

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services



MURIEL BOWSER
MAYOR

ODIE DONALD II
ACTING DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 16-155

JAMES GREEN,
Claimant-Respondent,

v.

DISTRICT OF COLUMBIA DEPARTMENT OF CORRECTIONS,
Employer-Petitioner.

Appeal from an October 31, 2016 Compensation Order on Remand
by Administrative Law Judge Fred D. Carney Jr.
AHD No. PBL No. 10-043B, DCP No. 30080837039-0001

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2017 FEB 28 PM 12 13

(Decided February 28, 2017)

David J. Kapson for Claimant¹
Frank McDougald for Employer

Before LAWRENCE D. TARR, *Chief Administrative Appeals* GENNET PURCELL and HEATHER C. LESLIE, *Administrative Appeals Judges*.

Before LAWRENCE D. TARR, for the Compensation Review Board.

DECISION AND REMAND ORDER

INTRODUCTION

This case is before the Compensation Review Board on the application for review (“AFR”) filed by the District of Columbia Department of Corrections (“Employer”).² Employer has appealed the October 31, 2016 Compensation Order on Remand (“COR”) issued by an administrative law judge (“ALJ”) in the Administrative Hearings Division (“AHD”) of the Department of

¹ At the hearing Claimant was represented by Michael Kitzman.

² During all relevant times, the District of Columbia Department of Corrections’ workers’ compensation claims were administered by the Government of the District of Columbia’s Office of Risk Management Public Sector Worker’s Compensation Program (“PSWCP”). In this decision, the term “Employer” shall refer to the District of Columbia Department of Corrections unless otherwise specified.

Employment Services. In the COR, the ALJ held Claimant was entitled to restoration of temporary total disability benefits beginning on December 9, 2011.

BACKGROUND

This case has a rather unusual procedural history involving several claims and appeals. On August 26, 2008, James Green (“Claimant”) was attacked by several inmates while working as a correctional officer for Employer. His claim was accepted by PSWCP and Claimant received wage loss and medical benefits for several years.

Claimant first received medical treatment at Greater Metropolitan Orthopedics, where orthopedic surgeons, Drs. Schreiber, Hung, and Carlini treated him. He was initially diagnosed with cervical and lumbar strains secondary to the work injury. Diagnostic testing also showed that Claimant had pre-existing degenerative neck and back conditions. On October 7, 2010, Dr. Schreiber performed a laminectomy and fusion at L4-L5. Dr. Robert O. Gordon also saw claimant for an additional medical examination (“AME”) on October 24, 2009.

On May 6, 2011, PSWCP notified Claimant that his benefits were being suspended for allegedly failing to attend several additional medical examinations that had been set up by PSWCP. Claimant filed for a formal hearing to challenge that decision and it was docketed as PBL 10-043A (“A case”). A formal hearing was held on September 6, 2011.

Before the ALJ issued his decision, PSWCP received information from another AME held on October 4, 2011, by Dr. Gordon. Based on this examination, on November 17, 2011, PSWCP issued another notification to Claimant that his benefits would be terminated on December 9, 2011. Claimant requested a formal hearing challenging that action which hearing took place on July 5, 2012. This case was docketed as PBL 10-043B (“B case”).

The ALJ issued a Compensation Order in PBL 10-043B on September 26, 2012. The ALJ reinstated Claimant’s benefits. The CRB reversed this decision and remanded the case to the ALJ because the ALJ had failed to address whether any disability was medically causally related to the work accident and because he failed to discuss whether Claimant’s injuries had resolved. *Green v. D.C. Department of Corrections*, CRB 12-175 (February 7, 2013).

Claimant appealed the CRB’s decision in the B case to the District of Columbia Court of Appeals (“DCCA”). The DCCA dismissed the appeal because it was not taken from a final order on April 26, 2013. *Green v. DOES*, DCCA No 13-AA-247 (April 26, 2013).

While the remand in the B case was pending, the ALJ issued his remand decision in the A case on April 10, 2013. The ALJ held PSWCP failed to establish Claimant had proper notice of the AMEs and ordered benefits be reinstated. The ALJ noted that, in effect, the reinstatement of benefits was subject to the outcome of the B case.³

³ The ALJ’s footnote stated, “The claim [in the A case] is subject to being eligible for disability benefits through the present and continuing. Note that Claimant was terminated in December 2011, and the issue of termination is pending in PBL 10-043B.”

Employer appealed the ALJ's decision in the A case. On October 31, 2013, the CRB reversed and vacated the award of benefits. The CRB, noting that the ALJ knew his decision in the B case was pending, held the ALJ had issued an impermissible advisory decision in the A case:

As is evident from the above quoted footnote from the Compensation Order, the ALJ obviously recognized the contingent nature of the award. Why the ALJ decided to issue this Compensation Order prior to acting upon the much older and still pending remand and resolving the issue of "Claimant being eligible for disability benefits" as a matter of compensability is not clear to us. Nonetheless, in the absence of a determination concerning whether Mr. Green's disabling condition in the time covered by this Compensation Order is causally related to the work injury, there can be no predicate for a legal determination that his benefits should or should not be suspended during that period. *See Heyward v. Metro Homes, Inc.*, CRB No. 12-123, AHD No. 12-145, OWC No. 682864 (September 25, 2012).

Green v. D.C. Department of Corrections, CRB No. 13-054 at 4, (October 31, 2013).

Also of note is that on December 10, 2012, PSWCP notified Claimant it was suspending benefits for his alleged failure to attend another AME. Claimant filed for a formal hearing to challenge the termination of benefits and it was assigned AHD No. PBL 10-043C ("C case"). Although the B case still was pending before him, the ALJ issued a CO in the C case on October 15, 2014, reinstating benefits as of December 20, 2012. Employer appealed the CO in the C case to the CRB but then withdrew its appeal. It was formally dismissed by the CRB on November 18, 2014. *Green v. D.C. Department of Corrections*, CRB No. 14-129 (November 18, 2014).

Claimant then moved for an order declaring Employer in default on the ALJ's C case award. The ALJ found Employer in default on June 29, 2016. The CRB vacated the ALJ's order on October 11, 2016. *Green v. D.C. Department of Corrections*, CRB No. 16-099 (October 11, 2016).

Claimant next filed with the ALJ a motion for default and penalties for the ALJ's October 15, 2014 C case award awarding him ongoing benefits beginning December 20, 2012. The ALJ denied this motion by order dated December 23, 2016. This decision was not appealed.

On October 31, 2016, the ALJ issued his Compensation Order on Remand in the B case, which is the case presently before the CRB. The issue before the ALJ, as stated in the Compensation Order on Remand, was "Whether Claimant has any remaining disability as a result of the August 26, 2008 work injury?"

The ALJ noted that Claimant had pre-existing cervical and lumbar degenerative disc disease and spinal stenosis but was able to perform his work duties with these conditions. These duties required Claimant to maintain order, sometimes breaking up fights or restraining prisoners, and to do extensive walking and standing, and bending, pushing and pulling large security doors.

The ALJ utilized the correct analysis for a claim involving the termination of a public sector worker's benefits articulated in the CRB's 2014 en banc opinion, *Mahoney v. D.C. Public Schools*, CRB 14-067 (November 12, 2014), which is a three-prong burden shifting analysis.

The ALJ found PSWCP met its first-step burden of presenting current and probative evidence of a change in Claimant's condition to warrant a termination of Claimant's benefits through the medical reports of Dr. Gordon, and Claimant met his second-step burden of presenting evidence that conditions have not changed through his own testimony, the 2009 AME of Dr. Collins, and the medical reports of his treating orthopedic surgeons. At the third step, the ALJ found that Employer had not met its burden of proof.

The ALJ found that Claimant still was disabled as a result of the work accident. The ALJ ordered reinstatement of benefits from when PSWCP ended them, December 9, 2011.

PSWCP filed a timely appeal of the ALJ's Compensation Order on Remand. After the AFR was filed, Employer moved the CRB to stay, in part, the awarded benefits. Employer requested the CRB stay the lump-sum benefits (i.e. benefits awarded from December 9, 2011, to the date of the ALJ's COR). Both parties have filed written briefs in support of their positions.

On December 7, 2016 the CRB's Chief Judge, acting pursuant to 7 DCMR§ 265.5 granted the motion and stayed the lump-sum payment and ordered that portion of the award requiring weekly payments to continue.

ANALYSIS

The ALJ's COR decision centered on his rejection of AME Dr. Gordon's opinion. Dr. Gordon opined:

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 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.

The ALJ held:

Dr. Gordon's opinion was inconsistent with the April 5, 2010 MRI. Dr. Gordon noted he did not have Claimant's medical records from George Washington University Hospital regarding his treatment for injuries after a car accident. He also noted he had no medical records of Claimant's prior work injury. Dr. Gordon opined Claimant is unfit for such a job as a correctional officer due to his back surgery which Dr. Gordon opined that "because of the unrelated back surgery that was performed, I believe that it would be reasonable to restrict this fifty-three year old man from any work that requires heavy lifting and repeated bending." (EE 2) Dr. Gordon inconsistently found, no complications from the back surgery, but determined that Claimant's current restrictions were the result of the back surgery. Therefore I reject the opinion of Dr. Gordon. Because I do not adopt Dr. Gordon's opinion, I do not find that Claimant can return to full-duty. Accordingly, I find Claimant continues to be disabled.

COR at 8-9. (footnote omitted) (emphasis added).

In the CRB's previous Decision and Remand Order, the CRB held that the ALJ had misinterpreted Dr. Gordon's opinion. As the CRB held:

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.

Green v. D.C. Department of Corrections, CRB 12-175 at 4, (February 7, 2013) (emphasis added).

A comparison of the portions of the ALJ's 2012 and his present analysis (and the CRB's previous rejection of that analysis) shows that the ALJ has again misinterpreted Dr. Gordon's opinion. With respect to the residuals from the work accident, there is nothing inconsistent about Dr. Gordon's opinion; any restrictions on Claimant's ability to work are not caused by the work accident, they are caused by the unrelated back surgery.

The other stated bases for disqualifying Dr. Gordon's report in this passage also are problematic. The ALJ failed to explain how Dr. Gordon's report was inconsistent with the MRI and the ALJ did not identify the significance of Dr. Gordon not having the George Washington University Hospital's records regarding Claimant's car accident.

Should the ALJ rely on these in his remand decision, the ALJ would need to identify the inconsistency between the MRI and Dr. Gordon's report and how that inconsistency relates to Claimant's condition in October 2011 and why not having access to the motor vehicle accident records impeaches Dr. Gordon's opinion.

The ALJ further held:

When weighing the conflicting medical opinions and other credible evidence of record it is determined that Employer has not met its burden of showing, by a preponderance of the evidence, that a termination of Claimant's benefits is warranted.

Claimant testified that he injured his shoulder in 2008 and was treated in April or May of 2008. He did not have any problem with his back, and the problems he had before the work injury had resolved. Claimant testified he had pain in his back, neck and shoulders after the August 26, 2008 work injury that was more tolerable after the October 7, 2010 surgery. There is no evidence to contradict Claimant's candid testimony on this point. The reports of two of Claimant's treating physicians Dr. Hung and Dr. Faulks corroborate Claimant's testimony that his current condition is and was disabling, and that it is a result of his being sandwiched between a metal security door and the door jam by disruptive residents at the correctional facility. Claimant's testimony is supported by Employer's earlier JME [sic] report of Dr. Collins and a record of continued medical treatment. Dr. Collins, unlike Dr. Gordon, determined Claimant's condition was related to the August 26, 2008 work injury.

COR at 7.

As shown, the ALJ's placed great weight on the April 2009 AME report of Dr. Collins that showed pre-existing problems were aggravated by the accident. Should the ALJ on remand rely on this report, he would need to explain the significance of this report to the issue before him, since the NOD was issued based on Claimant's condition in October 2011, two years after the 2009 report.

CONCLUSION AND ORDER

The October 31, 2016 Compensation Order on Remand is VACATED because it is not supported by substantial evidence and is not in accordance with the law. This case is remanded to the Administrative Hearings Division for a new decision.

So ordered.