrues authorization for medical treatment and the weight the ALJ gave Ms. Carrington's treatment when assessing the suitability of the modified duty offered by Employer.

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[18] Hearing Transcript, pp. 12-13.

[19] *Carrington*, *supra*, p. 6.

[20] Memorandum of Points and Authorities Supporting Petitioner's Application for Review, p. 8.

Ms. Carrington has not asserted that Employer is responsible for payment of her medical treatment from Dr. Tesfayohannes, but that Employer is not responsible for paying Dr. Tesfayohannes' bills does not change that Dr. Tesfayohannes treated Ms. Carrington for her work-related injury and part of that treatment included medication that made her sleepy, drowsy, and unable to perform the responsibilities of the light duty position. In addition,

> Dr. Magee's report, dated October 14, 2012, made reference to Claimant's concerns regarding the amount of pain medication she was taking. He recommended that a pain management evaluation would be in order. When Dr. Love examined Claimant on December 19, 2011, after the knee manipulation, he prescribed Naprosyn and a refill of Percocet to assist Claimant with fighting the pain as she rehabilitated her knee.[21]

The record is rife with evidence of Ms. Carrington's use of medication to treat her work-related injury as well as the effects of the medication on her ability to perform the responsibilities of the light duty position. Ms. Carrington's credible testimony in this regard is corroborated by Employer's own witness:

> Ms. Davis observed Claimant sleeping on the job and "just kind of being out of it", and Claimant explained that she was on medication that made her drowsy. After the conversation about the medication, Ms. Davis referred Claimant back to HR to discuss her ability to continue with the job assignment.[22]

Thus, while it may be true that "Employees with disabilities who are offered a modified duty assignment and elect not to accept the modified duty assignment shall forfeit any further disability compensation benefits,"[23] in this case, Ms. Carrington was not presented with suitable, modified duty.

It is unfortunate that the ALJ wrote "Employer has failed to present substantial recent medical evidence to support the termination of Claimant's disability benefits on June 1, 2012." [24] It, however, is clear the ALJ did not rely on Employer's inability to satisfy its initial burden in order to resolve this case; the ALJ actually was referring to Employer's failure to present evidence of suitable, alternate employment within Ms. Carrington's abilities when considering the effect of her medications:

> Employer has not offered Claimant a job within her restrictions, including the medication that she has been prescribed for her knee by Dr. Love and Dr. Tesfayohannes to address the pain in her knee. Each of these physicians had the

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[21] *Carrington*, *supra*, p. 5.

[22] *Id.*

[23] Section 1-623.47(i) of the Act.

[24] *Carrington*, *supra*, at p. 6.

> opportunity to evaluate Claimant's condition over an extended period of time. Dr. Lewis' opinion is rejected.[25]

In the end, Employer goes to great lengths to present selective facts in a way advantageous to its position; however, that narrative is contrary to the findings of fact found by the ALJ and supported by the record, and this tribunal is without authority to reweigh the evidence as Employer would have us do.[26]

CONCLUSION AND ORDER

The burdens of persuasion and of proof were properly applied to resolve the question of Ms. Carrington's entitlement to reinstatement of temporary total disability compensation benefits. Substantial evidence in the record supports the ALJ's finding that Ms. Carrington was unable to perform light duty as a result of the effects of medication prescribed to treat her work-related injury; therefore, the conclusion that the modified duty position did not qualify as suitable, alternative employment is in accordance with the law. The June 24, 2013 Compensation Order is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

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MELISSA LIN JONES
Administrative Appeals Judge

August 29, 2013
DATE

[25] *Id.*

[26] *Marriott*, *supra*.