GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR

DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 16-013

FRANCES WADE,
Claimant–Respondent,

v.

DISTRICT OF COLUMBIA DEPARTMENT OF BEHAVIORAL HEALTH
Employer–Petitioner.

DEPT. OF EMPLOYMENT SERVICES
COMPENSATION REVIEW BOARD
2016 JUN 24 AM 10 :2

Appeal from a January 7, 2016 Compensation Order on Remand by
Administrative Law Judge Gwenlynn D'Souza
AHD No. PBL 15-008, DCP No. 0468-WC-13-0500387

(Decided June 24, 2016)

Andrew J. Hass for Claimant
Frank Mc Dougald for Employer

Before LINDA F. JORY, HEATHER C. LESLIE, and GENNET PURCELL, *Administrative Appeals Judges.*

LINDA F. JORY for the Compensation Review Board.

DECISION AND REMAND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

Claimant, a Consumer Affairs Specialist at St. Elizabeth's Hospital, sustained a work-related injury on May 24, 2013 when she was assaulted at work by a patient. The Public Sector Workers' Compensation Program (PSWCP) accepted the claim for the face/scalp contusion and concussion.

On January 29, 2015, a Notice of Determination (NOD) was sent to Claimant, advising her that benefits were terminated on that date based on an Additional Medical Examination (AME) of Dr. Jerry Freidman, who opined Claimant could return to work with no restrictions. Claimant requested a Formal Hearing, seeking restoration of benefits from January 29, 2015 to the present and continuing.

A full evidentiary hearing occurred on June 4, 2015 and a Compensation Order (CO) issued on July 15, 2015. The CO awarded Claimant temporary total disability benefits and medical

benefits from January 29, 2015, to the present and continuing, for the accepted claim of injury and any residual claim of injury. Employer was also ordered to provide Claimant the appropriate claim forms and to process the amended claim for the neck, according to the applicable regulations.

Employer timely appealed the CO. The Compensation Review Board (CRB) issued a Decision and Remand Order (DRO) on January 5, 2016. *Wade v. D.C. Department of Mental Health,* CRB No. 15-126 (January 5, 2016).

In the DRO, the CRB determined the July 14, 2015 Compensation Order was not supported by substantial evidence and not in accordance with the law and vacated and remanded the matter for further consideration based on the CRB's determinations that:

1. The Administrative Law Judge was without authority to order any action related to Claimant's neck as the neck was not an accepted injury, *citing Linnin v. D.C. Public Schools*, CRB 15-111 (November 23, 2015).
2. Claimant submitted sufficient documents to satisfy the second prong of the *Mahoney* analysis. *See Mahoney v. D.C. Public Schools*, CRB No. 14-067 (November 12, 2014) (*Mahoney*).
3. The ALJ exceeded the scope of authority in rendering a medical opinion that Claimant's headaches are medically causally related to the accepted concussion and are disabling. *Citing Daly v. R.J. Reynolds,* CRB No. 12-023 (April 3, 2012) (*Daly*).

The CRB noted:

> We agree that if tinnitus is a symptom of the accepted concussion, then any discussion of tinnitus is not beyond the jurisdiction of the ALJ contrary to Employer's argument. If the tinnitus is a separate injury, then, similar to the neck condition, it would be beyond the scope of the ALJ's jurisdiction.

DRO at 4, n 1.

A Compensation Order on Remand (COR) was issued on January 7, 2016. In that COR, the ALJ concluded that Claimant had not proven jurisdiction over the claim for the neck or tinnitus and that Employer did not prove by a preponderance of the evidence that it properly terminated disability benefits for the accepted claims. The ALJ granted Claimant's claim for relief.

Employer appeals the COR, asserting that the COR is neither supported by substantial evidence and not in accordance with the law. Employer requests the CRB vacate COR.

ISSUE ON APPEAL

Whether the Compensation Order on Remand is supported by substantial evidence and in accordance with the law.

ANALYSIS[1]

Initially, we note that although the CRB previously found no error with the ALJ's determination that both Employer and Claimant met their burdens of production of the first two prongs under *Mahoney,* the ALJ analyzed the evidence again and found Employer and Claimant met their respective burdens. The ALJ correctly shifted the burden to Employer pursuant to step three of *Mahoney.*

Employer's asserts:

> . . . In awarding Claimant benefits again, the ALJ first observed that the report of Dr. Friedman addressed the causal relationship between Claimant's headaches and the work injury of May 24, 2013, and that he "determined [Claimant's] episodic headaches were not related to the work injury on May 24, 2013 but were instead a result of a muscle contraction. COR at 7. The ALJ however, further stated the following:
>
>> I do rely on Dr. Friedman's August 14, 2014 opinion to the extent he acknowledged that headaches may be sign of concussion. However, I reject Dr. Friedman's opinion on causal connection because he does not reference the June 4, 2013 Concentra medical records and the muscle contraction headaches **appear** indistinguishable from prior medical finding of muscle spasm with head pain. Rather I rely on Dr. Mamedova's December 16, 2013 opinion that Claimant has a concussion which was presently disabling. Based on this record, I find Claimant has a concussion which results in head pain and continues to be disabling (emphasis added).
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> COR at 7. The ALJ's rationale and findings are erroneous. Despite the CRB's cautioning regarding speculation and conjecture and the necessity of relying on medical evidence to support a legal determination, the ALJ's determination that Claimant's headaches are related to the May 24, 2013 work injury is not based on medical evidence, but instead is based on speculation and conjecture.

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[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, supra,* 834 A.2d at 885.

The ALJ has completely misstated Dr. Friedman's August 14, 2014 report. First, nowhere in Dr. Friedman's August 14, 2014 report does he state that "headaches may be a sign of concussion." Interestingly, in the July 14, 2015 CO, the ALJ stated otherwise in saying that "Dr. Friedman does not address Claimant's diagnosis of concussion and the relation, if any, to the headaches." July 14, 2015 CO at 7.

Second, in Dr. Friedman's August 14, 2014 report, he identified the medical reports he reviewed as part of his INE [sic]. He stated:

> I reviewed the records from Kaiser Permanente from May 24, through June 10, 2013. I read an EMG and nerve conduction study of the left arm from September 12, 2013. I read a November 8, 2013 referral by Dr. Khan, a neurologist, for a neurosurgery consultation. I read the report of a normal head CT from May 27, 2013 and June 10, 2013. I read a Concentra Medical clinic report from June 13, 2013. I read Dr. Tamara Mamedova's Patient First report from December 16, 2013. I read Dr. Dunlop's neurologic office notes from Howard University Hospital from October 25, 2013, and November 8, 2013 (emphasis added).

EE 8 at 2. Dr. Friedman, in concluding that there was no causal relationship between Claimant's headaches and the May 24, 2013 work injury, reviewed and considered the very medical record the ALJ cited as not being reviewed by him and was the single reason his opinion was rejected. Because the reason relied upon by the ALJ to reject the opinion of Dr. Friedman was wrong, his opinions that Claimant's headaches were not causally related to the May 24, 2013 work injury is uncontroverted and conclusive and renders the January 7, 2016 COR not supported by substantial evidence.

Furthermore, the ALJ's determination that Claimant's headaches are disabling is based on speculation because there is no medical evidence that supports that finding. The ALJ reasoned that "I rely on Dr. Mamedova's December 16, 2013 opinion that Claimant had a concussion which **was presently disabling** (emphasis added)." While the December 16, 2013 report of Dr. Mamedova does provide a diagnosis of concussion**, nowhere** in her report does Dr. Mamedova state that it **was presently disabling**. Notably, Dr. Mamedova concluded that it "is really hard to evaluate [Claimant] more than half a year after the injury to give a 2nd opinion." EE 3 at 3. Hence, the finding by the ALJ that Claimant's concussion **was presently disabling** is not based on medical evidence and therefore not supported by substantial evidence.

Employer's Brief at 6 -8. (Emphasis in original).

Claimant responds asserting that the ALJ adequately weighed the evidence, concluding Dr. Mamedova's finding of continued disability was entitled to more weight. Specifically Claimant asserts:

> Following a review of Claimant's medical history, Dr. Mamedova ordered Claimant off of work until examined by a specialist. EE 3 at 1-2; CE 2. Dr. Mamedova reiterated this diagnosis and order following Claimant's visit on May 8, 2014. CE 3. Though Dr. Mamedova did not use the words "presently disabling" the ALJ used that term to characterize Dr. Mamedova's multiple reports diagnosing Claimant with a concussion and placing her off of work until further examination. Dr. Mamedova's conclusion that Claimant should not return to work until she sees a specialist indicates a specialist's concern that the Claimant remain impaired as a result of the workplace injury. The ALJ concluded as such in her Order. CO at 7.

Claimant's Brief at 5, 6.

At the outset we reject Claimant's statement that Claimant visited Dr. Mamedova on May 8, 2014. While Dr. Mamedova completed the PSWCP Form 3 on May 8, 2014, the date of the examination is December 16, 2013. This Panel does not agree with Claimant's explanation for the ALJ's conclusion that Employer did not meet its burden of production and concluding instead that the report of a Patient First physician who did not opine that Claimant's headaches are causally related to the concussion and ***would not*** render an opinion with regard to Claimant's ability to work was sufficient to entitle Claimant to ongoing disability benefits as of January 29, 2015. There is no indication that Dr. Mamedova reviewed any of Claimant's records, including the negative CT scans of the head and face. Nor is there any indication of Dr. Mamedova's area of expertise other than we know he or she is not a neurologist. Although not submitted by Claimant in her Exhibit packet, Employer submitted the typed record prepared by Dr. Mamedova, which includes:

> HISTORY
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> Chief complaint: Was sent to PF for a 2nd opinion. Had a head injury, was beaten by a student in May 2013. Has been diagnosed with concussion. Still has a headache on the right side, and left arm and left neck pain. Nobody knows what is going on with her. Was asking for a 2nd opinion and was sent to us. Had an MRI compact disc with her which we could not open it here. Since that episode, became very anxious and scared by people. Has a constant headache, left arm and neck pain. Previous doctor did not want to prescribe her pain medications. Complaints as above remain unchanged and not getting any better. Had multiple treatments including physical therapy without any success. Has arm and left neck pain. Giving multiple descriptions of that like a burning, dull, achy, and sharp at same time. The rest of ROS is negative.

EE 3 at 3.

Dr. Mamedova further provides:

> PROV COMMENTS
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> It is really hard to evaluate her more than half a year after the injury to give a 2nd opinion. According to her papers, has been seen by a neurologist in the past so I believe she needs to seek another neurologist consult if she wants to have a 2nd opinion. Agreed with the plan. We talked to her workman's compensation case manager who said that is fine and we can refer her if we believe that that is what she needs,

Id.

Dr. Mamedova's responses in the PSWCP Form 3 with regard to Claimant's disability status includes:

1. Patient is able to work without restriction as of: **per specialist**.

2. Patient is able to work with restrictions from: **as per specialist.**

CE 3.

We do not agree that Dr. Mamedova's conclusion that Claimant should not return to work until she sees a specialist indicates a specialist's concern that the Claimant remain impaired as a result of the workplace injury. We must further agree with Employer that the ALJ's rationale and findings are erroneous.

Despite the CRB's cautioning regarding speculation and conjecture and the necessity of relying on medical evidence to support a legal determination, the ALJ's determination that Claimant's headaches are related to the May 24, 2013 work injury is not based on medical evidence, but instead is based on speculation and conjecture. As the CRB cautioned in the DRO and as we held in *Daly, supra* "If there is no evidence in the record to support the ALJ's conclusion the ALJ exceeds the scope of authority in rendering medical opinions."

We further agree with Employer that the ALJ's rejection of the opinion of Dr. Friedman is not supported by substantial evidence. Contrary to the ALJ's sole reason for rejecting Dr. Friedman's opinion, Dr. Freidman did include the June 4, 2013 Concentra medical records as a record he reviewed in reaching his conclusions that Claimant's headaches are not causally related and Claimant could return to her pre-injury duties.

The third step of the *Mahoney* three prong process requires the ALJ to weigh the evidence to determine whether employer met its burden of proving by a preponderance of the evidence that Claimant's benefits should be modified or terminated. With the full report of Dr. Mamedova, the CT scans and Dr. Jerry Friedman's opinion, the ALJ's conclusion that Employer did not meet its burden by a preponderance of evidence is not supported by substantial evidence and must be vacated.

CONCLUSION AND ORDER

The January 7, 2016 Compensation Order on Remand is not supported by substantial evidence, and not in accordance with the law. The Compensation Order on Remand is reversed and the award is vacated. The matter is remanded to the Administrative Hearings Division with instruction that an order denying the claim be entered. *See WMATA v. DOES* 926 A.2d 140 (D.C. 2007).

So ordered.