

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 15-111

**STEPHANIE LINNEN,
Claimant–Respondent,**

v.

**DISTRICT OF COLUMBIA PUBLIC SCHOOLS
Employer–Petitioner.**

Appeal from a June 12, 2015 Compensation Order
by Administrative Law Judge Fred D. Carney, Jr.
AHD No. PBL 09-062B, DCP No. 0468-WC-07-0501-409

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2015 NOV 23 PM 2 10

(Decided November 23, 2015)

Stephanie Linnen, *pro se*
Rahsaan Dickerson for Employer

Before LINDA F. JORY, HEATHER C. LESLIE, and JEFFREY P. RUSSELL, *Administrative Appeals Judges.*

LINDA F. JORY for the Compensation Review Board.

DECISION AND REMAND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

On August 6, 2007, Stephanie Linnen (Claimant) was working as a teacher for the District of Columbia Public Schools (Employer) when she slipped and fell. The Public Sector Workers' Compensation Program (PSWCP) accepted Claimant's claim for injuries to the left shoulder, left side, and left hip and granted her temporary total disability and medical benefits.

On January 17, 2014, the PSWCP issued a notice of termination informing Claimant that disability benefits would be terminated effective February 17, 2014 based on a determination that Claimant was capable of returning to work full duty, no longer needed further treatment, and her current condition was not causally related to the August 6, 2007 accident at work. The PSWCP affirmed the termination notice on July 23, 2014. Consequently, the parties proceeded to a formal hearing to determine whether the PSWCP properly terminated benefits and whether the

Administrative Hearings Division (AHD) has jurisdiction over a claim for benefits related to Claimant's right arm.

An administrative law judge (ALJ) granted Claimant's claim for relief on the grounds that Employer had not proven a termination was justified by a change in medical condition such that Claimant could return to work. *Linnen v. D.C. Public Schools*, AHD No. PBL 09-062B DCP No. 0468-WC-07-0501409, (June 12, 2015). The ALJ further ordered Employer to provide Claimant with appropriate claim forms and to process the amended claim for the right arm according to the applicable regulations.

Employer appealed the June 12, 2015 Compensation Order (CO) asserting that the CO is neither supported by substantial evidence or in accordance with the law. Employer requests the Compensation Review Board (CRB) vacate the CO.

ISSUES ON APPEAL

1. Whether AHD has jurisdiction to decide the issue of whether Claimant's right arm problems are causally related to her August 6, 2007 fall.
2. Whether the ALJ improperly found that Claimant met her burden of producing reliable and relevant evidence that her condition has not changed.
3. Whether Employer met its burden that of establishing a change in condition based on an AME report of Dr. Louis Levitt.

ANALYSIS¹

Whether AHD has jurisdiction to decide the issue of whether Claimant's right arm problems are causally related to her August 6, 2007 fall.

Employer asserts:

Notably, the record evidence and the CO make equally clear that Claimant never filed a claim for the right side injuries. Comp. Or. P. 8. Nevertheless, the ALJ found that the Claimant, through the medical reports of her treating physician, Dr.

¹ The scope of review by the Compensation Review Board (CRB) and this Review Panel (Panel) as established by the District of Columbia Comprehensive Merit Personnel Act of 1978, as amended, D. C. Code §1-623.01(the Act) and as contained in the governing regulations is limited to making a determination as to whether the factual findings of the 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. D. C. Code §1-623.28(a) "Substantial evidence", as defined by the District of Columbia Court of Appeals (DCCA), is such evidence as a reasonable person might accept to support a particular conclusion. *Marriott Int'l. v. DOES* 834 A.2d 882 (D.C. 2003)(*Marriott*). Consistent with this scope of review, the CRB and this panel are bound to uphold 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 the reviewing authority might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

Azer, provided proper notice of the additional body part to Employer on or about October 14, 2013. *Id.* Per the ALJ, Claimant's ostensible 'timely notice' of the additional body part via Dr. Azer's report of October 14, 2013, and Agency's July 23, 2014 Final Decision on Reconsideration which makes reference to Claimant's right arm, establishes the ALJ's jurisdiction to address the right arm. *Id.* The ALJ relies on *Sisney v. Dist. of Columbia Public Schools*, CRB No. 08-200, AHD No. PBL 08-066, DCP No. 007970 (July 2, 2012) as support for his conclusion that the Program's Final Decision on Reconsideration, which addresses both Claimant's accepted body parts and the right side injury, constitutes a Final Determination under the applicable statute, which effectively confers jurisdiction on the ALJ to address Claimant's right side claim. Further analysis is necessary.

Employer's Brief at 11.

Employer cites to the CRB decision in *Reyes v. District of Columbia Dept. of Mental Health*, CRB No. 14-158, AHD No. PBL 13-029, DCP No. 30110170199-0001 (May 13, 2015)(*Reyes*) wherein the CRB held that AHD lacks jurisdiction to adjudicate Reyes' claim for benefits for a right knee injury that Reyes failed to claim in her First Report of Injury. The Panel agrees with Employer that neither a physician's notice of a separate injury nor the PSWCP's reference to a separate injury in its notice of termination of benefits confers jurisdiction on this agency to adjudicate injuries to Claimant's right side.

As in *Reyes*, we take guidance from the DCCA reversal of the CRB in *Jackson v. D.C. Housing Authority*, CRB 12-104, AHD No. PBL11-022A, DCP No. 30110173190-0001 (October 11, 2012)(*Jackson*), wherein the DCCA reversed a CRB affirmance of an AHD finding that AHD and DOES could exercise jurisdiction over a claim for an injury for which a claimant has not filed a specific claim, and for which a specific denial has not been issued by the PSWCP. Despite *Jackson's* being an unpublished Memorandum Opinion and Order, we take it as instructive of the court's views on this subject, and have adopted its views on this subject. *See D.C. Housing Authority v. DOES*, No. 12-AA1824, Mem. Op. & J. (D.C. March 31, 2014).

We vacate the portion of the Compensation Order in which the ALJ directed the PSWCP to provide Claimant with forms or to take any other specific action regarding administration of this claim. Such an order is beyond the authority of this agency. Assuming that DOES has jurisdiction over a dispute regarding a workplace injury, its authority is limited to adjudicating matters relating to compensability. While the agency has the power to adjudicate compensability and make awards, it has no power to order the PSWCP to do anything unrelated to the litigation of disputed claims. This agency's power is declarative only. Enforcement of awards is a matter left to the judicial branch in the nature of imposition of a lien in Superior Court.

Whether the ALJ improperly found that Claimant met her burden of producing reliable and relevant evidence that her condition has not changed.

The ALJ correctly referred to the CRB's *en banc* decision in *Mahoney v. D.C. Public Schools*, CRB No. 14-067, AHD No. PBL 14-004, ORM/PSWCP No. 76000500012005-008 (November 12, 2014)(*Mahoney*) and found both Employer and Claimant met their burdens of production.

If the employer meets its initial burden, then the claimant 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.

Mahoney supra at 8, 9.

Employer asserts that the ALJ's finding that Claimant met her burden of producing reliable and relevant evidence that her condition has not changed is neither supported by the record nor the law. Specifically, Employer asserts:

The evidence cited by the ALJ to support his finding that Claimant 'satisfied her burden of showing reliable and relevant evidence that she remains disabled' does not meet the standard of proof required under *Mahoney*. In order to satisfy her burden of proof under *Mahoney*, the Claimant similar to Employer, must produce *relevant and recent medical evidence* to establish a continued disability caused by the work injury. See *Jones v. D.C. Superior Court*, CRB No. 10-003, AHD No. PBL-09-06 (Mar 10, 2011) (noting Claimant's failure to offer relevant, reliable medical evidence as a basis for denial of the requested relief). In Claimant's case, the ALJ relies on dated medical reports that are contradicted by the more recent reports of Claimant's treating physician, which throughout 2013, indicate marked improvement in Claimant's injury to her left extremity. See EE 2 f, g; CE D. In fact, it is not until *after* Claimant receives notification of the Program's intent to terminate her benefits for her accepted injuries that she resumes her complaints about the body parts which were either not mentioned at all in 2013 (i.e. left hip and left side), or per Claimant's treating physician, were healing well and showing marked improvement (left shoulder and extremity) CE B,C,D.

With respect to the only piece of "recent" evidence provided by Claimant, namely the August 18, 2014 EMG, the diagnosis actually supports Employer's position that Claimant's condition has lessened, as the report indicates that Claimant's chronic conditions to her left extremity are improved. CE D. The ALJ's finding with respect to the EMG study seems to indicate his belief that, because Claimant was diagnosed with a chronic, albeit improved condition, the record evidence does not indicate that Claimant's condition has ceased, lessened or more importantly, that Claimant's chronic improved condition precludes her from performing sedentary. This is incorrect. There is no requirement for Employer to establish that Claimant's chronic condition would face potential aggravation by a return to work. See *Jones*, CRB 10-003. To the contrary, if Claimant returned to work and suffered an aggravation of her 'chronic improved left carpal tunnel syndrome' or her 'chronic improved left ulnar neuritis' the regulations allow Claimant to re-enter the workers' compensation system for resumption of receipt

of benefits. The ALJ's reliance on the EMG test as a basis for establishing that Claimant's condition has not changed is misplaced.

The record evidence contains assessments from Claimant's treating physician that are more recent than the stale documents which the ALJ relies on as a basis for finding that Claimant met her burden under *Mahoney*. It therefore stands to reason that Claimant's recent medical evaluations more accurately reflect Claimant's current condition. As the recent medical evaluations suggest, with the exception of her left extremity, Claimant *stopped* receiving treatment for her left side and left hip. In fact, the record evidence indicates that throughout 2013, Claimant did not complain about her left side or left hip at all. CE B,C,D. Despite this fact, the ALJ references a 2012 FCE addressing Claimant's range of motion in her hip. Comp or. [sic] P. 11. With respect to the only accepted body part that Claimant continued to receive treatment for (Claimant's left extremity), the record evidence, including reports by Claimant's treating physician, evinces a clear lessening of Claimant's disability. *Id* Per D.C. Code § 1-623.24(d)(4)(A), Employer was justified in terminating benefits. As Claimant failed to provide any relevant, reliable and current evidence that her condition had not changed, the ALJ's analysis under *Mahoney* should have stopped at the second prong with a finding that Claimant had not satisfied her burden. Instead, the ALJ relied on dated evidence that was clearly contradicted by more recent, relevant, probative evidence. Consequently, the ALJ's finding that Claimant met her burden of production under *Mahoney* is not based on substantial evidence.

Employer's Brief at 13, 14 (emphasis in original).

Claimant offers no response to Employer's arguments. Instead, Claimant submitted a list of nine documents which she stated she was relying on with respect to Employer's appeal. The Panel is mindful that in order to submit additional evidence post-hearing, the additional evidence must be material and there must exist reasonable grounds for the failure to present the evidence while the case was before AHD, however it does not appear that Claimant is attempting to submit evidence that was not before AHD. *See Edwards v. DC Department of Youth and Rehabilitation Services*, CRB No. 08-106, AHD No. PBL 07-007 (November 4, 2009). A review of the list of documents reveals the documents do not differ from those relied upon by Claimant at the formal hearing, nevertheless, Claimant fails to explain how any of the documents provided either at the formal hearing or attached to her list are sufficient to meet her burden of presenting reliable and relevant evidence that conditions have not changed to warrant a modification or termination of benefits.

As Employer correctly states, the record evidence contains assessments from Claimant's treating physician that are more recent than the stale documents which the ALJ relies on as a basis for finding that Claimant met her burden under *Mahoney*. We further agree with Employer that the ALJ's analysis under *Mahoney* should have stopped at the second prong with a finding that Claimant had not satisfied her burden. Instead, the ALJ relied on dated evidence that was clearly contradicted by more recent, relevant and probative evidence. Consequently, the ALJ's finding that Claimant met her burden of production under *Mahoney* is not based on substantial evidence.

The determination that Claimant met her burden with respect to the second prong is not supported by substantial evidence. Therefore, the ALJ erred in reaching the 3rd prong of the *Mahoney* steps and in awarding the claim for relief.

CONCLUSION AND ORDER

The June 12, 2015 Compensation Order is not supported by substantial evidence. The award is VACATED and the matter remanded for the ALJ to enter a COR denying Claimant's claim for reinstatement.

So ordered.