GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR

LISA MARÍA MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 13-114

DAVID ROBINSON,
Claimant–Respondent,

v.

DISTRICT OF COLUMBIA DEPARTMENT OF YOUTH REHABILITATION SERVICES,
Employer–Petitioner.

Appeal from a Compensation Order issued August 29, 2013 by
Administrative Law Judge Leslie A. Meek
AHD PBL No. 13-007, DCP No. 76011-0008-1999-0004

Frank Mc Dougald, for the Petitioner
Harold L. Levi, for the Respondent

Before JEFFREY P. RUSSELL, HENRY W. MCCOY and HEATHER C. LESLIE, *Administrative Appeals Judges*.

JEFFREY P. RUSSELL, for the Compensation Review Board:

DECISION AND REMAND ORDER

BACKGROUND

This case is before the Compensation Review Board (CRB) on the request of the District of Columbia Department of Youth and Rehabilitation Services (Employer) for review of a Compensation Order issued August 29, 2013 by an Administrative Law Judge (ALJ) in the hearings and adjudications section of the District of Columbia Department of Employment Services (DOES). That Compensation Order was issued following a formal hearing conducted March 21, 2013, for the purpose of determining David E. Robinson's (Claimant's) entitlement to benefits under the District of Columbia Comprehensive Merit Personnel Act of 1978, as amended, D.C. Code § 1-623.01, *et seq.*, (the Public Sector Workers' Compensation Act, or "PSWCA").

In that Compensation Order, the ALJ ordered that Claimant's disability compensation benefits, which had been terminated as of October 11, 2012, be reinstated. Employer appealed the Compensation Order to the CRB, to which appeal Claimant has filed an opposition.

Because the ALJ's decision is based upon a clear misreading of critical evidence, we vacate the award and remand for further consideration.

STANDARD OF REVIEW

The scope of review by the CRB, as established by the PSWCA and as contained in the governing regulations, is generally limited to making a determination as to whether the factual findings of a written 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. Comprehensive Merit Personnel Act of 1978, as amended, D.C. Code § 1-623.01, *et seq.*, at § 1-623.28(a), and *Marriott International v. D.C. DOES*, 834 A.2d 882 (D.C. 2003). Consistent with this standard of review, the CRB and this review panel are constrained to 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.

DISCUSSION AND ANALYSIS

Claimant worked for employer as a painter. It is undisputed that he injured his left knee on July 16, 1998 when he tripped over a drop cloth and fell. There is also no dispute that following the accident, Claimant has undergone three surgical procedures to the knee, including a menisectomy in September 1998, a debridement in 1999, and most recently a total knee replacement on January 4, 2010. The parties also agree that Claimant has not returned to work and has been receiving disability compensation payments from the date of the accident until their termination on October 11, 2012.

Where a claim has been accepted and benefits paid under the PSWCA, in order to modify or terminate those benefits, it is the employer's burden to present substantial and recent medical evidence to support a modification or termination of benefits.[1] Once the employer has produced such evidence, the burden shifts to the claimant to produce substantial evidence that the work injury continues to be disabling. If the claimant does so, the evidence is to be weighed and the claimant must demonstrate entitlement to the requested benefits by a preponderance of the evidence. As the District of Columbia Court of Appeals has stated:

> In workers' compensation cases where, as here, there is no presumption of compensability, [footnote omitted] the burden of proof "falls on the claimant to show

[1] In a public sector case, once a claim for disability compensation has been accepted and benefits have been paid, the government must adduce persuasive evidence sufficient to substantiate a modification or termination of an award of benefits. *Lightfoot v. D.C. Department of Consumer and Regulatory Affairs,* ECAB No. 94-25 (July 30, 1996); *Scott v. Mushroom Transportation,* Dir. Dkt. No. 88-77 (June 5, 1990). Employer initially must present substantial and recent medical evidence to support a modification or termination of benefits payable as a result of disability caused by those injuries. *Jones v. D.C. Department of Corrections,* Dir. Dkt. No. 07-99, OHA No. PBL97-14, ODC No. 312082 (December 19, 2000).

> by a preponderance of the evidence that his or her disability was caused by a work-related injury." *McCamey v. District of Columbia Dep't of Employment Servs*., 947 A.2d 1191, 1199 n.6 (D.C. 2008) (en banc) (citing *Washington Hosp. Ctr. v. District of Columbia Dep't of Employment Servs*., 744 A.2d 992, 998 (D.C. 2000)).

D.C. Department of Mental Health v. DOES, 15 A.3d 692 (D.C. 2011), at 698.

The basis of the termination was an Additional Medical Evaluation (AME) performed on May 8, 2012 by Dr. Stanley Rothschild. In his report, EE 2, Dr. Rothschild opined:

> Based solely on the work injury of July 16, 1998, the patient can return to work as a painter. Having had, however, a total knee replacement, I think this would limit him from doing all that he needs to do. For example, because of his total knee replacement, he should not be climbing ladders, crawling, kneeling, and many other activities that would require pulling and extending himself in certain directions. Certainly, with a total knee replacement, it would be possible for him to do some light capacity work. I therefore believe that his continuing disability is solely related to the progressive osteoarthritis of his knee and not related to the accident of July 16, 1998.

In reaching the conclusion that Claimant's benefits should be restored, the ALJ wrote:

> Dr. Rothschild has opined Claimant is now capable of returning to work as a painter yet states, because of his total left knee replacement he is restricted from climbing ladders, kneeling and performing activities that require pulling and extending himself in "certain" directions. Employer relies upon Dr. Rothschild's opinion to support its modification of Claimant's benefits however, the functional restrictions that Dr. Rothschild has placed on Claimant are all activities that are required for the performance of a painter's work. Claimant has testified that as a painter he is required to lift heavy objects, kneel, bend, stoop and climb. (TR p. 33). It is unreasonable to expect Claimant to be capable of performing as a painter with the restrictions Dr. Rothschild has determined Claimant must abide. Dr. Rothschild's opinion that Claimant can return to work as a painter is rejected.
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> Employer's evidence is not persuasive or substantial and does not substantiate a termination of Claimant's benefits. Employer has failed to meet its burden of proof regarding the termination of Claimant's benefits.

Compensation Order, page 6.[2]

Employer argues that the ALJ's reasoning is misplaced in that Dr. Rothschild has not expressed the opinion that Claimant can return to work as a painter. Rather, Employer argues that Dr. Rothschild

[2] Nowhere in the Compensation Order is there a discussion of what the burden of proof is, or who ultimately bears it once the employer has adduced "substantial" and "persuasive" evidence substantiating the termination of benefits. We address this later in the body of this Decision and Remand Order.

is stating that the limitations on Claimant's functioning which disable him are completely unrelated to the work injury, and by implication, that the knee replacement also was unrelated to the injury.

Claimant disagrees, and argues that Dr. Rothschild's opinion is as the ALJ described it, is inconsistent, and hence its rejection is supported by substantial evidence.

We agree with Employer in this instance. Although not as artfully worded as would be optimal, the only fair way to read Dr. Rothschild's opinion is that although Claimant is disabled from engaging in activities that a painter is required to perform, his lack of capacity is unrelated to the knee injury sustained at work, but rather the result of progressive osteoarthritis which ultimately required knee replacement surgery.

The first two sentences quoted above, "Based solely on the work injury of July 16, 1998, the patient can return to work as a painter", and "Having had, however, a total knee replacement, I think this would limit him from doing all that he needs to do", make apparent that the doctor stating that were it not for the unrelated (in his opinion) knee surgery, Claimant could return to work as a painter. The phrase "based solely on the work injury of July 16, 1998" in the first sentence would make no sense if what the doctor meant to convey, unmodified, was the opinion that "the patient can return to work as a painter." The doctor is saying that, if the only medical conditions affecting this patient were the ones caused by the work injury in 1998, this patient could return to being a painter. That the doctor is not opining that Claimant can return to work as a painter is evident in that the doctor immediately adds the "however" sentence, explaining that because of the knee replacement, Claimant is "limit[ed] in all that he needs to do [as a painter]."

We note that the Compensation Order fails to follow the burden shifting scheme described above. A claimant who has had a claim accepted and received benefits is entitled to continue to receive them unless the employer produces substantial and recent medical evidence to support a modification or termination of benefits payable as a result of disability caused by those injuries. However, once such evidence is produced, it remains the claimant's ultimate burden to prove entitlement to those benefits by presenting evidence that is superior to that of the employer, under the preponderance standard.

Were that the only error in this case, we might be able to deem it harmless, given that, as Claimant points out in this appeal, the ALJ appears to have weighed the evidence rather than merely accepting Employer's AME or placing some lesser burden upon Claimant than is proper. However, as the CRB has ruled in the past, "Where, as here, the fact finder so misapprehends the substance and meaning of a piece of evidence, and then relies upon that misapprehension as the principal basis of the ultimate decision, the decision can not be said to be supported by substantial evidence." *Crawford v. National Rehabilitation Hospital*, CRB No. 11-071, AHD No. 10-380, OWC 625645 (August 26, 2011).

The misreading of Dr. Rothschild's report is a fundamental basis for the decision contained in the Compensation Order, which compels us to vacate the reinstatement and remand this matter for further consideration.

CONCLUSION AND ORDER

The determination that Dr. Rothschild is of the opinion that Claimant can return to work as a painter is not supported by substantial evidence. The reinstatement of Claimant's disability benefits is vacated, and the matter is remanded for further consideration of the claim in a manner consistent with the aforegoing Decision and Remand Order.

FOR THE COMPENSATION REVIEW BOARD:

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JEFFREY P. RUSSELL
Administrative Appeals Judge

December 5, 2013
DATE