

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR



F. THOMAS LUPARELLO
DIRECTOR

COMPENSATION REVIEW BOARD

CRB 14-085

**LARRY LEWIS,
Claimant-Respondent,**

v.

**DISTRICT OF COLUMBIA PUBLIC SCHOOLS,
Employer-Petitioner.**

Appeal from an June 5, 2014 Compensation Order
issued by Administrative Law Judge Fred D. Carney, Jr.
AHD No. PBL 12-044A, DCP No. 761020-0001-1999-0039

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2014 NOV 26 PM 1 06

Harold L. Levi for Claimant
Margaret P. Radabaugh for Employer

Before: Jeffrey P. Russell, Heather C. Leslie, *Administrative Appeals Judges*, and Lawrence D. Tarr, *Chief Administrative Appeals Judge*.

Jeffrey P. Russell for the Compensation Review Board.

DECISION AND REMAND ORDER

This case is before the Compensation Review Board (CRB) on the appeal filed by Employer, District of Columbia Public Schools, challenging the June 5, 2014 Compensation Order (CO) issued by an Administrative Law Judge in the Administrative Hearings Division of the District of Columbia Department of Employment Services (DOES). In the CO, the ALJ granted Claimant's request for reinstatement of Claimant's temporary total disability benefits. For the reasons stated, we must VACATE the order and REMAND this matter for further consideration.

BACKGROUND AND FACTS OF RECORD

Claimant Larry Lewis sustained injuries while employed as a custodian for Employer on June 21, 1974. The claim was initially accepted as compensable, and Employer provided medical care and temporary total disability benefits. Following an independent medical evaluation (IME) performed at Employer's request, temporary total disability benefits were terminated, and Claimant's request that they be reinstated was denied by a hearing examiner in the Department of Employment Services (DOES), which denial was appealed to the Employee Compensation

Appeals Board (ECAB)¹, which remanded the matter to DOES on August 27, 1996, with instructions to allow Claimant to submit additional evidence, an MRI, demonstrating that he had two herniated discs. On January 13, 1997, a hearing examiner in DOES ordered the reinstatement of Claimant's temporary total disability benefits, and further ordered that Claimant be provided "an examination by an impartial medical specialist" to determine whether Claimant was permanently totally disabled.

On April 12, 2012, Employer had Claimant evaluated by Dr. Steven S. Hughes, an orthopedic surgeon. Dr. Hughes authored a report, with an addendum dated October 19, 2012, in which he opined that Claimant had recovered from the work injury and was capable of returning to full time employment without restriction. Based upon these reports, Employer terminated Claimant's ongoing temporary total disability benefits.

Claimant presented his request for reinstatement of those benefits to an Administrative Law Judge (ALJ) in DOES on March 27, 2013. On June 5, 2014, the ALJ issued a Compensation Order (CO) reinstating those benefits. Employer appealed the CO to the Compensation Review Board (CRB), which appeal Claimant has opposed.

Because the ALJ failed to properly evaluate the evidence in a manner consistent with the burden shifting protocol established for the purpose of analyzing modification requests, we vacate the CO and remand for further consideration and explication.

DISCUSSION²

Once the government-employer has accepted and paid a claim for disability benefits, it has the burden of proving by a preponderance of the evidence that conditions have changed such that the claimant no longer is entitled to the benefits.

Where the government-employer is seeking to prove a change in circumstances, i.e., that conditions have changed such that the employee is no longer is entitled to disability benefits or is entitled to a lower level of disability benefits, as the party asserting the change, it has the burden of proving its claim. A three step analysis as described in *Smith v. D.C. Department of Public Works*, CRB 13-160, AHD PBL No. 08-035B, DCP No. 761020-0005-20004-0004 (June 3, 2014) is consistent with the long-standing rule that the government-employer has the burden to prove the modification or termination. Those steps are:

1. The government-employer first has the burden of producing current and probative evidence that the claimant's condition has sufficiently changed to warrant a modification

¹ Prior to 1998, ECAB had responsibility for ruling on appeals of final Compensation Orders involving D.C. government employees.

² 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. 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").

or termination of benefits. If it fails to present this evidence then the claim for modification fails, and employee's benefits continue, unmodified.

2. Otherwise, step two shifts the burden to the employee to produce reliable and relevant evidence that conditions have not changed to warrant a modification or termination of benefits. If the employee fails to do so, the modification is granted, and benefits are either reduced or terminated, as the case may be.
3. However, if this burden is met, then the evidence is 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.

See, Mahoney v. District of Columbia Public Schools, CRB No. 14-067, AHD No. PBL 14-004, DCP No. 76000500012005-008, (sitting *en banc*, AAJ Jones and AAJ McCoy, *dissenting*) (July 22, 2014); *see also Smith v D.C. Department of Public Works*, CRB 13-160, AHD PBL No. 08-035B, DCP No. 761020-0005-20004-0004 (June 3, 2014).

In the instant case, the ALJ stated the posture of the burdens of proof as follows:

In the instant matter, Employer must produce evidence that supports a reasonable basis for terminating Claimant's benefits. Upon such a showing, the burden of production shifts to Claimant to show that Claimant's condition has not changed such that a termination of benefits is warranted. If Claimant meets that burden then the burden shifts back to the Employer.

CO, p. 4.

We shall assume for the purposes of our analysis that the ALJ recognized that the final step includes weighing the evidence and assessing whether Employer has proved its case by a preponderance of the evidence. Assuming this, the ALJ's description is accurate.

The CO continues to describe the evidence adduced by Employer, being characterized as "a four page report" dated April 12, 2012 by Dr. Steven S. Hughes, an orthopedic surgeon, and an addendum dated October 12, 2012, in which Dr. Hughes states that "the prognosis is static and the claimant is at MMI for the 1974 injury, and indeed no further treatment is medically necessary for that resolved injury. He can work at a full duty status relative to the resolved 32 year old injury" and "as stated in the 4/12/12 IME and review of his job description, he should resume full duty work activities relative to the remote resolved injury." CO, p.5.

At this point in the CO, and under the established analytic protocol as set forth in *Mahoney, supra*, and as described by the ALJ in the CO, it was incumbent upon the ALJ to assess this evidence and determine whether it constitutes "current and probative evidence that claimant's condition has sufficiently changed to warrant a modification or termination of benefits." At this stage of the analysis, it was the ALJ's obligation to determine whether, based solely upon these reports, Employer has met its initial burden. In other words, assuming that what Dr. Hughes has

stated is sufficiently recent and is accurate, is Claimant entitled to continue to receive ongoing temporary total disability benefits. This first stage analysis was not done.

Rather, the ALJ immediately moved on to a discussion of what he determined “the record overwhelmingly established”, being that Dr. Hughes’s reports contain a reference to “ventral scar tissue” and that the record is “replete with requests from Claimant’s treating physicians for Claimant to have another MRI” which “Employer has not authorized”, and makes reference to an “H&AS order to have a[n impartial] permanent total disability evaluation” performed, which arguably at least has not been done.

We are not unsympathetic to the ALJ’s suggestion that it is somehow unfair or at least problematic that Employer seeks this modification without Claimant having obtained the benefit of the “impartial disability evaluation” that has been ordered³, if that is in fact the case. However, it appears beyond cavil that on its face, an opinion from an orthopedic surgeon who has examined the Claimant less than a year prior to the hearing⁴, reviewed a job description purportedly outlining the requirements of Claimant’s position, and rendered an opinion that Claimant is capable of returning to that position without restriction is sufficient to establish that his condition is no longer such that he is entitled to ongoing temporary total disability benefits.

Accordingly, because the analysis was not performed according to the legal procedures established therefor we are compelled to vacate the denial of the request for modification, and find that Employer’s evidence at a minimum meets its initial burden, and remand the matter to the ALJ for further consideration of the claim in a manner consistent with the three step process as discussed in *Mahoney*.⁵

³ We do not at this time accept or reject Employer’s argument that referring Claimant to Dr. Hughes for an AME or IME constitutes compliance with the earlier order for an “impartial” disability examination, and leave to the ALJ on remand the discretion to consider whether the failure of said impartial examination to have been conducted has an impact upon the validity of Dr. Hughes’s opinions, when considering the record as a whole, should the third stage be reached. Such an analysis will require that the ALJ address, in the first instance, why the referral to Dr. Hughes does not constitute compliance with that order, and if not, whether and how the failure to comply with the order is relevant to the validity of Dr. Hughes’s opinions.

⁴ The formal hearing in this case occurred March 27, 2013.

⁵ We are also not unsympathetic to the fact that it could be argued that the ALJ’s error is harmless, since he ultimately appears to have weighed the evidence and found it less persuasive than the other evidence in the record, hence it fails the “preponderance” test. However, this argument permits the ALJ to undervalue Dr. Hughes’s report *ab initio* by entirely dismissing it as being inadequate to meet Employer’s initial burden without having to weigh it against other evidence. The second stage of analysis (and third if needed) are required so that the ALJ can explain why the specific matters to which he refers (i.e., the putative lack of an impartial permanency evaluation and the failure to authorize an additional MRI) cast doubt upon Dr. Hughes’s otherwise fairly straightforward opinion.

CONCLUSION AND ORDER

The June 5, 2014 Compensation Order is VACATED and this matter is REMANDED to the Administrative Hearings Division for proceedings consistent with this Decision and Remand Order.

FOR THE COMPENSATION REVIEW BOARD:



JEFFREY P. RUSSELL
Administrative Appeals Judge

November 26, 2014

DATE