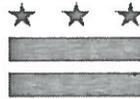


GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



ODIE A. DONALD II
ACTING DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 16-134

JAMES DAVIDSON,
Claimant-Petitioner,

v.

DISTRICT OF COLUMBIA FIRE & EMERGENCY SERVICES,
Employer-Respondent.

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2017 JAN 30 PM 1 16

Appeal from a September 13, 2016 Compensation Order on Remand
by Administrative Law Judge Fred D. Carney, Jr.
AHD PBL No. 99-073A, DCP No. 7610330003190005

(Decided January 30, 2017)

Richard Link for the Claimant
Frank McDougald for the Employer

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

HEATHER C. LESLIE, for the Compensation Review Board.

DECISION AND REMAND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

The procedural history pertinent to the current appeal is described by the Compensation Review Board (CRB) in a prior Decision and Remand Order (DRO),

The Claimant was employed as an emergency paramedic. On February 3, 1999, Claimant injured his right wrist and lower back. Claimant came under the care and treatment of Dr. Hampton Jackson. Dr. Jackson passed away after which Claimant came under the care and treatment of Dr. Julio Gonzales.

Claimant's claim was accepted by the Employer, who paid disability benefits until February 17, 2011. On that date, the Claimant's benefits were terminated based on the additional

medical evaluation (AME) of Dr. Robert Gordon. The Claimant timely appealed this termination.

A full evidentiary hearing was held on May 3, 2011. At that hearing, the Claimant sought reinstatement of temporary total disability benefits from February 18, 2011 to the present and continuing, payment of related medical expenses and bills, and authorization for treatment with Dr. Jackson. The Employer contested the nature and extent of the Claimant's disability. A Compensation Order (CO) was issued on October 31, 2011. In that CO, the ALJ awarded the Claimant the requested claim for relief. Employer unsuccessfully appealed the CO to the CRB.

On April 17, 2013, Claimant underwent an additional AME with Dr. Stanley Rothschild. Dr. Rothschild took a history of Claimant's injury and treatment and performed a physical evaluation. Dr. Rothschild opined Claimant's current condition is no longer related to his injury and that he could go back to work full duty, without restrictions. Thereafter, based on Dr. Rothschild's opinion, the Employer terminated Claimant's disability payments on June 10, 2013. Claimant timely appealed this termination.

A full evidentiary hearing occurred on October 1, 2013. Claimant sought reinstatement of medical benefits and temporary total disability benefits from June 17, 2013 to the present and continuing. The issue presented was the nature and extent of Claimant's disability. On June 23, 2014, a Compensation Order (CO2) was issued which denied Claimant's requested relief. Claimant timely appealed.

Claimant argues on appeal that the ALJ erred in finding that Dr. Rothschild's medical opinion was enough to substantiate a change in condition. Claimant also argues the evidence fails to support the conclusion that Claimant's condition has changed since the last Compensation Order, that the ALJ failed to review the medical evidence of Dr. Gonzalez, the CO2 is inconsistent with prior orders, and the CO2 fails to explain what duties Claimant is capable of performing.

Employer opposes the appeal, arguing the CO2 is supported by the substantial evidence in the record and in accordance with the law.

Davidson v. DC Fire & Emergency Services, CRB No. 14-099 (February 26, 2015).

After considering the parties' arguments, the CRB determined a remand for further analysis and fact finding was necessary in light of the CRB's decision in *Mahoney v. D.C. Public Schools*, CRB No. 14-067 (November 12, 2014) (*Mahoney*). Specifically, the CRB remanded for the ALJ to apply the second step

of the *Mahoney* analysis to determine whether Claimant produced reliable and relevant evidence that conditions had not changed to warrant a modification or termination of benefits. The ALJ was reminded that if he concludes the Claimant produced reliable and relevant evidence that Claimant's condition has not changed, the evidence must be 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.

The CRB, in an effort to avoid further remands, addressed several other arguments Claimant raised. The CRB first directed the ALJ, in considering the burden shifting scheme in *Mahoney*, to analyze and discuss Claimant's current work capabilities. The DRO also tasked the ALJ with clarifying the determination of Claimant's credibility, pointing out inconsistent language in the CO regarding Claimant's credibility. The CRB also determined that the ALJ's rejection of Dr. Gonzalez's report did not flow rationally from the evidence presented. Finally, the ALJ was directed to strike reference to the treating physician preference as there is not a treating physician preference in public sector workers compensation cases.

A Compensation Order on Remand (COR) was issued on October 30, 2015. The ALJ found Claimant had produced reliable and relevant evidence that conditions had not changed to warrant a modification or termination of benefits. However, after weighing the evidence at the third step of the *Mahoney* analysis, the ALJ concluded that the Employer met its burden of proving by a preponderance of the evidence that Claimant's benefits should be terminated. The COR denied Claimant's request for reinstatement of disability benefits.

Claimant appealed. Claimant argues first, the ALJ's credibility assessment is not supported by the substantial evidence in the record. Second, Claimant argues the ALJ misapplied step three in the *Mahoney* analysis. For these reasons, Claimant urges the COR to be remanded for further analysis.

Employer opposes the review, arguing the COR is supported by the substantial evidence in the record and is in accordance with the law.

Davidson v. DC Fire & Emergency Services, CRB No. 15-192 (May 23, 2016)("DRO2").

After reviewing the parties arguments, the CRB again vacated and remanded the order, concluding,

The October 30, 2015 Compensation Order on Remand is VACATED and REMANDED. The ALJ is ordered to address whether Claimants condition, specifically his reliance on pain medication, has changed since the October 31, 2011 order, and what if any, impact this pain medication has on his ability to work as a paramedic.

DRO2 at 6.

A Compensation Order on Remand (COR2) was issued on September 13, 2016. In the COR2, the ALJ concluded the Employer had proven, by a preponderance of the evidence, that Claimant's disabling condition had changed to warrant a termination of benefits.

Claimant appealed. Claimant argues the COR2 should be reversed as the ALJ's conclusion that Claimant can return to work as an EMT is not supported by the substantial evidence. Specifically, Claimant argues the ALJ's conclusions regarding the effects of medication are contradictory, and the COR2 fails to address what work duties Claimant can perform. Claimant also argues the ALJ's rejection of Dr. Gonzalez's opinion is not supported by the substantial evidence.

Employer opposes, arguing the COR2 is supported by the substantial evidence in the record and in accordance with the law.

ANALYSIS¹

Claimant first argues that the ALJ's conclusions regarding the effects of the medication Claimant takes is in error as these conclusions not only contradict prior findings in the preceding orders, but also do not flow rationally from the facts. Specifically, Claimant points to the following conclusion:

Employer has further shown that Claimant has not complained of drowsiness due to his medication since January-February 2012, more than a year before the June 17, 2013, NOD terminating Claimant's benefits. I further find and conclude that the condition, if any, that is causing Claimant to require treatment with narcotic pain medication is not related to the Claimant's accepted work injury of 1999. I further find Claimant can perform the duties of his regular employment while using medication.

COR2 at 6.

A review of the findings of fact reveal the ALJ found:

On June 3, 2013, Dr. Gonzales reported that Claimant returned to him with complaints that his back pain had increased, and that it interferes with his daily activities. Dr. Gonzales noted that Claimant was unable to perform any kind of work due to his back pain and continued Claimant on pain medication. I find Dr. Gonzales did not mention that Claimant complained of the medication making him drowsy since his February 2013 report except when mentioning that Claimant

¹ The scope of review by the CRB is generally 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. See D.C. Workers' Compensation Act of 1979, as amended, D.C. Code § 32-1501, *et seq.*, (the Act) at § 32-1521.01 (d)(2)(A), and *Marriott International v. DOES*, 834 A.2d 882 (D.C. 2003). Consistent with this standard of review, the CRB and this review panel must affirm 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 this panel might have reached a contrary conclusion. *Id.*, at 885.

was working at night and that his drowsiness maybe due to his shift alteration from sleeping at night to sleeping during the day.

COR2 at 3.

We agree with Claimant that the ALJ's conclusion does not flow rationally from the facts as found by the ALJ, and as supported by the evidence in the record. The conclusion that the Claimant had not complained of drowsiness due to his medication for more than a year prior to the June 17, 2013 NOD is directly contradicted by the findings of fact.

Moreover, we agree with Claimant that the conclusion not only contradicts the findings of fact in the present order, but also contradicts the ALJ's statement in his July 23, 2014 order where it refers to Dr. Gonzales January 15, 2013 wherein Dr. Gonzales notes morphine causes Claimant drowsiness.

We also noted previously (and pointed out by the CRB in the prior DRO):

He is currently taking Oxycontin and Oxycodone to help him tolerate the pain for some years. (HT 63) The medication makes him drowsy and he is able to function for only a few hours a day. (HT 38&39, 63&64) Dr. Jackson recommended Claimant was not a candidate for laminectomy and the condition would not improve with conservative treatment. (HT 51).

Davidson v. DC Fire & Emergency Services, AHD No. 11-001, 5 (October 31, 2011).

Indeed, the CRB stated:

In the findings of fact section, when summarizing Claimant's medical treatment with Dr. Gonzalez, the ALJ notes Claimant's continued use of pain medication, and Claimant's continued pain and drowsiness. *See* COR at 4-5. The COR however, fails to analyze or discuss whether since the October 31, 2011 Compensation Order, Claimant's condition, specifically his reliance on pain medication, has changed and what, if any, impact this reliance has on his ability to work as a paramedic. *See Marriot v. DOES*, 85 A.3d 1272, (D.C. 2014). We are forced to remand for further analysis and reiterate, as directed in our prior DRO, that discussion of Claimant's current work capabilities is warranted in the case *sub judice*. In light of Employer's burden at the third step of the *Mahoney* analysis, when addressing Claimant's reliance on pain medication, the ALJ must determine specifically what physical limitations, if any, Claimant currently suffers.

DRO2 at 5.

Thus, we again remand the case with instructions to the ALJ to address the referenced contradictions adhering to the law of the case.

Turning to Claimant's second argument, a review of the COR2 reveals the following discussion:

I note Dr. Rothschild's report includes a history taken from Claimant concerning his injury, as well as a summary of the medical treatment from July 2005 up to March 2013. While Dr. Rothschild acknowledged some tenderness in Claimant's back in April 2013, he determined that the strain/sprains Claimant sustained in 1999, including any aggravation of a pre-existing disease, had long since resolved. As a result, he opined that Claimant, based on his musculoskeletal condition, could return to work as an EMT. (EE 2)

In contrast, Dr. Gonzales diagnosed Claimant as having traumatic bilateral sciatica with radiculitis and radiculitis of LS-S1 due to discongenic disease. On examination, Dr. Gonzales noted tenderness and, at times, he noted muscle spasm about Claimant's lumbar and thoracic spine. Dr. Gonzales recommended repeat MRI of the lumbar spine to determine how to better treat Claimant's complaints of pain radiating from his low back to his lower extremities. Dr. Gonzales has treated Claimant consistently from March 27, 2012 to the present with medication including opiate drugs, *i.e.*, OxyContin, Oxycodone, and Morphine. (CE 2)

I reject the report of Dr. Gonzales in this matter for the following reasons. Dr. Gonzales noted on examination of Claimant on March 27, 2012, that Claimant appeared to be a well-developed 46 year old, 6 foot tall, 208 lbs., Caucasian male in no acute distress. On examination Dr. Gonzales noted no extra cranial deformity or facial asymmetry. He noted Claimant was able to stand from sitting and Claimant could walk straight on tiptoes and heels with some difficulty but no true ataxia. Dr. Gonzales noted however some sensory abnormality of the L5-S1 distribution. He noted Claimant was involved in a work related accident around February 3, 1999 and that Claimant had two other injuries at work since the 1999 injury. Dr. Gonzales does not indicate which injury caused Claimant's current back pain. Dr. Gonzales appears to be basing his treatment on Claimant's subjective complaints of pain and Claimant's history of his condition.

Dr. Gonzales does not explain how Claimant's accepted work injury over a decade ago is medically causally related to his complaints of pain today. Claimant's clinical findings are little more than tenderness about the spine and decreased sensation in the area of his low back. At the time of his 1999 work related injury, Claimant was diagnosed with back sprain/strain only. Dr. Gonzales diagnosed Claimant with traumatic bilateral sciatica with radiculitis. He did not indicate that the work trauma, or which work trauma, caused the bilateral sciatica or what, if anything did cause it. Dr. Gonzales's opinion parrots Claimant's subjective complaints of pain but lack any clinical support for the conclusion that Claimant's complaints are the result of his 1999 work injury. Dr. Gonzales provides no medical explanation for his complaints today. Thus, I conclude that Claimant's current disability, if any, is not the result of the work injury and that the strain/sprain to Claimant's low back and wrist has completely resolved.

COR2 at 5 (Footnotes omitted.)

A review of the evidentiary file reveals this is the exact same discussion in the prior COR without any alteration. As we discussed in DRO2,

Finally, Claimant argues that the ALJ, contrary to our prior DRO, focuses on medical causation, an issue not contested by the parties. Our prior DRO indicated the only issue to be resolved was the nature and extent of Claimant's injury, and expressed concern that the ALJ seemed to be conflating the issues in the prior order.

To clarify any confusion that may have resulted from our prior DRO, we reiterate that if the ALJ determines Employer proved, by a preponderance of the evidence, that Claimant's current disability has changed or that his condition has resolved, Employer has satisfied its burden that benefits should be modified or terminated.

Until such time as the ALJ addresses whether, since the findings of fact and conclusions of law outlined in the October 31, 2011 order, Claimant's condition - specifically his reliance on pain medication - has changed, and what, if any, impact his reliance on pain medication, has on Claimant's ability to work as a paramedic, we will not address other arguments.

DRO2 at 6. (Emphasis added.)

We again remand the case for consideration consistent with the above, with specific instructions to reconcile the several orders and findings of fact in this case and to respond to the remand directives contained in prior CRB DRO.²

CONCLUSION AND ORDER

The September 13, 2016 Compensation Order on Remand is VACATED and REMANDED for further findings of fact and conclusions of law consistent with the above discussion.

² For instance, the CRB did affirm the ALJ's credibility finding. DRO2 at 4.