GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

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ACTING DIRECTOR

DEPT. OF EMPLOYMENT SERVICES
COMPENSATION REVIEW BOARD
2014 NOV 12 PM 10 50

COMPENSATION REVIEW BOARD

CRB 14-067

RONALD MAHONEY,
Claimant-Respondent,

v.

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,
Employer.

Appeal from an April 23, 2014 Compensation Order
by Administrative Law Judge Fred D. Carney, Jr.
AHD No. PBL 14-004, ORM/PSWCP No. 76000500012005-008

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

Before: Lawrence D. Tarr, *Chief Administrative Appeals Judge*, Melissa Lin Jones, Heather C. Leslie, Jeffrey P. Russell, and Henry W. McCoy, *Administrative Appeals Judges*.

Lawrence D. Tarr, *Chief Administrative Appeals Judge*, for the Compensation Review Board. Melissa Lin Jones and Henry W. McCoy, *dissenting*.

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 April 23, 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 an Award restoring his temporary total disability benefits. For the reasons stated, we must VACATE the award and REMAND this matter.

BACKGROUND AND FACTS OF RECORD

Claimant Ronald Mahoney has worked for Employer for many years and has had several accidents. As found by the ALJ:

> Prior to the October 19, 2004, work injury, Claimant sustained multiple work related injuries. I find in 1968, Claimant sustained the first work related injury

> when he was involved in a motor vehicle accident. His claim was accepted and Claimant was treated with traction at Hadley Hospital and he remained off work until 1977. March 29, 1979, Claimant sustained injury to his lumbar spine. On June 14, 1984, Claimant sustained a back injury which WC accepted. I find Dr. Rida N. Azer, orthopedic surgeon, treated Claimant for his 1984 injury and diagnosed Claimant with degenerative disease and acute lumbar strain. I find Claimant was again treated conservatively by Dr. Azer with physical therapy, home exercise and rest from work. Claimant was out from work from June 16, 1984 until July 30, 1984, for the June 14, 1984, work injury. I find that on June 21, 1985, Claimant sustained cervical and lumbar strains in the performance of his duties. I find Claimant was off work from June 24, 1985 until August 12, 1985 with wage loss and medical benefits.

CO at 2.

The present matter concerns an October 19, 2004 accident at work. On that day, Claimant was working for Employer as a transportation supervisor. Claimant injured his back when he slipped and fell down some steps while exiting the trailer in which his office was located. Employer accepted Claimant's workers' compensation claim and paid him temporary total disability and medical benefits from the date of injury until November 15, 2012.

The medical record established that Claimant received emergency room treatment and then came under the care of several doctors associated with Greater Metropolitan Orthopedics. Dr. Edward Rabbitt diagnosed a lumbosacral strain with probable radiculopathy and herniated nucleus pulposis and treated Claimant until mid-2006. His associate, Dr. Alan Schreiber, began treating Claimant in mid-2006 and diagnosed stenosis secondary to degenerative spondylosis and facet hypertrophy and recommended surgery. Another doctor at Greater Metropolitan Orthopedics, Dr. Jeffrey Sabloff reported Claimant had early degeneration but no evidence of disk herniation so no surgery was performed.

Claimant had to discontinue treatment with the doctors at Greater Metropolitan Orthopedics when Employer advised Claimant that those doctors no longer were authorized panel doctors. Claimant then came under the care of another orthopedic surgeon, Dr. Easton Manderson. Dr. Manderson diagnosed discogenic disease, spondylosis, bulging discs at L2, L3 and L5-S1, and bilateral neuroforaminel stenosis with disc osteophytes.

Claimant stopped treating with Dr. Manderson in December 2012 when he no longer was an authorized panel doctor. On February 4, 2013, Claimant came under the care of Dr. Lori E. Nelson. Dr. Nelson also diagnosed lumbar degenerative disease, stenosis and spondylosis.

On May 31, 2001 and September 5, 2013, Employer had Claimant examined by Dr. Mark Scheer for Additional Medical Examinations (AME). In 2001, Dr. Scheer opined that Claimant's problems were not caused by the work-related accident but were either age-related or due to pre-existing conditions.

After his 2013 AME Dr. Scheer opined that Claimant's then current medical condition was not causally related to a work accident. After receipt of this report, Employer notified Claimant his benefits would be ended as of September 5, 2013. Claimant sought reconsideration and upon further review, Employer upheld its decision to end benefits. Benefits were ended as of November 15, 2014. Thereafter, Claimant filed for a formal hearing.

A formal hearing was held in February 2014 and the ALJ issued his CO on April 23, 2014, reinstating Claimant's benefits. In reaching his decision, the ALJ utilized a three-step burden shifting analysis:

> Once a claim for disability compensation has been accepted and benefits paid, in order to prevail at a formal hearing, Employer must adduce persuasive evidence sufficient to substantiate the modification or termination of an award of benefits. The holding of the Employees' Compensation Appeals Board (ECAB) is often recited: that once government-employer has accepted a claim of disability compensation, and has actually paid benefits, employer must adduce persuasive medical evidence sufficient to substantiate a modification or termination of an award of benefits. In addition, ECAB has held the evidence relied upon to support a modification or termination of compensation benefits must be current and fresh in addition to being probative and persuasive of a change in medical status.
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> * * *
>
> The WC's burden is one of production and requires an evaluation of the WC's evidence standing alone without resort to evaluating or weighing the injured worker's evidence in conjunction thereto for if the DCP fails to sustain its burden, the injured worker prevails outright. However, if the DCP meets its burden, then the burden shifts to the injured worker to show through reliable, relevant, and substantial medical evidence that her physical condition has not changed and that benefits should continue. If the injured worker meets her burden, the medical evidence is weighed to determine the nature and extent of disability, if any.

CO at 4-5. (Citations omitted).

The ALJ held

> Based upon a review of the record evidence as a whole, I find and conclude Employer has failed to present substantive evidence of a change in Claimant's condition sufficient to modify benefits.[1]

CO at 7.

Employer timely appealed. On review, Employer argues that the ALJ's award should be reversed for several reasons; the ALJ improperly applied the burden-shifting scheme for public sector cases involving modification or termination of a claimant's benefits, the

[1] It appears the ALJ inadvertently used the word "substantive" when he meant to use "substantial."

ALJ's finding that Claimant continues to suffer from a work-related injury is not supported by substantial evidence, and the ALJ improperly applied the treating physician preference.

Claimant timely filed an Opposition. Claimant first argues that the ALJ's decision should be affirmed because Employer did not meet its burden at the first step of the burden-shifting analysis. Claimant, while acknowledging inconsistencies in the reported cases, further argues that under any analysis, the ALJ's decision reinstating benefits is supported by substantial evidence. Lastly, Claimant asserts the ALJ properly gave evidentiary preference to the treating physicians.

EN BANC REVIEW

On July 22, 2014, the parties were advised that this case would be decided by the CRB sitting *en banc*. Authority for CRB *en banc* review is found in 7 DCMR § 255.8:

> Where two or more Review Panels disagree concerning the resolution of an issue, the Chief Administrative Appeals Judge may direct that the issue be reviewed and resolved by the full Board sitting en banc. In such instance, official action of the full Board can be taken only on the concurring vote of at least three Board members.

The letter advising the parties of *en banc* review noted there have been inconsistent panel decisions regarding the burden-shifting analysis in public sector cases for the modification or termination of benefits for a claim that has been accepted by the Employer. For example, compare *Smith v. D.C. Department of Public Works*, CRB 13-160 (June 3, 2014) with *Workcuff v. D.C. Housing Authority*, CRB No. 12-187(1) (August 30, 2013).

DISCUSSION

An early reported case from the CRB that dealt with the issue before us is *Toomer v. D.C. Department of Corrections*, CRB No. 05-202, OHA No. PBL 98-048A, DCP No. LT5-DOC001603 (May 2, 2005) which adopted the precedent from the Employee's Compensation Appeals Board (ECAB).[2] A later decision described the *Toomer* holding:

> *Toomer* established that the CRB would continue to apply the longstanding rule previously enunciated by the now abolished Employee's Compensation Appeals Board (ECAB) in *Chase v. District of Columbia Department of Human Services,* ECAB No. 82-9 (July 9, 1992), and later adopted by the Director of the Department of Employment Services (DOES) in *Jones v. District of Columbia*

[2] Prior to 1998, ECAB had responsibility for ruling on appeals of final Compensation Orders involving D.C. government employees. The reference in the *Williams* decision to ECAB being abolished was an inartful statement regarding ECAB's role in deciding appeals of District of Columbia's employee injury claims. While ECAB does not decide workers' compensation appeals for the District of Columbia, it continues to adjudicate appeals of Federal employee injury claims.

> *Department of Corrections,* Dir. Dkt. No. 07-99, OHA No. PBL 97-14, ODC No. 312082 (December 19, 2000), among other cases. Under that rule, once a claim for benefits has been accepted by the District of Columbia government's administrator of the Act, and has paid benefits for that claim, the burden of proof which normally rests with a claimant to establish a causal relationship between a condition and the claimant's employment is shifted to the employer to demonstrate a change of conditions has occurred sufficient to terminate or otherwise reduce those benefits.

Williams v. D.C. Dept. of Parks and Recreation, CRB 08-026 at footnote 2, AHD No. PBL 07-029, PBL/DCP No. 761013-0001-2005-0007 (Dec. 13, 2007).

It must be noted, as Claimant's counsel correctly points out in his brief, that the AHD and CRB decisions with respect to this issue have not been consistent. While almost all of the decisions recognize that DOES has adopted ECAB's rule that Employer has the burden of proof to prove the modification or termination and that Employer's claim fails if it does not present current and probative evidence to support the modification or termination, the case law is inconsistent as to what happens if Employer meets its initial burden of persuasion.

For example, the CRB's 2005 *Toomer* decision and the 2007 *Williams* decision utilized a single step in their analyses that placed the burden of proof on the employer. Many later cases utilized a three-step analysis. This passage from *Gaston Jenkins v. D.C Dept. of Motor Vehicles*, CRB No. 12-098, AHD No. PBL 11-049, DCP No. 761019000120060005 (August 8, 2012) is representative of this analysis:

> It is well-settled in this jurisdiction that once the DCP accepts an injured worker's claim as compensable, the DCP bears the initial burden to demonstrate a change in the injured worker's medical condition such that disability benefits need to be modified or are no longer warranted and must be terminated. 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.
>
> The DCP's burden is one of production and requires an evaluation of the DCP's evidence standing alone without resort to evaluating or weighing the injured worker's evidence in conjunction thereto for if the DCP fails to sustain its burden, the injured worker prevails outright. However, if the DCP meets its burden, then the burden shifts to the injured worker to show through reliable, relevant, and substantial medical evidence that her physical condition has not changed and that benefits should continue. If the injured worker meets her burden, the medical evidence is weighed to determine the nature and extent of disability, if any.

There have been several recent cases that place the ultimate burden of proof on the Claimant. Two recent cases that are representative of these cases are *Nicholas v. D.C. Public Schools*, CRB No. 08-162, AHD No. PBL 06-090, DCP/ODC No. 760002-2002-12 (March 29, 2009) and *Workcuff v. D.C. Housing Authority* CRB 12-187 (1), AHD No. PBL12-022, DCP No. 761001000120060006 (October 25, 2012). (Response to Claimant's Motion for Reconsideration).

In the *Nicolas* case, the CRB stated that if the employer met its burden at the first step, then

> the burden of production shifts to the claimant to show that his/her condition has not changed such that a modification is or termination of benefits is warranted.

As authority for this holding, the CRB did not cite any ECAB, CRB, or DCCA decision. Rather, the *Nicholas* panel cited as authority an AHD decision, *Boyd v. D.C. Corrections*, AHD No. PBL 06-068, DCP No. 761032-0001-1999-0054, (April 9, 2007). The AHD *Boyd* decision cited no authority for this holding. We find *Nicolas* and *Boyd* to be of no precedential value.

Workcuff is a second case that differs from the long-established analysis. Instead of utilizing a second step that had the burden of production on the claimant and a third step that had the burden of proof on the employer, the *Workcuff* panel's analysis ended with a second step that placed the burden of proof on the claimant to prove entitlement by a preponderance of the evidence:

> Mr. Workcuff relies on *Toomer* for the proposition that if the government meets its initial burden, the burden on the claimant is "to show through reliable, relevant and substantial medical evidence that his physical condition has not changed and that benefits should continue;" however, *Toomer* has been abrogated by several D.C. Court of Appeals cases that make it clear:
>
>> In workers' compensation cases where, as here, there is no presumption of compensability, [footnote omitted in original] the burden of proof "falls on the claimant to show 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 [footnote omitted] (D.C. 2008) (*en banc*) (citing *Washington Hosp. Ctr. v. District of Columbia Dep't of Employment Servs.*, 744A.2d 992, 998 (D.C.2000)).

In a footnote to this passage the CRB panel in *Workcuff* cited *D.C Department of Mental Health v DOES,*_15 A. 3d 692, 698 (D.C. 2011), *Mahoney v. DOES,* 953 A.2d 739, 745 (D.C. 2008); and repeated its citation to *McCamey v. DOES,* 947 A.2d 1191 (D.C. 2008) as additional authority for its decision.

As the CRB held 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), in which a panel of the CRB held Employer, not Claimant, had the burden of proof,

> None of the cases relied on by *Workcuff; McCamey v. DOES,* 947 A.2d 1191, 1199 (D.C. 2008) (*en banc*), *D.C. Department of Mental Health v. DOES, 15 A.3d 692, 698 (D.C. 2011)* and *Mahoney v. DOES*, 953 A.2d 739, 745 (D.C. 2008) were cases in which the public sector Employer accepted claim and then modified or terminated benefits. All the cases relied on in *Workcuff* involved challenges to

> initial decisions by Employer. There does not appear to be any inconsistency in the CRB and DCCA case law decisions that for initial claims, a public sector claimant has the burden to show by a preponderance of the evidence that his or her disability was caused by a work-related injury.
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> We should also note that the *Workcuff* decision has not been consistently followed by the CRB. Two decisions since *Workcuff* applied the preponderance standard at the second step. Six decisions since *Workcuff* applied the substantial evidence burden of proof.

CRB 13-160 at 5 (Footnotes omitted).

Here, the Employer is seeking to prove a change in circumstances; that conditions have changed such that Claimant no longer is entitled to disability benefits. As the party asserting the change, it has the burden of proving its claim. Therefore, we find the three step analysis of *Smith* to be consistent with the long-standing rule that Employer has the burden to prove the modification or termination.

Applying this law to the present case, although the ALJ appears to correctly state the three-step analysis[3] and placed the burden of proof on Employer, the ALJ committed reversible error in his application of the law when he held:

> Having presented the report of Dr. Scheer which indicates that Claimant's current symptoms are caused by his advanced age and not the residuals of his October 19, 2004 work injury, it is determined that Employer has presented substantive[4] evidence of a change in Claimant's condition sufficient to warrant an [sic] modification of his benefits. <u>Thus, the burden now shifts to Claimant to show by preponderance of the evidence that he continues to suffer with residuals of the work injury that have a negative effect on him earning wages</u>.

Id.

As this underlined portion of the ALJ's decision shows, the ALJ misapplied the standard of proof at Step 2; the Claimant need only produce substantial evidence that his condition has not changed. Claimant is not required to establish this by a preponderance of the evidence.

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[3] We should point out that in the third part of his analysis, the ALJ did not state that either party had the third-step burden, rather he held that if the claimant met his burden of persuasion at the second step, "the medical evidence is weighed to determine the nature and extent of disability, if any."

One could argue that there is no need to allocate the burden to a party at step 3 because the ALJ weighs all the evidence at this step. However, assigning a legal burden at this step is necessary because the evidence can be in equipoise.

[4] We agree with Employer that the ALJ intended to use "substantial" not "substantive" so that this sentence should state: "Employer has presented substantial evidence of a change in Claimant's condition sufficient to warrant a modification of his benefits."

We also find that the CO contains an irreconcilable inconsistency that requires remand; the ALJ made inconsistent findings with respect to Dr. Scheer's report.

On page 4 of the CO, the ALJ determined that Dr. Sheer's report was sufficient to meet Employer's Step1 burden:

> Having presented the report of Dr. Scheer which indicates that Claimant's current symptoms are caused by his advanced age and not the residuals of his October 19, 2004 work injury, it is determined that Employer has presented substantive evidence of a change in Claimant's condition sufficient to warrant an [sic] modification of his benefits.

But at page 5, the ALJ inconsistently found Dr. Scheer's report was not sufficient evidence to meet this burden:

> Therefore, the report of Dr. Sheer is rejected. Having rejected the report of Dr. Sheer as unreliable there is nothing to support Employer's termination of benefits. Therefore, I find Employer failed to present substantive evidence of [sic] sufficient to support a termination of Claimant's benefits.

We further note that while the ALJ correctly stated Claimant's burden at Step 2, he never made a specific finding with respect to whether Claimant met that burden. We recognize that it might be assumed that the ALJ found Claimant met his burden at Step 2 in light of his decision reinstating benefits, in Claimant's favor; on remand the ALJ should expressly state his finding.

Lastly, in *D.C. Public Schools v. DOES and Proctor, Intervenor*, 95 A.3d 1284, (D.C. 2014), a decision issued while this review was pending, the Court of Appeals held that when the Council of the District of Columbia repealed the 2004 amendment which codified the treating physician preference for public sector cases, Council eliminated this preference.

It reviewing the CO, it appears that the ALJ utilized the treating physician preference in his decision. Therefore, on remand, the ALJ should analyze the evidence without any treating physician preference.[5]

In conclusion, we find that once the government-employer has accepted and paid a claim for disability benefits, the employer 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.

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[5] We state it "appears" the ALJ utilized treating physician preference because the CO is confusing as to whether the ALJ relied on the treating physician preference in his decision. In the CO at page 5, the ALJ found that Dr. Rabbitt and his associates "were once Claimant's treating physicians," cited the (now-repealed) law regarding the treating physician preference and the law regarding an ALJ's ability to reject a treating physician's opinion. However, the ALJ never explicitly stated any legal conclusions with respect to the opinions of Dr. Rabbitt or his associates.

The employer first has the burden of producing current and probative evidence that claimant's condition has sufficiently changed to warrant a modification or termination of benefits. If the employer fails to present this evidence then the claim fails and the injured worker's benefits continue unmodified or terminated.

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. 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.

CONCLUSION AND ORDER

The April 23, 2014 Compensation Order is VACATED and this matter REMANDED to the Administrative Hearings Division for proceedings consistent with the Decision and Remand Order.

FOR THE COMPENSATION REVIEW BOARD:

/s/ Lawrence D. Tarr

LAWRENCE D. TARR
Chief Administrative Appeals Judge

November 12, 2014
DATE

MELISSA LIN JONES and HENRY W. MCCOY dissenting:

Unlike the majority, the dissent cannot tell if the ALJ properly stated and applied the law or not. Although the ALJ purportedly applied a 3-step test, it appears he actually applied a 2-step test:

> Once a claim for disability compensation has been accepted and benefits paid, in order to prevail at a formal hearing, Employer must adduce persuasive evidence sufficient to substantiate the modification or termination of an award of benefits. JONES v. D. C. SUPERIOR COURT, CRB No. 10-003, AHD No. PBL09-026, DCP No. 7610460001199-0002 (March 11, 2011) *citing* LIGHTFOOT V. D. C. DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS, ECAB No. 94-25 (July 30, 1996). ANGELA ASHTON V. DMV, CRB No. 10-193, PBL 10-065, DCP No. 30100438785-0001 (July 7, 2011). The holding of the Employees' Compensation Appeals Board (ECAB) is often recited: that once government-employer has accepted a claim of disability compensation, and has actually paid benefits, employer must adduce persuasive medical evidence sufficient to substantiate a modification or termination of an award of benefits. CHASE, ECAB No. 82-9 (July 9, 1992); MITCHELL, ECAB No. 82-28 (May 28, 1983); and STOKES, ECAB No. 82-33 (June 8, 1983). In addition,

ECAB has held the evidence relied upon to support a modification or termination of compensation benefits must be current and fresh in addition to being probative and persuasive of a change in medical status. ROBINSON, ECAB No. 90-15 (September 16, 1992). *See also*, WARREN, *Dir. Dkt.* No. 10-00, OHA No. PBL 99-32, OWC No. 003923 and AMAICHE, *Dir. Dkt.* No. 12-00, OHA No. PBL 99-31, OWC No. 004146.

Because this matter involves the termination of benefits for a claim that has been accepted as compensable, WC has the burden of proving that Claimant has had a change in medical status sufficient to warrant a modification of his benefits. On its behalf WC introduced the May 31, 2011, and the April 8, 2013, independent medical report of Dr. Mark J. Scheer, orthopedic surgeon.

> "I performed an independent medical evaluation on Mr. Mahoney on 5/31/11, which was reviewed. It was my opinion his diagnosis was consistent with resolved aggravation of preexisting lumbosacral degenerative disease/stenosis and radiculopathy to the right lower extremity. This diagnosis was felt to be causally related to the work injury on 10/19/04. It was my opinion his current complaints were due to age related preexisting degenerative disc disease and stenosis. With regard to the work injury on 10/19/04, no further diagnostic studies or medical treatment was felt to be indicated. I recommended returning him back to a sedentary job with no lifting, pushing, or pulling greater than 10 lbs., and no climbing, crawling, repetitive bending or twisting and those were considered permanent in nature due to his preexisting degenerative disease and stenosis. I did not feel surgical intervention was indicated. He was felt to be at maximum medical improvement."

The WC's burden is one of production and requires an evaluation of the WC's evidence standing alone without resort to evaluating or weighing the injured worker's evidence in conjunction thereto for if the DCP fails to sustain its burden, the injured worker prevails outright. However, if the DCP meets its burden, then the burden shifts to the injured worker to show through reliable, relevant, and substantial medical evidence that her physical condition has not changed and that benefits should continue. If the injured worker meets her burden, the medical evidence is weighed to determine the nature and extent of disability, if any. JENKINS, V. DEPT. OF MOTOR VEHICLES, CRB No. 12-098, AHD No. PBL 11-049, DCP No. 761019000120060005, (2012)

Having presented the report of Dr. Sheer which indicates that Claimant's current symptoms are caused by his advanced age and not the residuals of his October 19, 2004 work injury, it is determined that Employer has presented substantive evidence of a change in Claimant's condition sufficient to warrant an modification of his benefits. Thus, the burden now shifts to Claimant to show by

> preponderance of the evidence that he continues to suffer with residuals of the work injury that have a negative effect on him earning wages.[6]

Shortly thereafter, after summarizing Mr. Mahoney's evidence and the treating physician preference (which does not apply in public sector cases),[7] the ALJ concluded:

> Based upon a review of the record evidence as a whole, I find and conclude Employer has failed to present substantive evidence of a change in Claimant's condition sufficient to modify benefits.[8]

Furthermore, there is a contradictory statement in between which could have ended the entire analysis:

> Claimant's testimony is undisputed regarding his prior work injuries. Dr. Sheer's report gave no indication that he knew of Claimant's prior injuries. It is determined that Dr. Sheer's opinion was not based on Claimant's full medical history. Therefore, the report of Dr. Sheer is rejected. Having rejected the report of Dr. Sheer as unreliable there is nothing to support Employer's termination of benefits. Therefore, I find Employer failed to present substantial evidence of sufficient to support a termination of Claimant's benefits.[9]

Either Employer did not satisfy its initial burden or Mr. Mahoney's evidence sufficed to prove his case, but in the end, the ALJ first discounted the opinion of the independent medical examination physician then summarized Mr. Mahoney's evidence before ruling that "Claimant's evidence is found the to be the most probative and accorded greater weight that of Employer's on the issue of whether Claimant still suffers some remaining work related disabilities"[10] or that the government did not meet its burden "to present substantive [*sic*] evidence of a change in Claimant's condition sufficient to modify benefits."[11] Thus, there was only a 2 step analysis, if that.

Be that as it may, as the majority points out,

> once a claim for benefits has been accepted by the District of Columbia government's administrator of the Act, and has paid benefits for that claim, the

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[6] *Mahoney v. D.C. Public Schools*, OHA/AHD No. PBL14-004, ORM/PSWCP No. 76000500012005-0008 (April 23, 2014), pp. 4-5 (ipsissima verba).

[7] *D.C. Public Schools v. DOES*, 95 A.3d 1284 (D.C. 2014).

[8] *Mahoney v. D.C. Public Schools*, *supra*, at p. 7.

[9] *Id.* at p. 6.

[10] *Id.*

[11] *Id.* at p. 7.

> burden of proof which normally rests with a claimant to establish a causal relationship between a condition and the claimant's employment is shifted to the employer to demonstrate a change of conditions has occurred sufficient to terminate or otherwise reduce those benefits.[12]

This burden, however, is not one of proof but an "initial burden," as the majority also notes but discounts:

> It is well-settled in this jurisdiction that once the DCP [footnote omitted] (the agency-employer) accepts an injured worker's claim as compensable, the DCP bears the initial burden to demonstrate a change in the injured worker's medical condition such that disability benefits need to be modified or are no longer warranted and must be terminated. [Footnote omitted.] 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. [Footnote omitted.]
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> The DCP's burden is one of production and requires an evaluation of the DCP's evidence standing alone without resort to evaluating or weighing the injured worker's evidence in conjunction thereto for if the DCP fails to sustain its burden, the injured worker prevails outright. [Footnote omitted.] However, if the DCP meets its burden, then the burden shifts to the injured worker to show through reliable, relevant, and substantial medical evidence that her physical condition has not changed and that benefits should continue. If the injured worker meets her burden, the medical evidence is weighed to determine the nature and extent of disability, if any. [13]

As the District of Columbia Court of Appeals echoed in *Mahoney v. DOES*, (a public sector workers' compensation case involving Mr. Otis Mahoney, not Respondent), "The CRB stated that it agreed that the District had the initial burden to 'present [] persuasive medical evidence to terminate Mahoney's benefits' after which the 'burden then shifted back to [the claimant] to provide proof of an employment related impairment following the termination of benefits.'"[14]

Contrary to the majority's analysis, this situation is unlike the burden requirements in a private sector modification case. Although *Washington Metropolitan Area Transit Authority v. DOES*, (a private sector case) states, "the burden is on the party asserting that a change of circumstances warrants modification to prove the change,"[15] it is important not to overlook that same case also

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[12] *Williams v. D.C. Department of Parks and Recreation*, CRB 08-0262, AHD No. PBL 07-029, PBL/DCP No. 761013-0001-2005-0007 (Dec. 13, 2007), nt.2.

[13] *Gaston Jenkins v. D.C. Department of Motor Vehicles*, CRB No. 12-098, AHD No. PBL11-049, DCP No. 761019000120060005 (August 8, 2012) (Emphasis added.); see also *Wentworth M. Murray*, 7 ECAB 570 (1955) (Based on the medical evidence, once termination of compensation payments is warranted, the burden shifts to the claimant to show by the weight of the reliable, probative and substantial evidence that any disability is causally related to the employment and results in a loss of wage-earning capacity).

[14] *Mahoney v. DOES*, 953 A.2d 739, 742 (D.C. 2008).

[15] *Washington Metropolitan Area Transit Authority v. DOES*, 703 A.2d 1225, 1231(DC. 1997).

states "The burden may shift once the moving party establishes his case."[16] That shift is paramount here where the prior caselaw says the "initial burden" is on the government. That initial burden is one of production, not proof; only if the government meets that initial burden does the burden of proof shift to the claimant to prove compensability.[17] Then, only once compensability has been established is the medical evidence weighed to determine the nature and extent of the claimant's disability, not entitlement or compensability but the type or amount of benefit owing.

Instead of the majority's modification analogy, once the government has accepted a claim, the posture is analogous to a private sector case wherein the employer has voluntarily paid benefits and the presumption of compensability has been invoked. In other words, accepting the claim in essence "invokes the presumption" because the government's investigation has led to the conclusion that a claim is compensable; therefore, the initial burden to terminate or modify benefits is on the government to prove through substantial evidence that a change is warranted, and if the government is successful, the burden returns to the claimant to prove entitlement to ongoing benefits by a preponderance of the evidence:

> the Employees' Compensation Appeal Board (ECAB) has consistently held that once the employer has accepted a claim for disability compensation and actually paid benefits, the employer must adduce sufficient medical evidence to support a modification or termination of benefits. See Chase, ECAB No. 82-9 (July 9, 1992); Mitchell, ECAB No. 82-28 (May 28, 1983); and Stokes, ECAB No. 82-33 (June 8, 1983). In addition, the Board has held that the medical evidence relied upon to support a modification or termination of compensation benefits, as well as being probative of a change in medical or disability status, shall be fresh and current.
>
> Therefore, while there is no statutory presumption de jure in favor of the claimant's claimed injury being work-related, under this Act unlike the private sector workers' compensation Act, D.C. Code §36-321, the foregoing cited case precedent appears to have established a de facto presumption once a claim has been accepted and benefits paid.[18]

If at any point, the evidence is in equipoise, the party with the burden loses.

For these reasons, the dissent disagrees that

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[16] *Id.*

[17] Although prior caselaw states the standard is "substantial evidence," it is clear from *McCamey v. DOES*, 947 A.2d 1191 (D.C. 2008) that where, as in public sector cases, there is no presumption of compensability, the ultimate burden falls on the claimant to prove by a preponderance of the evidence that a claim is compensable.

[18] *Williams v. D.C. Department of Corrections*, OHA No. PBL93-077B, ODC No. 8921 (June 29, 2001). Admittedly, this quote is from a Compensation Order with no precedential value, but it is cited as an appropriate explanation of the burden, not as precedent for the burden.

> once the government-employer has accepted and paid a claim for disability benefits, the employer 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.
>
> The employer first has the burden of producing current and probative evidence that claimant's condition has sufficiently changed to warrant a modification or termination of benefits. If the employer fails to present this evidence then the claim fails and the injured worker's benefits continue unmodified or terminated.
>
> 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. 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.

Rather, the dissent takes the position that if the government has accepted a claim for disability compensation benefits, the initial burden to terminate or modify benefits is on the government to prove through substantial evidence that a change is warranted; if the government is successful, the burden returns to the claimant to prove by a preponderance of the evidence entitlement to ongoing benefits as well as the nature and extent of any disability.

/s/ Melissa Lin Jones
MELISSA LIN JONES
Administrative Appeals Judge