

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 14-044 (R)

**SAMUEL SMITH,
Claimant,**

v.

**DISTRICT OF COLUMBIA HOUSING AUTHORITY,
Self-Insured Employer.**

On Remand from the from the District of Columbia Court of Appeals
DCCA No. 15-AA-227 (December 23, 2015)

Appeal from a March 20, 2014 Compensation Order by
Administrative Law Judge Fred D. Carney, Jr.
AHD No. PBL13-011, DCP No. 761020-0001-1999-0014

(Issued March 8, 2016)

Andrew J. Hass for Claimant
Frank Mc Dougald for Employer

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

LAWRENCE D. TARR for the Compensation Review Board

DECISION ON REMAND

This case is before the Compensation Review Board (“CRB”) on the February 11, 2016 Order issued by the District of Columbia Court of Appeals (“DCCA”), denying Claimant’s motion to recall the mandate and motion for reconsideration of the December 23, 2015 Order, vacating and remanding the January 28, 2015 CRB Decision and Order. For the reasons stated, we find we must remand this matter to the Administrative Hearings Division (“AHD”) for a new decision.

Claimant, Samuel Smith, injured his back on August 1, 1997, while working as a painter for this employer. He was awarded medical and temporary total disability benefits in 2000. *Smith v. D. C. Housing*, OHA No. PBL00-027, OBA No. 367122 (September 15, 2000). His benefits were stopped on October 12, 2012, after Employer issued an August 14 2012 Notice of Intent to Terminate Public Sector Workers’ Compensation Payments.

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Claimant challenged this action by filing for a formal hearing before an administrative law judge (“ALJ”). In his March 20, 2014 Compensation Order (“CO”), the ALJ upheld the decision to terminate Claimant’s benefits and also found Claimant required no further “formal medical treatment” for injuries caused by the 1997 accident at work. *Smith v. D. C. Housing*, AHD No. PBL 13-011, DCP No. 761020-0001-1999-0014 (March 20, 2014). In our January 28, 2015 decision, the CRB affirmed the ALJ’s CO. *Smith v. D. C. Housing*, CRB No. 14-044 (January 28, 2015).

Claimant appealed to the DCCA. The DCCA vacated and remanded the CRB’s decision for further proceedings in light of *Ross v. D. C. DOES*, 125 A.3d 698 (D.C. 2015). The *Ross* decision affirmed the burden-shifting framework established by the CRB in *Mahoney v. D.C. Public Schools*, CRB No 14-67 (Nov. 12, 2014). Therefore, analyzing this case in light of *Ross* is, in effect, analyzing this case in light of *Mahoney*.

In *Mahoney*, the CRB acknowledged that there had 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. To clarify and provide certainty, the CRB in *Mahoney* held that there should be a three-step analysis when a D.C. government agency accepted a claim, paid benefits, and later seeks to modify or end those benefits.

Mahoney held that at the first step, the agency has the initial burden of production to present current and probative evidence to show claimant’s condition has changed to justify a modification or termination of benefits. If met, then the second step shifts the burden of production to the injured worker to show by reliable and relevant evidence that the worker’s benefits should not be modified or terminated. If that is shown, then the third-step requires the agency to prove, by a preponderance of all the evidence presented, that benefits should be modified or terminated.

In the present case, the ALJ issued his decision before the CRB’s *Mahoney* decision and chose to follow a two-step analysis. The ALJ held the agency met its burden in showing a change in Claimant’s medical condition. His second and final step was to analyze the evidence presented by Claimant to show he was still totally disabled, found it lacking, upheld Employer’s decision to end benefits by denying Claimant’s claim for restoration of benefits.

Looking at the ALJ’s decision in light of *Ross* and *Mahoney*, we must conclude that the ALJ used an erroneous analysis. Not only did the ALJ use a two-step analysis as just explained, but also the ALJ’s analysis at the second step was internally inconsistent with respect to the standard of proof.

On page 5 of his decision, the ALJ correctly held that at the second step, “Claimant must then demonstrate through reliable, relevant, and probative evidence that Claimant continues to have a disability that is causally related to the accepted injury.” However, on page 6 of the Compensation Order, the ALJ changed the standard of proof for the Claimant at the second step and stated “The burden now shifts to Claimant to show by a preponderance of evidence that he continues to be totally disabled for a temporary period of time.”

Therefore, we find that the analysis used by the ALJ was a faulty analysis - he used a two-step not a three-step analysis, and his analysis of Claimant's burden at the second step is inconsistent at best, legally wrong, at worst.

Despite this, we are not required to remand this matter if we found that the evidence was so one-sided that it compelled a certain result. As the DCCA stated in *WMATA v. DOES and Payne, Intervenor*, 992 A. 2d 1276, 1283 (D.C. 2010), a case where an ALJ used the wrong standard of proof:

We could avoid a remand if we were able to make a legal determination that the evidence compelled a determination that Payne met (or failed to meet) his burden of proof as to his claim that workplace conditions prevent him from returning to work.

In the present case, we cannot say that the evidence is so one-sided that it compels affirmation of the CO.

The critical part of the ALJ's decision centered on a conflict between the medical opinions of the treating doctor, Dr. Patricia Wright and the IME doctor, Dr. Steven S. Hughes.

We should note that the ALJ analyzed these medical opinions, both written in 2012, in light of the treating doctor preference. However, in 2014 the DCCA held that the treating doctor preference was abolished by legislative action in 2010. *D.C. Public Schools v. DOES and Proctor, Intervenor*, 95 A.3d 1284 (D.C. 2014). Because the ALJ, writing before the *Proctor* decision, held that the treating doctor's opinion was not entitled to the treating doctor preference, his use of that analysis does not constitute an independent reason for remanding the case.

The principle reason why the evidence is not so one-sided to compel affirmation has to do with the reasons the ALJ cited for rejecting the opinion of Dr. Wright. The ALJ's reasons cannot be reconciled with his finding Claimant was a credible witness.

One of the significant reasons that the ALJ determined that the treating physician's opinion was not convincing was because he found that Dr. Wright had not referred Claimant to an orthopedist or neurologist. However, at the formal hearing, Claimant testified that Dr. Wright referred him to a neurologist:

Claimant: I have to go to a neurologist tomorrow, I have—she set me up for an appointment to go see a neurologist or something, yeah.

HT 59-60.

Another reason relied on by the ALJ for discounting Dr. Wright's opinion was because he determined there was an unacceptable gap in treatment from September 15, 2000, until February 18, 2001. Contrary to this finding, at the formal hearing, Claimant testified that during this time he treated with Dr. Wright every couple of months: "I was seeing her [Dr. Wright], like, maybe every two months or something." (HT 56).

The CRB usually defers to the credibility findings of the ALJ. However, in this case the ALJ also made the following factual finding:

As an initial matter, I find Claimant a credible witness based on the internal consistency of his testimony and its consistency with the other credible evidence of record as well as Claimant's appearance and demeanor at the formal hearing.

The ALJ's decision does not explain why he did not believe Claimant's testimony with respect to the referral to a specialist and treatment during with Dr. Wright. These findings, without explanation, appear to be inconstant with his finding that Claimant was credible.

To be clear, we are not saying that the ALJ must find that Dr. Wright's opinion is persuasive. We are saying that his reasons for accepting one medical report over the other should be consistent with his other factual and credibility findings.

Therefore, the CRB finds that this case must be remanded to the ALJ to analyze the evidence in accordance with the three-step *Mahoney* analysis, applying the appropriate standards of proof at each step and without the treating physician preference.

Finally, we have not overlooked that fact that in a footnote to our previous decision, we noted the disparity between the analysis in *Mahoney* and the analysis that the ALJ used but held this was harmless error:

Because it is clear the ALJ did not find Mr. Smith had met his burden, placing the burden on Employer to prove Mr. Smith is not entitled to benefits is a higher burden than placing the burden on Mr. Smith to prove he is entitled to ongoing benefits; therefore, this error is harmless.

Smith, supra CRB No. 14-044 at 13.

As the present decision points out, there are significant concerns regarding the ALJ's decision regarding several of his findings that underpinned his decision that Claimant did not meet his burden of proof. Until those inconsistencies are reconciled or eliminated, we cannot say that the ALJ's errors are harmless errors.

CONCLUSION

This case is remanded to the Administrative Hearings Division for a new decision, consistent with our findings. The Administrative Hearings Division, may, in its discretion, reconvene the formal hearing or accept additional evidence.