

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 15-102

**DAVID E. ROBINSON,
Claimant–Respondent,**

v.

**DEPARTMENT OF YOUTH REHABILITATION SERVICES,
Employer–Petitioner.**

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
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Appeal from a May 22, 2015 Compensation Order on Remand by
Administrative Law Judge Gwenlynn D’Souza
AHD No. PBL 13-007, DCP No. 761011-0008-1999-0004

(Decided November 13, 2015)

Harold L. Levi for Claimant
Andrea G. Comentale for Employer

Before LINDA F. JORY, HEATHER C. LESLIE, JEFFREY P. RUSSELL, *Administrative Appeals Judges.*

LINDA F. JORY for the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

The facts of record and procedural history were outlined first in *Robinson v. District of Columbia Department of Youth Rehabilitation Services*, CRB No. 13-114, AHD No. PBL No. 13-007, DCP No. 76011-0008-1999-0004 (December 5, 2013) and again on May 5, 2015 in *Robinson v. District of Columbia Department of Youth Rehabilitation Services*, CRB No. 15-001, AHD No. PBL No. 13-007, DCP No. 76011-0008-1999-0004 (May 5, 2015).

David E. Robinson (Claimant) worked for District of Columbia Department of Youth Rehabilitation Services (Employer) as a painter. It is undisputed that he injured his left knee on July 16, 1998 when he tripped over a drop cloth and fell. There is also no dispute that following the accident, 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. The parties also agree that 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.

A Decision and Remand Order (DRO I) was issued on December 5, 2013. In that DRO I, 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 I) 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 had 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 appealed the December 4, 2014 Compensation Order (COR I). On May 5, 2015, the CRB issued a Decision and Remand Order (DRO II) which concluded:

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*.

DRO II at 5 (emphasis in original).

The CRB instructed the ALJ to consider steps two and three (if necessary) of the *Mahoney* analysis on remand:

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

A Compensation Order on Remand (COR II) was issued by AHD on May 22, 2015. In it, the ALJ concluded Employer had not proven by a preponderance of the evidence that the termination of Claimant's benefits was justified, as it had not shown that the effect of an aggravation of Claimant's pre-existing condition had dissipated or been overtaken by the effect of the natural progression of Claimant's pre-existing condition. Claimant's claim to reinstate her temporary total disability (TTD) benefits and medical care from October 11, 2012 to the present and continuing was granted.

Employer appeals COR II, asserting it is neither supported by substantial evidence nor in accordance with the law.

Employer requests the CRB vacate COR II.

ISSUES ON APPEAL

1. Whether the ALJ improperly found that Claimant met her burden of producing reliable and relevant evidence that her condition has not changed.
2. Whether Employer met its burden that of establishing a change in condition based on an AME report of Dr. Stanley Rothschild.

ANALYSIS¹

Whether the ALJ improperly found that Claimant met her burden in producing reliable and relevant evidence that her condition has not changed.

¹ The scope of review by the Compensation Review Board (CRB) and this Review Panel (hereafter, the Panel) as established by the District of Columbia Comprehensive Merit Personnel Act of 1978, as amended D. C. Code § 1-623.01(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 are based upon substantial evidence in the record, and whether the legal conclusions drawn from those facts are in accordance with applicable law. D. C. Code §1- 623.28(a) "Substantial evidence", as defined by the District of Columbia Court of Appeals (DCCA) , is such evidence as a reasonable person might accept to support a particular conclusion. *Marriott Int'l. v. DOES* 834 A.2d 882 (D.C. 2003) (*Marriott*). Consistent with this scope of review, the CRB and this panel are bound 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.

The ALJ correctly referred to the CRB's *en banc* decision in *Mahoney v. D.C. Public Schools*, CRB No. 14-067, AHD No. PBL 14-004, ORM/PSWCP No. 76000500012005-008 (November 12, 2014) (*Mahoney*) and found both Employer and Claimant met their burdens of production.

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.

Mahoney supra at 8.

Employer asserts that the ALJ's determination is not based upon substantial evidence because the reports of Drs. Verklin and Hanley were not reliable in establishing a causal relationship between the knee replacement surgery and the work-related injuries. Specifically, Employer asserts:

Dr. Hanley's report failed to consider Claimant's pre-existing knee problems and its relationship to possible future knee replacement surgery. Dr. Hanley's report was not comprehensive and thorough, but rather was incomplete and lacked any details about Claimant's pre-existing condition. Thus, Dr. Hanley's report was not reliable and should not have been given the weight it was accorded by the ALJ. Similarly, Dr. Verklin's report was not reliable because it failed to consider and provide a relationship between Claimant's possible replacement knee surgery and the work-related injuries. In that regard, Dr. Verklin failed to state whether possible future knee replacement surgery was due solely to (1) the work-related injuries, (2) the natural progression of Claimant's pre-existing condition, or (3) an unresolved aggravation of Claimant's pre-existing condition caused by the work-related injuries. Accordingly, the ALJ should not have given Dr. Verklin's report the weight it was accorded.

Keeping in mind that Claimant's burden in step two of the *Mahoney* test is producing reliable and relevant evidence that conditions have not changed to warrant a modification or termination of benefits, we disagree with Employer's characterization of the ALJ's analysis, as the ALJ was not required to weigh Claimant's evidence against Employer in step two. The ALJ stated:

When ascertaining a causal relation, generally a subsequent injury is compensable if it is the direct and natural result of a compensable primary injury. *McCamey*, 947 A.2d at 1209(sic); *Gerdas*, ECAB No. 8709(sic). Here, Claimant posited evidence about the relatedness of surgery. On March 10, 1999, Dr. Verklin noted that the condition of the Claimant's knee is "of post traumatic arthritis" and that Claimant would be a candidate for total knee replacement if his symptoms did not improve and that on February 9, 2001, Dr. Hanley noted that the disease stemmed from residuals of industrial exposure, particularly the two work-related injuries, and recommended total knee replacement. (CE9) With this evidence, Claimant

produced reliable and relevant evidence regarding the relatedness of his current condition to the work-related injury, particularly the relatedness of the prescribed surgery to Claimant's work-related injury.

COR II at 6.

We conclude that the ALJ's analysis at the second level is in accordance with the law and her conclusion that Claimant met his burden is supported by substantial evidence of record and no reversible error is found.

Whether Employer met its burden of establishing a change in condition based on an AME report of Dr. Stanley Rothschild.

With regard to Dr. Rothschild's AME report, Employer asserts:

...Dr. Rothschild did discuss the possibility that the pre-existing knee problem was aggravated by the injuries where he stated:

In summary Mr. Robinson is a gentleman who has had a number of injuries to his left knee, the injury in question being July 16, 1998. He also unfortunately has developed degenerative arthritis of his left knee and his right knee. I believe that the degenerative arthritis that has developed in both knees is within a reasonable degree of medical certainty (sic) *independent of the accidents that he has had in the past*. Dr. Townsends' initial observation, within days of his July 16, 1998 accident, was that he already had a significant amount of degenerative joint disease of his left knee. This arthritis obviously became progressive (emphasis added).

EE2.

Stated differently, Claimant's degenerative arthritis was unrelated – which includes not being aggravated by “the accidents that [Claimant] has had in the past”. Notably in its May DRO, the CRB stressed that ‘Dr. Rothschild opined that Claimant's current condition is *unrelated* to the work injury’ (emphasis in the original) May DRO at 5. Finally, the ALJ's finding that prior to the July 16, 1998 accident, Claimant's knee was “asymptomatic” is not supported by substantial evidence or any evidence in the record. Moreover, in making the finding, the ALJ ignored the report of Dr. Johnson dated June 28, 2000, where he clearly stated that after the ‘original injury in 1993’, Claimant ‘always was symptomatic thereafter’. CE at 8.

Employer's Brief at 10, 11(emphasis in original).

This Panel rejects Employer's characterization of Dr. Rothschild's report. While Dr. Rothschild stated "the degenerative arthritis that has developed in both knees is within a reasonable degree of medical certainty (sic) *independent of the accidents that he has had in the past*", Dr. Rothschild did not opine that the 1998 accident did not aggravate Claimant's arthritis. The CRB stated in the DRO II:

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.

DRO II at 5.

The ALJ correctly shifted the burden to Employer pursuant to step three of *Mahoney*:

In the third and final step, Employer must show by a preponderance of the evidence that Claimant's benefits should be terminated based on a change of condition. Dr. Rothschild's report and the June 9, 1994 MRI reveal that Claimant did have pre-existing degenerative arthritis prior to the July 16, 1998 accident. I rely on the opinions of Drs. Verklin and Hanely (sic) who both identified Claimant's post-July 16, 1998 condition as an aggravation of a pre-existing degenerative disease. Dr. Rothschild alone determined that Claimant's arthritis could not have been caused in any way by trauma. I favor the opinions of Drs. Verklin and Hanely (sic) over the opinion of Dr. Rothschild because Dr. Rothschild did not discuss the possibility of an aggravation of the pre-existing condition before ruling out causation and the record reveals facts consistent with an aggravation. At the time of accident, Claimant's arthritic condition was

extensive and it had affected all three compartments of Claimant's knee but it was asymptomatic. (EE 7, CE 7) During the September 24 1998 operation, Dr. Townsend shaved down the irregular surface of the medical femoral condyle and other areas to form a smoother surface. (CE 5) However, palpable spurs appeared by December 16, 1998. (CE 5) Therefore, I find that an aggravation occurred because even with extensive intervention, bone spurs formed within a short period of time after the July 16, 1998 accident.

COR II at 6. The ALJ went on to state:

Given this finding of aggravation, Employer must show Claimant's current condition is due to natural causes and the effect of the aggravation has dissipated or has been overtaken by the Claimant's naturally worsening condition. *Davis-Dodson* [v. *DOES*] 697 A.2d 1214, 1219, fn. 5 [(D.C 1997)][*Davis Dodson*]. In this case, it is uncontested that Claimant had pre-existing degenerative arthritis prior to the July 16, 1998 accident. Therefore, it is uncontested that degenerative arthritis was a natural contributing cause of Claimant's current condition².

COR II at 7(bracket material added).

Although not raised by Employer on appeal, the Panel must note that the case cited by the ALJ, *Davis-Dodson*, involved an aggravation of a previous injury under the private sector act, and the language relied on by the ALJ was used by the Court of Appeals in a footnote explaining to its recitation that the statutory presumption applies to the causal relationship not just between the original injury and the employment but between the current disabling condition and the employment, citing *Whittaker v. DOES*, 668 A.2d 844 (D.C. 1995). The Court stated in the footnote:

Contrary to intervenor's assertion, this approach does not for a moment suggest that petitioner should receive compensation 'until she returns to a condition healthier than prior to the work related injury'. Of course the pre-existing condition remains relevant and if the employer can show that petitioner's present state is due to those natural causes and the effect of the aggravation has dissipated or been overtaken by the petitioner's worsening condition, liability for compensation ends.

While it is clear the ALJ did not apply the private sector presumption of compensability to this public sector case, we agree citing to the Court's language in a private sector matter does not

² Although somewhat redundant the ALJ stated:

In order to prevail however, Employer must also show evidence of dissipation of the aggravation or an overtaking by a natural progression of a disease. In this case, the effect of the aggravation does not appear to have dissipated because Claimant used a cane from the time of the Jul 16, 1998 accident until shortly after the September 24, 1998 operation, but he continued to limp until the December 7, 1999 operation, and then continued to use a cane thereafter. (EE 6 CE 5, CE 6) Claimant's symptoms were temporary relieved by surgery, but did not resolve to the point that he could return to work. COR II at 7.

automatically render the matter reversible. The ALJ did conclude that “Based on this evidence, I conclude that the natural progression of the pre-existing arthritis did not overtake the aggravation of the time of the knee replacement surgery because the pre-existing arthritis was treated almost immediately after the accident”. COR II at 7. The ALJ went on to conclude:

Dr. Rothschild’s May 8, 2012 report attributes Claimant’s current disability to the residuals of the knee replacement surgery. However, Drs. Verklin and Hanley both recommended knee replacement as a form of treatment for the July 16, 1998 accident. Therefore, I find that the surgery was not a result of natural progression of preexisting arthritis, but rather that the surgery was a result of the July 16, 1998 accident.

COR II at 7.

While we agree with Employer that Dr. Johnson’s statement in his June 28, 2000 report that Claimant always was symptomatic after 1993 does not support the ALJ’s finding that Claimant was asymptomatic prior to 1998, there is substantial evidence in the record to support the ALJ’s finding that the work injury contributes to Claimant’s current disability. See CE 5.

The issue before us is not whether there is some evidence that supports a contrary finding, nor are we permitted to re-weigh the evidence in Employer’s favor. Rather the CRB reviews the Compensation Order on Remand to see if there is substantial evidence to support the ALJ’s determination that Employer has not established by a preponderance of the evidence that Claimant’s disability benefits should be terminated. As stated above, the CRB and this Panel are 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 concluding, and even where the reviewing authority might have reached a contrary conclusion, such is the case here.

CONCLUSION AND ORDER

The May 19, 2015 Compensation Order is supported by substantial evidence, in accordance with the law and is AFFIRMED.

So ordered.