

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR



F. THOMAS LUPARELLO
INTERIM DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 13-148

**WILLIAM A. WORKCUFF,
Claimant–Respondent,**

v.

**DISTRICT OF COLUMBIA HOUSING AUTHORITY,
Employer–Petitioner.**

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
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Appeal from an October 28, 2013 Compensation Order on Remand
by Administrative Law Judge Karen R. Calmeise
AHD No. PBL12-022, DCP No. 761001000120020006

Eric Adam Huang for the Petitioner
Harold L. Levi for the Respondent

Before MELISSA LIN JONES, HENRY W. MCCOY and JEFFREY P. RUSSELL, *Administrative Appeals Judges*.

MELISSA LIN JONES for the Compensation Review Board, JEFFREY P. RUSSELL concurring.

DECISION AND REMAND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

On February 21, 2002, Mr. William A. Workcuff injured his back while working for the District of Columbia Housing Authority (“Employer”) as a maintenance mechanic. In a Compensation Order dated January 14, 2004, Mr. Workcuff was awarded ongoing temporary total disability compensation benefits and medical benefits.¹

On October 27, 2011, the Public Sector Workers’ Compensation Program issued a Notice of Intent to Terminate, and on April 6, 2012, it issued a Final Decision on Reconsideration; Mr. Workcuff’s disability compensation benefits were terminated.

¹ *Workcuff v. D.C. Housing Authority*, OHA No. PBL03-020A, MS-HCD002589 (January 14, 2004).

Following a formal hearing, an administrative law judge (“ALJ”) issued a Compensation Order dated October 25, 2012. Mr. Workcuff’s disability compensation benefits were reinstated from November 30, 2007 to the date of the formal hearing and continuing.²

Employer appealed the October 25, 2012 Compensation Order on the grounds that the ALJ applied the incorrect standard of proof and the ALJ erred by excluding probative evidence. On August 9, 2013, the Compensation Review Board (“CRB”) vacated the Compensation Order and remanded the matter.³

The ALJ issued a Compensation Order on Remand on October 28, 2013. Mr. Workcuff’s claim for relief was granted because “Employer has failed to show that there has been a change in Claimant’s condition. Claimant continues to be [] temporarily totally disabled and is entitled to reinstatement of temporary total disability benefits.”⁴

On appeal of the Compensation Order on Remand, Employer contends the ALJ did not clearly articulate the burden of proof she used to review the evidence. Furthermore, Employer contends “the ALJ’s analysis of the Claimant’s evidence was insufficient and did not clearly articulate whether the Claimant satisfied his burden.”⁵ Employer also argues that the ALJ’s analysis of Dr. Robert Gordon’s opinion is not supported by substantial evidence and that it had no obligation to demonstrate available work existed. Employer requests the CRB vacate the Compensation Order on Remand.

In response, Mr. Workcuff asserts the ALJ properly reviewed and considered the totality of the evidence and complied with the directives in the August 9, 2013 Decision and Remand Order. Mr. Workcuff also argues the proper burden of proof rests with Employer:

Once a claimant has met his or her burden of proof and Petitioner has accepted a claim and paid the claimant benefits. . . the process changes dramatically. As Section 1-623.24 and relevant case law show, the ultimate burden now rests with Petitioner to show a requisite change of condition by medical evidence sufficient to substantiate a modification or termination.

While Petitioner did not “accept” Respondent’s claim here in the first instance, the [Compensation Order on Remand] acknowledges that the Recommended Decision awarded Respondent wage loss and medical benefits judicially and Petitioner subsequently paid Respondent those benefits from 2002 to 2012 (CE-3; COR, p. 4). There is no question, then that [*D.C. Department of*

² *Workcuff v. D.C. Housing Authority*, OHA No. PBL12-022, DCP No. 761001000120020006 (October 25, 2012).

³ *Workcuff v. D.C. Housing Authority*, CRB No. 12-187, OHA No. PBL12-022, DCP No. 761001000120020006 (August 9, 2013).

⁴ *Workcuff v. D.C. Housing Authority*, OHA No. PBL12-022, DCP No. 761001000120020006 (October 28, 2013), p. 7.

⁵ Memorandum of Points and Authorities Supporting Petitioner’s Application for Review, p. 2.

Mental Health v. D.C. Department of Employment Services, 15 A.3d 692 (D.C. 2011)] and [*Washington Hospital Center v. D.C. Department of Employment Services*, 744 A.2d 992 (D.C. 2000)] (as is [*McCamey v. D.C. Department of Employment Services*, 947 A.2d 1191 (D.C. 2008)]) are inapplicable as Petitioner bears the ultimate burden of proof to establish by a preponderance of the evidence that it had grounds to justify the termination of Respondent's benefits.^[6]

Mr. Workcuff requests the CRB dismiss the appeal because

[w]hile the [Compensation Order on Remand] perhaps need not have gone as far as it did, the ALJ gave a clear, concise and detailed justification for rejecting the AME medical evidence in favor of the testimony and medical evidence introduced by Respondent which is unassailable. Whether or not evidence in the record might have persuaded the CRB to reach the same conclusion independently, the evidence, including but not limited [to] the Gordon report and the addendum which the ALJ previously omitted, was unquestionably sufficient to support the findings of fact which the ALJ made in the [Compensation Order on Remand].

The [Compensation Order on Remand] considered all of Petitioner's medical evidence. It did not impose any impermissible limitations or conditions or any requirements or considerations in the IME. At the same time it did not release the IME from providing support with a competent review and recitation of pertinent medical records and diagnostic studies. The [Compensation Order on Remand] simply held that weighing all of the evidence, Dr. Gordon's report and addendums did not meet Petitioner's burden of proof and it demonstrated why not. As we have shown, the fact trier's evaluations made in this respect cannot be reversed unless they are found to be clearly erroneous.^[7]

Furthermore, for these reasons, Mr. Workcuff claims the ALJ's consideration of Employer's failure to offer a light duty position is irrelevant, harmless error.

ISSUES ON APPEAL

1. Did the ALJ apply the correct burden of proof and adequately explain how Mr. Workcuff satisfied the ultimate burden?
2. Did the ALJ articulate proper reasons for rejecting Dr. Gordon's opinion?

⁶ Claimant-Respondent's Memorandum in Opposition to Employer-Petitioner's Application for Review of Compensation Order on Remand, pp. 10-11.

⁷ Claimant-Respondent's Memorandum in Opposition to Employer-Petitioner's Application for Review of Compensation Order on Remand, pp. 18-19.

3. Was it error for the ALJ to consider that Employer has not offered Mr. Workcuff modified duty within his physical limitations and restrictions?

ANALYSIS⁸

Employer asserts the ALJ did not clearly articulate the burden of proof she applied to weighing the evidence and the CRB cannot affirm a Compensation Order that “reflects a misconception of the relevant law or a faulty application of the law.”⁹ The CRB finds no misconception or faulty application of the law.

In a public sector case, once a claim for disability compensation has been accepted and benefits have been paid, Employer must adduce persuasive evidence sufficient to substantiate a modification or termination of an award of benefits.¹⁰ Pursuant to the January 14, 2004 Compensation Order, Employer paid Mr. Workcuff temporary total disability compensation benefits from February 21, 2002 until April 6, 2012; therefore, having paid disability compensation benefits for work-related injuries, 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.¹¹ In step two of the process, if Employer satisfies this burden of production, the burden of persuasion shifts to the claimant to prove entitlement by a preponderance of the evidence; naturally, in order to assess and weigh whether the claimant has met that requirement, the ALJ must consider the evidence in the record as a whole.¹²

Based upon this standard, in the August 9, 2013 Decision and Remand Order, the CRB determined

⁸ The scope of review by the CRB is limited to making a determination as to whether the factual findings of the appealed Compensation Order on Remand 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). Consistent with this standard of review, the CRB is constrained to uphold a Compensation Order on Remand that is supported by substantial evidence, even if there also is contained within the record under review substantial evidence to support a contrary conclusion and even if the CRB might have reached a contrary conclusion. *Marriott International v. DOES*, 834 A.2d 882, 885 (D.C. 2003).

⁹ Memorandum of Points and Authorities Supporting Petitioner’s Application for Review, p. 17 quoting *D.C. Department of Mental Health*, at 698.

¹⁰ *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). Although the Employees’ Compensation Appeals Board was abolished in 1998, its rulings remain persuasive in deciding disability cases.

¹¹ *Jones v. D.C. Department of Corrections*, Dir. Dkt. No. 07-99, OHA No. PBL97-14, ODC No. 312082 (December 19, 2000).

¹² *McCamey* at 1214. (“Where the presumption [of compensability found in the private sector workers’ compensation act] is either inapplicable or has been rebutted, the burden falls on the claimant to prove by a preponderance of the evidence that the physical accident caused or contributed to the psychological injury.” There is no reason to depart from this standard when the injury is physical rather than psychological.)

[b]y the ALJ's own assessment, Dr. Gordon's opinion is recent medical evidence to support a termination of benefits. Although the ALJ ultimately may find reasons to reject Dr. Gordon's opinion when weighing the evidence in the record as a whole, at this stage, the burden of production shifts to Mr. Workcuff. Because the ALJ failed to apply the proper burden, the conclusion that "[b]ased upon a review of the record evidence as a whole, I find and conclude Employer failed to show by a preponderance of the evidence that a change in condition has occurred which would warrant, under the Act, a modification or termination of the January 2004 award of Compensation" is not in accordance with the law and must be vacated.^[13]

In the Compensation Order on Remand, the ALJ did not specify the burden she applied when weighing the evidence as a whole;¹⁴ however, there is no requirement that a Compensation Order contain magic words in order to demonstrate the ALJ properly applied the law. In this case, given that the ALJ previously stated that the ultimate burden is a preponderance of the evidence, the CRB finds no merit to Employer's argument.

Employer's argument that the ALJ's analysis of whether Mr. Workcuff satisfied his burden gives us greater pause. Once Employer satisfied its burden of production, the burden of proof shifted to Mr. Workcuff "to show by a preponderance of the evidence that his . . . disability was caused by a work-related injury."¹⁵ Although assessing whether a claimant satisfies a burden of proof by a preponderance of the evidence necessarily requires the ALJ consider and weigh all the evidence in the record, the ALJ ultimately ruled

[b]ased upon a further review of the record evidence as a whole, I find Employer has failed to show that there has been a change in Claimant's condition. Claimant continues to be [] temporarily totally disabled and is entitled to reinstatement of temporary total disability benefits.^[16]

¹³ *Workcuff v. D.C. Housing Authority*, CRB No. 12-187, OHA No. PBL12-022, DCP No. 761001000120020006 (August 9, 2013) (Emphasis added.)

¹⁴ "As the Employer has produced evidence that supports a reasonable basis for terminating claimant's benefits, Claimant now bears the burden to show that he is entitled to ongoing payments of temporary total disability benefits due to the injury he sustained on February 21, 2002." *Workcuff v. D.C. Housing Authority*, OHA No. PBL12-022, DCP No. 761001000120020006 (October 28, 2013), p. 5

¹⁵ *D.C. Department of Mental Health* at 698:

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 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.*, 744 A.2d 992, 998 (D.C. 2000)).

¹⁶ *Workcuff v. D.C. Housing Authority*, OHA No. PBL12-022, DCP No. 761001000120020006 (October 28, 2013), p. 7.

Because the burden was not on Employer at this point in the adjudication, the law requires we remand this matter for the ALJ to assess whether Mr. Workcuff's current back condition is related to the injury he sustained on February 21, 2002 and whether that back condition results in a compensable disability.

As for the ALJ's assessment of Dr. Gordon's opinion, Employer takes issue with the ALJ's explanation of her reasons for rejecting that opinion, but all of the reasons given are supported by the ALJ's reasonable reading of Dr. Gordon's reports. While there may be other ways to read Dr. Gordon's reports and other ways to make advantageous inferences from his words, the ALJ provided cogent and persuasive reasons supported by substantial evidence:

Dr. Gordon examined Claimant, at Employer's request, on August 19, 2011. He did not find a causal connection between his current complaints and his 2002 work injury and he concluded that the Claimant only suffered a back strain which "he expected to have, resolved". (EE 1 pg. 2) On September 29, 2011 and August 30, 2012 he performed medical records reviews (additional Veterans Administration records were taken into consideration for the August 2012 report) [Footnote omitted.] I did not find Dr. Gordon's opinion to be persuasive regarding a change of condition, or nature and extent. The Addendum reports merely reiterate the physician's initial August 2011 IME opinion and both addendum reports contain editorial criticism of the treating physician's professional credentials, critique about the treating physicians reputation, and opinions that the prescribed pain medication was "potentially habituating" with no evidence that the medication was a contributing factor in Claimant's current physical condition. (EE 2 and 5) Dr. Gordon referenced earlier MRI test results dated 2003 and 2006 to support his opinion that the Claimant displayed only degenerative changes that were not related to the 2002 work injury. (EE 1) However, Dr. Gordon rejected Claimant's complaints of continued back and leg pain and, without justification, discounted additional medical tests results; *i.e.*, electrodiagnostic tests and a 2012 MRI. (EE 5 pg. 15) His reports were conclusory, not based on recent evidence, and were rendered without any objective information with respect to Claimant's work environments. (EE 1, 2, and 5)^[17]

There is no basis to disturb the ALJ's rejection of Dr. Gordon's opinions, including his opinion that Mr. Workcuff is capable of returning to work full duty.

Finally, the ALJ ruled

[e]mployer has not proffered any evidence to demonstrate that available work existed that fit claimant's capabilities and employer retains the burden of establishing that available work exists that [meets] claimant physical restrictions. (See *Henderson v. Department of Corrections*, CRB No. 05-03, AHD No. PBL No. 01-015B, DCP No. 005054 (March 23, 2005)^[18]

¹⁷ *Id.* at 6.

¹⁸ *Id.*

Employer contends this ruling is in error:

The ALJ lastly noted that “Employer has not proffered evidence to demonstrate that available work existed that fit [C]laimant’s capabilities and [E]mployer retains the burden of establishing that available work exi[s]ts that meet[s] [C]laimant[’s] physical restrictions.” COR P6 ¶4, citing *Henderson v. D.C. Dep’t of Corr.*, CRB No. 05-03, (March 23, 2005). The ALJ is somewhat correct – pursuant to D.C. Code §1-623.47, if an employee is released to work with a modified duty restriction, employing agencies shall provide employees with a modified duty assignment, if available. This statutory provision, however, shall not be confused with an employee or claimant that has been released to full duty status, which is the Employer’s position in the instant matter. Thus, while it was proper for Judge Carney to consider whether light duty work had been offered in the 2004 Compensation Order because the Claimant had been released with restrictions, it is improper to consider whether light duty work had been offered in the instant matter because the Claimant was released to full duty work.^[19]

Although *Henderson* does indicate the burden-shifting scheme in *Logan v. DOES*²⁰ applies in public sector cases, an opposite conclusion is reached in *Swanson v. D.C. Department of Corrections*.²¹ The CRB declines to address whether the *Logan* burden-shifting scheme applies to public sector cases because in this case, contrary to Employer’s argument, the ALJ did not find Mr. Workcuff capable of returning to full duty employment. The ALJ found that Mr. Workcuff’s release to modified duty in place at the time his benefits were terminated has not changed and that Employer has not offered Mr. Workcuff any employment within those limitations and restrictions. While the ultimate outcome regarding this issue is subject to possible change on remand, Employer’s argument in this appeal is based upon a premise not supported by the ALJ’s rulings in the compensation Order on Remand; the ALJ did not find Mr. Workcuff capable of working full duty as Employer had hoped.

CONCLUSION AND ORDER

Because the ALJ placed the ultimate burden on Employer, the ALJ did not apply the correct burden of proof, and the October 28, 2013 Compensation Order on Remand is not in accordance with the law, is not supported by substantial evidence, and is VACATED IN PART. The ALJ, however, did give appropriate reasons supported by substantial evidence for rejecting Dr. Gordon’s opinion, and because the ALJ did not find Mr. Workcuff is capable of returning to full duty work, in this case, it was not error for the ALJ to consider that Employer has not offered

¹⁹ Memorandum of Points and Authorities Supporting Petitioner’s Application for Review, pp. 27-28. (Emphasis added.)

²⁰ *Logan v. DOES*, 805 A.2d 237, 243 (D.C. 2002).

²¹ *Swanson v. D.C. Department of Corrections*, CRB No. 13-009, AHD No. PBL. 11-024, DCP No. 761032000120000-0005 (May 21, 2013).

duty work, in this case, it was not error for the ALJ to consider that Employer has not offered Mr. Workcuff modified duty within his physical limitations and restrictions. This matter is REMANDED for further consideration consistent with this Decision and Remand Order.

FOR THE COMPENSATION REVIEW BOARD:


MELISSA LIN JONES
Administrative Appeals Judge

March 5, 2014
DATE

JEFFREY P. RUSSELL concurring:

Although there is some degree of conflict between the language used in the *Swanson* and *Henderson* decisions, and by its plain language *Swanson* could support the proposition that *Logan* analysis has no place in Public Sector Workers' Compensation Act (PSWCA) cases, I do not agree with that assessment entirely. The discussion in *Henderson* was meant to illuminate, in a broad general way that establishing a failure to return to the pre-injury job is all that is needed to demonstrate total disability in the first instance, the principal for which *Logan* is most often cited. This is as opposed to requiring an additional showing that a claimant seeking permanent total disability had an additional initial burden, that of showing the inability to return to the pre-injury job "or any other employment", for temporary total disability. And, in my view, it stands for that principle under both the public and private sector acts, and nothing in its decision today appears to change that. I merely add my concurrence to make it clear that *Logan* may apply to the PSWCA in appropriate cases.

Swanson faulted the Compensation Order for awarding benefits because the injured worker's job had been eliminated and thus there was "no work to return to", and that under that circumstance the employer had failed to show the availability of suitable alternative employment. In saying that *Logan* didn't apply, the CRB noted that there appeared to be some confusion as to whether Ms. *Swanson* could or could not return to her pre-injury job as a physical matter.


JEFFREY P. RUSSELL
Administrative Appeals Judge