

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA MARÍA MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 12-175

JAMES GREEN,
Claimant–Respondent,

v.

DISTRICT OF COLUMBIA DEPARTMENT OF CORRECTIONS,
Self-Insured Employer—Petitioner

Appeal from an Order by
The Honorable Fred D. Carney, Jr., Administrative Law Judge
AHD No. PBL 10-043B, DCP No. 30080837039-0001

Michael J. Kitzman, Esquire, for the Claimant/Respondent
Frank Mc Dougald, Esquire, for the Self-Insured Employer/Petitioner

Before: HENRY W. MCCOY, MELISSA LIN JONES, and JEFFREY P. RUSSELL,¹ *Administrative Appeals Judges.*

HENRY W. MCCOY, *Administrative Appeals Judge*, for the Compensation Review Board.

DECISION AND REMAND ORDER

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board (CRB) pursuant to D.C. Code § 1-623.28, 7 DCMR § 118, and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005).

¹ Judge Russell has been appointed by the Director of the DOES as an interim CRB member pursuant to DOES Administrative Policy Issuance No. 11-01 (June 23, 2011).

FACTS OF RECORD AND PROCEDURAL HISTORY

Claimant was working for Employer as a correctional officer on August 26, 2008 when he was assaulted by several inmates, sustaining injuries to his neck and back with pain radiating into his buttocks and legs. Claimant filed a claim for disability benefits. The Public Sector Workers' Compensation Program (PSWCP) accepted the claim for injury to the neck and back and commenced paying temporary total disability (TTD) benefits from the date of the injury.

Claimant received treatment at Greater Metropolitan Orthopedics, primarily being treated by Drs. Alan Schreiber, Chee-Hahn Hung, and M. Theresa Carlini, all orthopedic surgeons. Claimant was initially diagnosed with cervical and lumbar strains secondary to the work injury and was treated with pain medication, physical therapy, and epidural injections. Diagnostic testing also showed that Claimant had pre-existing degenerative neck and back conditions.

Claimant underwent an independent medical evaluation (IME) by Dr. Robert E. Collins on April 21, 2009, at Employer's request. Dr. Collins determined that Claimant had severe pre-existing degenerative changes to his cervical and lumbar spine with a superimposed cervical and lumbar strain. He further determined that Claimant's symptoms were primarily related to his pre-existing degenerative changes in the neck and back, which were aggravated by the work injury. He deemed Claimant to be at maximum medical improvement from the work injury with no further treatment indicated, including surgery. He released Claimant to sedentary light duty with lifting restrictions but considered a return to duty as a correctional officer to be problematic.

Due to continuing pain in his lower back radiating primarily into the right leg, Dr. Schreiber recommended on July 13, 2010 that Claimant undergo a surgical fusion and decompression. The surgery was approved by Employer and performed on October 7, 2010. After surgery, Claimant's low back and leg pain was much better.

On October 4, 2011, Employer had Claimant undergo an Additional Medical Evaluation (AME), which was performed by Dr. Robert O. Gordon, an orthopedic surgeon. Dr. Gordon was of the opinion that any strains to the cervical and lumbar spine sustained on August 26, 2008 had resolved and the surgical fusion was unrelated to the work injury or any aggravation resulting from that injury. He further determined that as to any injuries sustained by Claimant on August 26, 2008, there were no restrictions on Claimant's physical capacity; rather, any restrictions were the result of the back surgery, which he deemed to be unrelated to the work injury.

Based on Dr. Gordon's AME, Employer issued a Notice of Intent to Terminate Public Sector Workers' Compensation Payments on November 17, 2011 notifying Claimant that his benefits would end effective December 9, 2011. Claimant filed for a formal hearing to have his benefits restored. Following a July 5, 2012 formal hearing, an Administrative Law Judge (ALJ) concluded that while Employer had provided evidence that Claimant's symptoms had resolved, no evidence was provided that Claimant could return to his pre-injury employment and ordered that Claimant's benefits be restored.² Employer filed a timely appeal, with Claimant filing in opposition.

² *Green v. D.C. Dept. of Corrections*, AHD No. PBL 10-043B, DCP No. 30080837039-0001 (September 26, 2012).

On appeal, Employer argues that the September 26, 2012 Compensation Order (CO) is not supported by substantial evidence because contrary to the ALJ's conclusion, the evidence shows Claimant has recovered from his work injury and he has no physical restrictions related to his work injury. In opposition, Claimant argues that the CO must be affirmed because he remains disabled from performing his pre-injury job.

ANALYSIS

The scope of review by the CRB is limited to making a determination as to whether the factual findings of the appealed Compensation Order are based upon substantial evidence³ in the record and whether the legal conclusions drawn from those facts are in accordance with the applicable law.⁴ 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 if the CRB might have reached a contrary conclusion.⁵

In reviewing a public sector employee's claim for the reinstatement of benefits, it is accepted that once a claim for disability compensation has been accepted and benefits have been paid, in order to prevail at a formal hearing, Employer must adduce persuasive evidence sufficient to substantiate the modification or termination of benefits.⁶ As the matter below involved the termination of benefits for a claim that has been accepted as compensable, the ALJ appropriately assigned the burden proof to Employer.⁷

In initiating action to terminate Claimant's disability benefits and subsequently at the formal hearing, Employer relied primarily upon the October 4, 2011 AME of Dr. Gordon. As the ALJ noted, Dr. Gordon opined after examining Claimant:

As related to any strains that occurred on 08/26/08, I believe that these have long since resolved and that his prognosis is excellent. There is nothing in my view of the medical records and radiographic reports thus far provided to indicate that any complications occurred as a result of the surgical procedure that he had performed. I do not believe that the surgical procedure was directed at any anatomical abnormalities that were caused or aggravated by what occurred on 08/26/08. Unless some complications occurred as a

³ "Substantial evidence," as defined by the District of Columbia Court of Appeals, is such evidence as a reasonable person might accept to support a particular conclusion. *Marriott International v. DOES*, 834 A.2d 882 (D.C. 2003).

⁴ Section 1-623.28(a) of the District of Columbia Government Merit Personnel Act of 1978, as amended, D.C. Code § 1-623.1 *et seq.* ("Act").

⁵ *Marriott*, 834 A.2d, 885.

⁶ *Jones v. D.C. Superior Court*, CRB No. 10-003, AHD No. PBL09-026, DCP No. 7610460001199-0002 (March 11, 2011) citing *Lightfoot v. D.C. Dept. of Consumer and Regulatory Affairs*, ECAB No. 94-25 (July 30, 1996).

⁷ CO at 4.

result of this surgery that I am not aware of, I believe that this patient would be best served with reassurance rather than by any further treatment and by being weaned off of his narcotic analgesics.

As related to any injuries that occurred on 08/26/08, I believe that there are no restrictions on this patient's physical capacity. Because of the unrelated back surgery that was performed, I believe that it would be reasonable to restrict this fifty-three-old man from any work that requires heavy lifting and repeated bending. EE 2.

Based on this opinion by Dr. Gordon, the ALJ determined that Employer "has presented some evidence of a change in Claimant's condition." While the ALJ further noted that Dr. Gordon deemed Claimant to be at maximum medical improvement and acknowledged that Dr. Gordon also found that Claimant's back surgery was not related to the work injury, the ALJ nonetheless reasoned:

Based on the evidence presented I find Employer failed to meet its burden. The November 17, 2011, Notice of Determination stated that based on the opinion of Dr. Gordon that Claimant had no physical restrictions from returning [sic] to work. However, Dr. Gordon found that Claimant was not able to perform any work involving heavy lifting and repetitive bending as a result of his back surgery. Dr. Gordon's opinion alone cannot form a basis to terminate Claimant's benefits because there is no indication Claimant can return to work as a Correctional Officer. Employer has provided no evidence that Claimant can return [to] his former duties or that suitable work was available. CO at 5.

While the ALJ has acknowledged the specific findings made by Dr. Gordon, he unfortunately misinterprets or misapplies them in making his determination that Employer has failed to meet its burden. Central to Dr. Gordon's opinion are his determinations that Claimant's work injuries have resolved and the back surgery performed was not related to the work injury. Consequently, Dr. Gordon determined that as a result of the work injury, Claimant had "no restrictions" on his "physical capacity" but he did have lifting and bending restrictions as a result of the unrelated back surgery. The ALJ is not clear on this distinction in arriving at a conclusion regarding the causal relationship between the October 2010 surgery and the August 2008 work injury. Therefore, this matter must be returned.

CONCLUSION AND ORDER

The determination by the ALJ that the Employer has not met its burden to justify terminating Claimant's benefits is not supported by substantial evidence and is not in accordance with the law. The Compensation Order of September 26, 2012 is REVERSED AND REMANDED for further consideration in keeping with this Decision and Remand Order.

FOR THE COMPENSATION REVIEW BOARD:

HENRY W. MCCOY
Administrative Appeals Judge

February 7, 2013
DATE