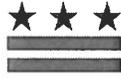


GOVERNMENT OF THE DISTRICT OF COLUMBIA  
Department of Employment Services

VINCENT C. GRAY  
MAYOR



DEBORAH A. CARROLL  
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 15-114

JEREMIAH ABU-BAKR,  
Claimant-Respondent,

v.

DISTRICT OF COLUMBIA DEPARTMENT OF PUBLIC WORKS,  
Self-Insured Employer--Petitioner.

Appeal of an June 17, 2015 Compensation Order on Remand by  
Administrative Law Judge Fred D. Carney, Jr.  
AHD No. PBL 11-038, DCP No. 30120819055-0001

DEPT. OF EMPLOYMENT  
SERVICES  
COMPENSATION REVIEW  
BOARD  
2015 DEC 14 AM 10 37

(Decided December 14, 2015)

Salvatore J. Zambri for Claimant  
Andrea G. Comentale for Employer

Before HEATHER C. LESLIE, LINDA F. JORY, *Administrative Appeals Judges* and LAWRENCE D. TARR, *Chief Administrative Appeals Judge*.

HEATHER C. LESLIE, for the Compensation Review Board.

**DECISION AND REMAND ORDER**

FACTS OF RECORD AND PROCEDURAL HISTORY

Claimant, a Motor Vehicle Operator for the Employer, sustained a work-related injury on March 10, 2010. The Public Sector Workers' Compensation Program accepted the claim and awarded wage loss and medical benefits.

On June 8, 2011 a Notice of Determination (NOD) was sent to Claimant, advising him that benefits were terminated effective July 8, 2011. Claimant requested a Formal Hearing, seeking restoration of benefits from July 8, 2011 to October 14, 2011. The sole issue presented for adjudication was the nature and extent of Claimant's disability. On March 19, 2014, a Compensation Order (CO) was issued granting Claimant's request for disability benefits.

Employer timely appealed the decision. In a Decision and Remand Order (DRO), the CRB remanded the case for application of the burden shifting scheme outlined *Mahoney v. D.C. Public Schools*, CRB No. 14-067, AHD No. PBL 14-004 (November 12, 2014) (*Mahoney*). The CRB also pointed out factual errors present in the CO which were to be addressed on remand.

A Compensation Order on Remand (COR) was issued on June 17, 2015. The ALJ concluded that Employer did not prove, by a preponderance of the evidence, that Claimant's condition had changed to warrant a suspension of benefits.

Employer appealed. Employer argues first, that Claimant did not satisfy his burden of showing reliable and relevant evidence that the condition had not changed, the second step in the *Mahoney* burden shifting analysis. Second, Employer argues the ALJ erred in concluding Employer did not satisfy its burden of proving, by a preponderance of the evidence, that Claimant's condition had changed warranted a suspension in disability benefits.

Claimant has not responded to Employer's Application for Review.

#### ANALYSIS

The scope of review by the CRB is limited to making a determination as to whether the factual findings of the Order are based upon substantial evidence in the record and whether the legal conclusions drawn from those facts are in accordance with the applicable law.<sup>1</sup> 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").

Turning to Employer's first argument, Employer argues the ALJ erred in determining that Claimant had satisfied the second prong of the *Mahoney* analysis, which is the following:

If the employer meets its initial burden, then the clamant has the burden of producing reliable and relevant evidence that conditions have not changed to warrant a modification or termination of benefits.

Employer takes issue with the ALJ's recitation of the facts as well as the cursory discussion on this point. When addressing Claimant's burden at the second step of the *Mahoney* analysis, the ALJ stated:

At the next step, Claimant must produce reliable and relevant evidence that his disabling condition related to the accepted claim has not resolved or lessened. Claimant posited evidence that he could only tolerate two weeks of work hardening. (CE 4) On August 12, 2011 Dr. Schreiber opines Claimant was unable to work. (CE 1) With this evidence, Claimant satisfied his burden of showing reliable and relevant evidence that the condition precedent to his return to work had not occurred and his condition has not resolved or lessened.

COR unnumbered at 5.

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<sup>1</sup> "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).

While Dr. Schreiber does opine Claimant cannot work, Dr. Schreiber does not relate his inability to work to the work injury. What is problematic is that Claimant may have suffered a new injury in May 2011, an argument put forth by Employer at the Formal Hearing. We agree with Employer that without a more detailed analysis, including addressing Claimant's potential new injury, the conclusion that Claimant satisfied the second prong of the *Mahoney* test is not in accordance with the law.

We also agree with Employer that the ALJ's misunderstanding of Claimant's work hardening attendance/completion requires remand. The ALJ concluded, when determining if Employer met its burden at the third step of the *Mahoney* analysis, that,

In the third and final step, Employer must show by a preponderance of the evidence that Claimant's benefits should be terminated based on a change of condition. Although Employer contends that Claimant was capable or returning to work by July 1, 2011 and, therefore, no longer met the requirements for wage loss or medical benefits, the facts in this case indicate otherwise. Employer must provide clear evidence that Claimant was returned to work. In this case, Claimant's return to work was subject to a specific condition, the completion of three weeks of work hardening. In this case, Claimant did not complete all three weeks of the work hardening program. The Physical Therapy Clinical Notes for the work hardening program show that on May 9, 2011, Claimant presented with frequent aching pain, rating of a 7 on a 0-10 scale, where 0 is not severe at all and 10 is extremely severe and that Claimant exhibited some weakness because his goal was to have no weakness by next re-evaluation. (EE 6) Employer has not shown that Claimant completed the work hardening program. Moreover, contrary to Dr. Levitt's findings of a lack of left knee weakness, the Physical Therapy Clinical Notes reference left knee weakness and the late May 2011 stair injury evidences left knee weakness. Therefore, Employer has not established a change to the left knee condition sufficient to warrant a change in disability benefits.

COR, unnumbered at 6.

We agree with Employer that the ALJ erred when stating Claimant did not complete three weeks of work hardening. A review of the evidence supports Employer's argument that contrary to the ALJ's assertion, Claimant completed over three weeks of work hardening, starting on April 12, 2011 and ending on May 9, 2011, completing 15 of 15 sessions. Thus, pursuant to Dr. Levitt's recommendation, Claimant did complete work hardening. Indeed, the May 9, 2011 report from Melwood Rehabilitation Center notes Claimant was to follow up with a physician to determine any need to continue with work hardening and an FCE. We further agree with Employer that the ALJ was incorrect when he described the May 9, 2011 report as showing Claimant to have a pain rating of 7. A review of that report reveals the following paragraph:

Patient experiences very tolerable pain (3) while working for longer than 30 minutes. Based on a most recent evaluation and/or outcomes of the assessment tools, the patient's capacity for working is 80% of normal. Patient experiences mild pain (2) while standing and walking for longer than 10 minutes. Based on the most recent

evaluation and/or outcomes of the assessment tools, the patient's capacity for standing and walking is 95% of normal.

Employer's exhibit 6.

We also agree with Employer that the ALJ's determination that the "late May 2011 stair injury evidences left knee weakness" causes confusion. The ALJ does not cite to any evidence to support such a conclusion. As we stated in our prior DRO,

As we are remanding the case, we caution the ALJ that and conclusions made by the ALJ determining whether Claimant's wage loss is caused by the work injury, are dependent opinion the experts and evidence submitted. It is settled that ALJ's cannot substitute a legal opinion for a medical opinion.<sup>2</sup> We point out the above statements as after reviewing those particular reports, we conclude there is some merit to the Employer's argument. We are quick to note this conclusion is not meant to sway the ALJ's ultimate conclusion, only that the ALJ must base any conclusions, even those related to medical opinions, upon the evidence and not just conjecture. Upon remand, the ALJ is to identify where in the record Dr. Mess and Dr. Schreiber opined that the Claimant's work injury caused the claimed disability.

We also caution the ALJ upon remand, that Dr. Levitt's opinion occurred before the re-injury. Any comparisons to other later medical reports by other physicians should be made with this fact in mind in order to avoid any further confusion or appeals.

DRO at 5.

We are forced to remand the case again, with the same instructions. The ALJ is to reanalyze the second and third step of the *Mahoney* burden shifting scheme, supporting any conclusions with the medical opinions and other evidence in the record, including the impact the May 2011 stair incident may have caused on Claimant's knee.

#### CONCLUSION AND ORDER

The June 17, 2015 Compensation Order on Remand is not supported by the substantial evidence in the record and in not accordance with the law. It is VACATED and REMANDED for further consideration in accordance with the discussion above.

*So Ordered.*

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<sup>2</sup> See *Seals v. The Bank Fund Staff Federal Credit Union*, CRB No. 09-131, AHD No. 144, OWC No. 653446 (May 20, 2010).