GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR

ODIE DONALD II
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 17-062

JAMES GREEN,
Claimant–Petitioner,

v.

DISTRICT OF COLUMBIA DEPARTMENT OF CORRECTIONS,
Employer-Respondent.

DEPT. OF EMPLOYMENT SERVICES
COMPENSATION REVIEW BOARD
2017 AUG 23 PM 12 33

Appeal from an June 1, 2017 Compensation Order on Remand
by Administrative Law Judge Fred D. Carney Jr.
AHD No. PBL No. 10-043B, DCP No. 30080837039-0001

(Decided August 23, 2017)

David J. Kapson for Claimant
Frank McDougald for Employer

Before HEATHER C. LESLIE, GENNET PURCELL and JEFFREY P. RUSSELL *Administrative Appeals Judges.*

HEATHER C. LESLIE for the Compensation Review Board.

DECISION AND REMAND ORDER

BACKGROUND

This case has been before the Compensation Review Board ("CRB") numerous times. The procedural history is unique and detailed and was sufficiently outlined in our prior Decision and Remand Order ("DRO") issued on February 28, 2017.[1] We need not repeat the history summarized in our prior orders and direct the parties to those decisions for a history of the case.

After summarizing the history and addressing the parties' arguments, the CRB in the DRO determined a remand was necessary because the Administrative Law Judge ("ALJ") had again misinterpreted the opinion of Dr. Gordon, as pointed out previously by the CRB. The CRB remanded, stating:

[1] *Green v. D.C. Dept. of Corrections*, CRB No. 16-155 (February 28, 2017). See also, *Green v. D.C. Dept. of Corrections*, CRB No. 12-175 (February 7, 2013).

> 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.

DRO at 6.

The CRB also ordered, with respect to Dr. Collin's opinion,

> ...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.

Id.

COR2 was issued on June 1, 2017 and denied Claimant's claim for relief, concluding the Employer met its burden of proof. Importantly, after addressing the CRB's remand instructions, the ALJ stated:

> Having no additional reasons for rejecting the report of Dr. Gordon, I am constrained to proceed without an acceptable basis to "impeach" his opinion. Therefore it is determined that Dr. Gordon's opinion is the most recent, based on his examination of Claimant and his review of the available medical history and therefore the most persuasive. It is well settled in this jurisdiction that the evidence used to modify or terminate benefits must be current and fresh in addition to being probative and persuasive of a change in medical status. *Mahoney, Supra.* Thus, having found Claimant's evidence deficient due to its staleness, I find and conclude that Employer has met it burden of showing by a preponderance of the evidence that the November 17, 2011, termination of Claimant's wage loss and medical benefits was appropriate. *Freddie Jones, v. D.C. Department of Corrections, Dir. Dkt.* No. 07-99 OHA No. PBL No. 97-14 ODC No. 312082 (December 19, 2000).

COR2 at 11.

Claimant appealed. Claimant first points out that the COR2 did comply with the CRB's remand instructions. Claimant argues, however, that the conclusion that the ALJ was constrained by the CRB is in error and must be reversed.

Employer opposes, arguing the COR2 is supported by the substantial evidence and should be affirmed.

ANALYSIS

It is important to note the current posture of the case. Claimant has only appealed the ALJ's handling of the third step of the *Mahoney* burden-shifting analysis where the ALJ must 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. *Mahoney v. D.C. Public Schools*, CRB No. 14-067 (November 12, 2014)(*en banc*)("*Mahoney*"). .

It is the third step that Claimant is appealing; that the COR2 did not weigh the evidence properly. As Claimant argues, the CRB's prior DRO required the ALJ on remand to do several things:

- Explain the inconsistency between the MRI and Dr. Gordon's report and how that inconsistency relates to Claimant's condition in October 2011;
- Explain why not having access to the motor vehicle accident records impeaches Dr. Gordon's opinion; and,
- Explain the significance of Dr. Collin's report, since the NOD was issued based on Claimant's condition in October 2011, two years after the 2009 report.

Claimant argues the ALJ did address the remand instructions in Claimant's favor and that the ALJ erred by his statement that he was "constrained" to reach a particular result. We agree.

A review of COR2 reveals a more detailed analysis regarding Dr. Gordon's opinions and the deficiencies noted in the prior DRO. The ALJ stated:

> Dr. Gordon's opinion was inconsistent with the April 5, 2010 MRI which indicated that there was anatomic damage to Claimant's back at L4-L5 subsequent to the work injury, which conflicts with Dr. Gordon's finding that as a result of the August 26, 2008 work injury, Claimant sustained no more than soft tissue injuries. The CRB has stated in a case under the Workers' Compensation Act DC Code 32-1501, *et. seq., Gracia* [sic] *v. Macy's* CRB No. 10-092, (2010), that it is acceptable to reject the medical report of a doctor that is inconsistent with medical imaging. Further Dr. Gordon did not have the benefit of Claimant's complete medical history. Dr. Gordon himself noted he did not have Claimant's medical records from George Washington University Hospital (GW) regarding his treatment for injuries after a car accident. The same reports were relied on by Dr. Carlini to conclude posttraumatic changes in Claimant's lumbar spine in September 2008 that was not present in April of the same year. (EE 3) The CRB also decided that it was necessary to explain the significance of Dr. Gordon not having the GW records regarding Claimant's car accident. In response, the answer lies in Dr. Gordan's own opinion wherein he states that:
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> > Obviously it would be extremely important to get all of those medical records regarding any injuries, treatment, or testing that he had performed prior to 08/26/08. He did tell the orthopedist that he went to after the injury that he had a workup from neck and back

> symptoms at George Washington prior to this injury earlier in the year 2008 where they think that he had some scans performed. However, it does not appear that the health care practitioner who was treating him requested all the medical records and radiographs studies that had been performed prior to 08/26/08. I think that it would be very important for such materials to be reviewed. (EE 2) (*Emphasis Added*)

COR2 at 9-10.

Not only did the ALJ explain the inconsistency between the MRI and Dr. Robert Gordon's opinion, but also used Dr. Gordon's opinion to explain how "extremely important" the past medical records would have been to Dr. Gordon's opinion had they been available.

Employer, in opposing Claimant's argument on this point, argues that Dr. Gordon's opinion makes it clear that surgery was not medically causally related to any "anatomical abnormalities" that were caused or aggravated by the work injury and that the ALJ's characterization of Dr. Gordon's opinion is incorrect. However, it is clear that the ALJ found notable that the MRI did show anatomic abnormalities after the work injury, contrary to Dr. Gordon's diagnosis of a strain. The ALJ's rejection of Dr. Gordon is sufficiently explained and supported by the substantial evidence in the record and satisfied the CRB's mandate.

The CRB also tasked the ALJ to explain the significance of Dr. Robert Collin's report, since the NOD was issued based on Claimant's condition in October 2011, two years after the 2009 report. On this the ALJ stated:

> Dr. Collins examined Claimant within a year of Claimant's August 26, 2008 work injury and he opined that Claimant had pre-existing asymptomatic degenerative changes in the neck and back that became symptomatic as a result of the work injury and subsequent back surgery. Dr. Collins explained the tangential relationship between Claimant's current complaints, the work injury and subsequent back surgery, which I find also to be related to Claimant's 2008 work injury. The reports of Claimant's treating physicians and Dr. Collins predate the IME of Dr. Gordon by almost two years.

COR2 at 10.

The ALJ erred in finding that the reports of the Claimant's treating physicians pre-date the IME by two years. Dr. Chee-Hahn Hung's last report in evidence is dated March 24, 2011, only several months before Dr. Collin's report, not several years and cannot be said to be stale.

However, this error is harmless, because the ALJ gave additional reasons why he found Dr. Collin's opinion persuasive.

After having addressed the CRB's instructions in the prior DRO, COR2 then states:

> The CRB has pointed out that the IME of Dr. Gordon is the most recent in time to the NOD which decided that Claimant's work related disability has resolved. In the case at bar, the CRB has rejected the arguments that: (1) earlier reports of Claimant's treating physicians and Dr. Collins outweigh Dr. Gordon's. Dr. Gordon's opinion was inconsistent with the MRI results of record, inconsistent with the reports of earlier treatment at GW hospital etc. These are essentially the same arguments Claimant made previously. Those arguments have been rejected by the CRB in its February 28, 2017 Decision and Remand Order.
>
> Having no additional reasons for rejecting the report of Dr. Gordon, I am constrained to proceed without an acceptable basis to "impeach" his opinion. Therefore it is determined that Dr. Gordon's opinion is the most recent, based on his examination of Claimant and his review of the available medical history and therefore the most persuasive. It is well settled in this jurisdiction that the evidence used to modify or terminate benefits must be current and fresh in addition to being probative and persuasive of a change in medical status. *Mahoney, Supra.* Thus, having found Claimant's evidence deficient due to its staleness, I find and conclude that Employer has met it burden of showing by a preponderance of the evidence that the November 17, 2011, termination of Claimant's wage loss and medical benefits was appropriate. *Freddie Jones, v. D.C. Department of Corrections, Dir. Dkt.* No. 07-99 OHA No. PBL No. 97-14 ODC No. 312082 (December 19, 2000).

COR2 at 12-13.

This is incorrect. The CRB did not constrain the ALJ to one conclusion in the prior DRO but remanded the DRO for further explanation of several key statements made in the prior orders that lacked support. This the ALJ did.

After further deliberations, the ALJ found persuasive the opinion of Claimant's treating physicians, Dr. Collins and the testimony of Claimant. Furthermore, the ALJ rejected the opinion of Dr. Gordon after further consideration. Thus, it cannot be said the Employer sustained its burden at the third step of the *Mahoney* analysis. The ALJ's denial of temporary total disability benefits from December 9, 2011 to the present and continuing is not supported by the substantial evidence in the record nor in accordance with the law.

CONCLUSION AND ORDER

The June 1, 2017 Compensation Order on Remand is REVERSED and REMANDED with instructions to enter an award in Claimant's favor.

So ordered.