

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

**Department of Employment Services**

MURIEL BOWSER  
MAYOR



DEBORAH A. CARROLL  
DIRECTOR

**COMPENSATION REVIEW BOARD**

**CRB No. 15-001**

**DAVID ROBINSON,  
Claimant-Respondent,**

**v.**

**DISTRICT OF COLUMBIA DEPARTMENT OF YOUTH SERVICES,  
Employer-Petitioner.**

Appeal from a December 4, 2014 Compensation Order on Remand  
by Administrative Law Judge Gwenlynn D'Souza  
AHD PBL No. 13-007, OWC/DCP No. 761011-0008-1999-0004

Harold L. Levi for the Claimant  
Frank Mc Dougald for the Employer

Before HEATHER C. LESLIE, MELISSA LIN JONES, and LINDA F. JORY, *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**

Claimant worked for Employer as a painter. He injured his left knee on July 16, 1998 when he tripped over a drop cloth and fell. Claimant has undergone three surgical procedures to the knee, including a menisectomy in September 1998, a debridement in 1999, and most recently a total knee replacement on January 4, 2010. Claimant has not returned to work and has been receiving disability compensation payments from the date of the accident until their termination on October 11, 2012. This termination was premised on the May 8, 2012 additional medical evaluation (AME) of Dr. Stanley Rothschild.

A Formal Hearing occurred on March 21, 2013. At that hearing, Claimant sought reinstatement of his medical benefits and temporary total disability benefits from October 11, 2012 to the present and continuing. A Compensation Order was issued on August 29, 2013 which ordered reinstatement of Claimant's disability compensation benefits. Employer appealed the Compensation Order to the CRB.

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A Decision and Remand Order (DRO) was issued on December 5, 2013. In that DRO, the CRB determined the ALJ had misinterpreted Dr. Rothschild's opinion and remanded the matter for further consideration. Specifically, the CRB stated:

The misreading of Dr. Rothschild's report is a fundamental basis for the decision contained in the Compensation Order, which compels us to vacate the reinstatement and remand this matter for further consideration.

DRO at 4.

A Compensation Order on Remand (COR) was issued on December 4, 2014. In that COR, the ALJ concluded that Employer had failed in its initial burden of producing current and probative evidence that Claimant's condition has sufficiently changed to warrant a modification or termination of benefits, pursuant to *Mahoney v. D.C. Public Schools*, CRB No. 14-067, AHD No. PBL 14-004 (November 12, 2014)(*Mahoney*). The ALJ granted Claimant's claim for relief.

Employer timely appealed. Employer argues "the COR is not supported by substantial evidence because the ALJ misinterpreted the AME of Dr. Rothschild." Employer's argument at 7. Claimant opposes, arguing the COR is supported by the substantial evidence in the record and is in accord 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. DOES*, 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

Employer takes issue with the ALJ concluding it had failed in the first prong of the *Mahoney* analysis. As the ALJ correctly noted, 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*, 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 clamant 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* at 8-9.

The ALJ, after having noted the above burden shifting scheme, and after analyzing the evidence, concluded:

With regards to the first prong, Employer failed to meets [sic] its burden of providing current and probative evidence that Claimant's knee condition has sufficiently changed to warrant a modification or termination of benefits. The notice of determination indicated that the reason provided was the disabling condition is no longer casually related to the employment. Specifically, Dr. Stanley Rothschild, an orthopedic surgeon, indicated that if the only medical conditions affecting Claimant were the ones caused by [sic] work injury in 1998, then Claimant could have returned to work as a painter.

Dr. Rothschild also stated, however, "because of his total knee replacement, he should not be climbing ladders, crawling, kneeling, and many other activities that would require pulling and extending himself in certain directions." Thus, Dr. Stanley Rothschild attributed Claimant's limitations, in part, to a knee replacement surgery. *McCamey*, 947 A.2d at 1209; *Gerdas*, ECAB No. 87-9. In this case, the knee replacement was recommended by several doctors as result of the July 16, 1998 injury. Because the additional medical examiner, Dr. Rothschild, partly attributed certain physical limitations to treatment which was a direct and natural result of the compensable injury, Employer failed to present evidence of a change that would warrant termination of benefits. Specifically, it failed to provide probative evidence that the disabling condition is not at all casually related. Therefore, since the disabling condition is related to treatment for the July 16, 1998 injury, Employer's claim fails, and the injured worker's benefits continue.

COR at 4-5.

The ALJ found that Employer had failed in the first burden because Dr. Rothschild attributed some of Claimant's limitations to his knee replacement and said knee replacement had been recommended by both other physicians as a result of the work injury, Employer failed to present

evidence of a change that would warrant termination. Employer argues that the ALJ misinterpreted this evidence as Dr. Rothschild had attributed the knee replacement solely to progressive osteoarthritis. As such, the COR cannot be said to be supported by the substantial evidence in the record. In opposition to the appeal, Claimant argues the COR is supported by the substantial evidence in the record as Dr. Rothschild's opinion is "highly questionable" and "unworthy of belief." Claimant's argument at 10. We agree with Employer.

A review of Dr. Rothschild's opinion is informative. His diagnosis was:

1. Status post left total knee replacement for what reportedly was degenerative arthritis of the left knee.
2. Degenerative arthritis of the right knee.

Employer's Exhibit 2 at 5.

Dr. Rothschild further states of the Claimant:

At this point, he does not require any further medical treatment of his left knee as a result of the accident on July 16, 1998 with a reasonable degree of medical certainty. If additional treatment is necessary, it will not be because of that accident, but it will be because of his current total replacement. Therefore, as the left knee relates to the accident on July 16, 1998, I can say with a reasonable degree of medical certainty that no further treatment will be necessary.

Based solely on the work injury of July 16, 1998, the patient can return to work as a painter. Having had, however, a total knee replacement, I think this would limit him from doing all that he needs to do. For example, because of his total knee replacement, he should not be climbing ladders, crawling, kneeling, and many other activities that would require pulling and extending himself in certain directions. Certainly, with a total knee replacement, it would be possible for him to do some light capacity work. This is, however, related to his total knee replacement and has no relationship to the accident of July 16, 1998. I therefore believe that the continuing disability is solely related to the progressive osteoarthritis of his knee and not related to the accident of July 16, 1998.

Employer's Exhibit 2 at 6.

As we stated in our prior DRO,

Although not as artfully worded as would be optimal, the only fair way to read Dr. Rothschild's opinion is that although Claimant is disabled from engaging in activities that a painter is required to perform, his lack of capacity is unrelated to the knee injury sustained at work, but rather the result of progressive osteoarthritis which ultimately required knee replacement surgery.

The first two sentences quoted above, "Based solely on the work injury of July 16, 1998, the patient can return to work as a painter", and "Having had, however, a total knee

replacement, I think this would limit him from doing all that he needs to do”, make apparent that the doctor stating that were it not for the unrelated (in his opinion) knee surgery, Claimant could return to work as a painter. The phrase “based solely on the work injury of July 16, 1998” in the first sentence would make no sense if what the doctor meant to convey, unmodified, was the opinion that “the patient can return to work as a painter.” The doctor is saying that, if the only medical conditions affecting this patient were the ones caused by the work injury in 1998, this patient could return to being a painter. That the doctor is not opining that Claimant can return to work as a painter is evident in that the doctor immediately adds the “however” sentence, explaining that because of the knee replacement, Claimant is “limit[ed] in all that he needs to do [as a painter].”

DRO at 4.

As we stated in our prior DRO, Dr. Rothschild’s opinion is that Claimant suffers from progressive osteoarthritis which required surgery. Stated another way, Dr. Rothschild opined that Claimant’s current condition is *unrelated* to the work injury. This opinion is enough to satisfy the first prong of the *Mahoney* test. By stating the Employer failed in the first prong, the ALJ seems to weigh the evidence against other opinions which is in error. At the initial step, the ALJ considers the Employer’s evidence only. Any weighing of the evidence occurs at the third step, where 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. Dr. Rothschild’s opinion that the Claimant’s condition is unrelated to the work injury is “current and probative evidence that Claimant’s condition has sufficiently changed to warrant a modification or termination of benefits.” *Mahoney, supra*.

On remand, the ALJ shall consider steps two and three (if necessary) of the *Mahoney* analysis:

If the employer meets its initial burden, then the clamant 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.

## CONCLUSION AND ORDER

The December 4, 2014 Compensation Order VACATED and REMANDED consistent with the above discussion.

FOR THE COMPENSATION REVIEW BOARD:



HEATHER C. LESLIE  
Administrative Appeals Judge

May 5, 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 (D.C. 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*.

*/s/ Melissa Lin Jones*  
MELISSA LIN JONES  
*Administrative Appeals Judge*