

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 15-122

**VALERIE JOHNSON,
Claimant-Respondent,**

v.

**DISTRICT OF COLUMBIA OFFICE OF UNIFIED COMMUNICATIONS
Employer-Petitioner.**

Appeal from a June 30, 2015 Compensation Order
by Administrative Law Judge Fred D. Carney, Jr.
AHD No. PBL 09-094D, DCP No. 30090625611-001

(Decided December 18, 2015)

Richard J. Link for Claimant
Lindsay Nienast 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

Valerie Johnson (Claimant) worked for the Office of Unified Communications (Employer) as a 911 Emergency Operator. On September 14, 2011, Claimant alleged that she suffered an asthma attack, itchy eyes, burning in her lungs and sinus burning as a result of working in the call center for Employer. Claimant sought medical treatment from Dr. Phil Zapanta, an otolaryngologist. Dr. Zapanta recommended Claimant work a modified duty schedule. Claimant stopped working on September 20, 2011. Claimant sought temporary total disability and medical benefits for her alleged aggravation of her pre-existing respiratory conditions. On May 21, 2013, The Office of Risk Management/Public Worker's Compensation Program (PSWCP) issued a Notice of Determination Regarding Denying Worker Compensation Benefits (NOD) denying her claim as not causally related to her employment.

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Consequently, the parties proceeded to a formal hearing to determine whether Claimant sustained an injury in the performance of her duties for Employer in September 2011 and the nature and extent of Claimant's alleged disability. Claimant sought temporary total disability and medical benefits from September 20, 2011 to the present and continuing.

An administrative law judge (ALJ) granted Claimant's claim for relief in part. The ALJ granted medical benefits and wage loss benefits from September 22, 2011 to February 8, 2012 and denied benefits beyond February 8, 2012.

Employer appealed the June 30, 2015 Compensation Order (CO) asserting that the CO is not accordance with the law. Employer requests the Compensation Review Board (CRB) vacate the CO.

ANALYSIS¹

Whether the ALJ inappropriately applied the burden shifting framework applicable in termination of benefits cases.

Employer asserts:

In this case, the ALJ applied the burden shifting framework applicable in a termination of benefits matter to this case. See CO, pp. 4-11 (examining Employer's evidence and then examining Claimant's evidence and then shifting the burden "to Employer to present evidence to rebut Claimant's evidence"). However, the case before the ALJ was a denial of benefits matter. The NOD before the ALJ was entitled "Notice of Determination Regarding Denying Worker Compensation Benefits". See EE 1. In the NOD, the program informed Claimant "You have provided no proof that the work environment caused your symptoms (mentioned above). Therefore your request for temporary total disability benefits from 9/14/2011 is denied." *Id.* Additionally, on May 3, 2013, the parties submitted a Joint Prehearing Order, in which Employer stated: "Employer asserts that Claimant's benefits were properly denied," and Employer defended the matter as a denial of benefits at the hearing. See Joint Prehearing Order (May 3, 2013); Hearing Transcript (June 13, 2013). The ALJ, in fact, acknowledged that this matter was before him because "[The Program] issued a Notice of

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.

Determination Regarding Denying Worker Compensation (NOD) denying her claim as not causally related to her employment [and] Claimant sought a formal hearing.” See CO, p.2.

Yet, in the CO, the ALJ incorporated findings from prior Compensation Orders and placed the burden on Employer as though it was a termination of benefits matter. *See* CO. However, a review of the May 25, 2011 Compensation Order indicates that benefits for Claimant’s previous claim were properly terminated when the decision to terminate Claimant’s benefits was upheld by the AHD and was not appealed to this tribunal. *See* CE 2, pp. 38-45. Accordingly, the only matter before the ALJ was a denial of benefits. As the ALJ applied the wrong standard, inappropriately placing the burden of proof on Employer, the CO cannot stand.

Employer’s Brief at 4, 5.

Claimant responds:

In response to this argument, Claimant would note that the ALJ did not place the burden of proof on the Employer. Rather, a careful review of the Compensation Order (at page 7) reveals that (based on testimony and medical evidence) “it is determined that Claimant has presented substantial, recent, medical evidence that her workplace aggravated her pre-existing conditions and that Employer had yet to follow the recommendations for cleaning the environment and giving Claimant the recommend (sic) work schedule as of September 2011.’ The CO then indicates that ‘the burden shifts to Employer to present evidence to rebut Claimant’s evidence.’ Thus, contrary to the Employer’s arguments, the ALJ actually placed the burden of proof on the Claimant.

Claimant’s Brief at 3.

This Panel disagrees with Employer that the ALJ incorporated findings from prior Compensation Orders. While we note the ALJ provided a lengthy discussion about the two prior Compensation Orders, we do not equate the recitation of the outcome of the prior Compensation Orders as an incorporation of any of the previous findings. Nevertheless, the findings and conclusions of law of the February 25, 2010 and May 25, 2011 Compensation Orders were not reversed by the CRB and are the law of the case. Moreover, the ALJ made specific findings with regard to Claimant’s work history and physical condition “Since the last Compensation Order” and at no time did he suggest he was incorporating anything from the prior orders.

The ALJ did not actually state that he was applying the three part test enunciated in *Mahoney* for situations that involved Employer terminating benefits after a claim has been accepted. *See Mahoney v. D.C. Public Schools*, CRB No. 14-067, AHD No. PBL 14-004, ORM/PSWCP No. 76000500012005-008 (November 12, 2014)(*Mahoney*). However, we do agree the ALJ placed a preliminary burden on Employer to show it had accommodated Claimant’s treating physician’s recommendations instead of demonstrating that Claimant did not sustain an injury in the course

of her employment or that her condition is not causally related to her employment. We further agree with Employer that the ALJ switched the burden several times during the course of the CO in a *Mahoney* manner. Accordingly we must conclude that by using the *Mahoney* analytic framework, the CO is fundamentally flawed.

We further note that after the ALJ made a determination that Claimant's pre-existing respiratory conditions, i.e., allergies and asthma, were exacerbated by her work environment, the ALJ engaged in a lengthy discussion about the "aggravation rule" and the "humanitarian nature of the Act". Yet the ALJ's "Conclusions of Law" fail to include a conclusion that the Claimant sustained an injury or aggravation that arose out of and in the course of his employment. The ALJ concluded:

Based upon a review of the record evidence as a whole, I find and conclude Employer has shown that it made reasonable accommodations for Claimant to return to work on February 8 2012. Claimant is entitled (sic) continuing medical benefits and temporary total disability benefits from September 22, 2011 until February 2012 when accommodations were made for her to return to work.

CO at 11.

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 (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)). It is further well documented that in a contested case, to conform to the requirements of the District of Columbia Administrative Procedure Act, D.C. Code § 2-501 (APA), an agency's decision must (1) state findings of fact on each material issue in contest, (2) those factual findings must be supported by substantial evidence, and (3) the conclusions of law must flow rationally from those factual findings. The failure to satisfy these requirements renders an agency decision unsupported by substantial evidence. *Perkins v. DOES*, 482 A.2d 401 (D.C. 1984).

Accordingly, we vacate the award and remand for further consideration, applying the appropriate analytic framework and making the necessary findings of fact and legal conclusions concerning the nature of Claimant's current, post-workplace exposure condition.

CONCLUSION AND ORDER

The June 30, 2015 Compensation Order is VACATED and REMANDED for the ALJ to make findings of fact and to reach reasonable conclusions of law based upon a legal analysis of those facts and to determine whether Claimant met her burden of proving she sustained a work-related aggravation of her pre-existing respiratory condition on or about September 14, 2011 and, if so, the nature and extent of Claimant's disability.

So ordered.