No. 13-AA-200

DISTRICT OF COLUMBIA COURT OF APPEALS

CASSANDRA ROSS,

Petitioner,

v.

DISTRICT OF COLUMBIA DEPARTMENT OF EMPLOYMENT SERVICES,

Respondent.

On Petition for Review from the Compensation Review Board
(2012-CRB-189)

BRIEF OF THE LEGAL AID SOCIETY OF THE DISTRICT OF COLUMBIA AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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STATEMENT PURSUANT TO RULE 28(a)(2)(B)

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GLOSSARY

CMPA	District of Columbia Government Comprehensive Merit Personnel Act of 1978, D.C. Code, as amended, §§ 1-623.1 *et seq.*
CRB	Compensation Review Board within the District of Columbia Department of Employment Services
DCMR	District of Columbia Code of Municipal Regulations
FECA	Federal Employment Compensation Act
PFRDA	Police and Firefighters Retirement and Disability Act, D.C. Code §§ 5-701 *et seq.*
R.	Administrative Record
WCA	District of Columbia Workers' Compensation Act, D.C. Code §§ 32-1501 *et seq.*

QUESTIONS PRESENTED

This *amicus* brief addresses the following questions posed by the Court in its April 13, 2015 Order:

1. Whether the Compensation Review Board's burden-shifting framework in *Mahoney v. D.C. Public Schools*, CRB No. 14-067 (Nov. 12, 2014) (en banc) is a reasonable interpretation of the public-sector workers' compensation statutes?

2. Whether *Mahoney* should be applied retroactively here?

3. Whether *Mahoney* was followed by the Administrative Law Judge in Ms. Ross's case?

INTEREST OF *AMICUS CURIAE*

By order dated April 13, 2015, this Court appointed the Legal Aid Society of the District of Columbia as *amicus curiae* in this matter, asking it to address specific legal issues not previously addressed by the parties.

Legal Aid was formed in 1932 to "provide legal aid and counsel to indigent persons in civil law matters and to encourage measures by which the law may better protect and serve their needs." Legal Aid By-Laws, Art. II, Sec. 1. Legal Aid is the oldest general civil legal services program in the District of Columbia. Since its inception, Legal Aid has represented clients and participated as *amicus curiae* in appeals before this Court involving a variety of safety net public benefits designed to prevent or ameliorate poverty and homelessness. *E.g.*, *Tagoe v. D.C.*

Dep't of Employment Servs., No. 13-AA-1421 (D.C.) (Legal Aid Brief filed Sept. 10, 2014); *Lynch v. Masters Sec.*, 93 A.3d 668 (D.C. 2014). Legal Aid has an interest in ensuring that the proper legal standard is applied in cases involving such benefits, including workers' compensation benefits, to eligible beneficiaries.

Legal Aid takes no position on the ultimate question of the entitlement to the workers' compensation benefits at issue in this case.

FACTUAL BACKGROUND

In 1994, Cassandra Ross suffered back and leg injuries while working as a physician's assistant for the District of Columbia Department of Corrections. Record (R.) at DOES 2, 25. Ms. Ross applied for and began receiving temporary total disability benefits for her work-related injuries pursuant to the District of Columbia Government Comprehensive Merit Personnel Act of 1978, D.C. Code, as amended, §§ 1-623.01 *et seq.* (CMPA). R. at DOES 24.

In 1998, Ms. Ross's leg went numb as a result of her prior work injury, and she fell, injuring her neck and knee. R. at DOES 2, 25. Ms. Ross was treated with physical therapy and medication, and her physician recommended back surgery. *Id.* She subsequently filed another claim for her injury, but the record does not indicate how this claim was resolved. R. at DOES 2. After further administrative proceedings, an Administrative Law Judge (ALJ) found that Ms. Ross could return

to work in some capacity and reduced her periodic benefit payments by more than half. R. at DOES 2 & n.5.[1]

In 2011, the District required that Ms. Ross submit to a medical examination by a physician of its choice. R. at DOES 2, 25-26; *see* 7 DCMR § 124. Based on the results, the District's Office of Risk Management issued a Notice of Intent to Terminate, and, on reconsideration, a Final Decision terminating Ms. Ross's benefits. R. at DOES 2, 25-26. Ms. Ross timely appealed the Final Decision to an ALJ. *Id.*

The ALJ held a formal hearing and issued a Compensation Order finding that Ms. Ross's injuries had been resolved such that she was no longer entitled to any workers' compensation benefits. R. at DOES 2-3. In reaching this decision, the ALJ stated that the burden of proof was on the employer, but cited for that proposition a CRB decision placing the ultimate burden of proof on the claimant. *See* R. at DOES 26 (citing *Jones v. D.C. Superior Court*, CRB No. 10-003 (March 10, 2011)). The ALJ found that Ms. Ross's employer "presented substantial evidence that [her] current conditions are not caused by her employment," and that she "can return to work," and further found Ms. Ross's evidence "insufficient to

[1] The ALJ's reduction in Ms. Ross's benefits was presumably a result of a request for such reduction (or termination) by Ms. Ross's employer, but no information regarding such a request is in the record.

overcome that presented by Employer," primarily due to inadequacies in the treating physicians' reports. R. at DOES 26-27.

Ms. Ross requested review by the Compensation Review Board (CRB). R. at DOES 1. In affirming the ALJ's decision, a panel of the CRB found that the ALJ had applied the correct legal presumptions regarding compensability and the treating physician's opinion. R. at DOES 3-4. The CRB did not address the applicable burden of proof.

Ms. Ross then filed a petition for review with this Court. Ms. Ross filed a brief and the District of Columbia Department of Employment Services filed a motion for summary affirmance, neither of which referenced the applicable burden of proof. This Court denied the motion for summary affirmance.

SUMMARY OF THE ARGUMENT

The burden of proof is on an employer that, having accepted and paid a workers' compensation benefit, later seeks to reduce or terminate that benefit. Basic administrative law principles place the burden of proof on the party seeking administrative action, which is the employer in this instance. This Court has already noted that this basic administrative law principle generally applies in workers' compensation cases, and, more specifically, has placed the burden of proof on the employer in these circumstances under a related workers' compensation statute – the Police and Firefighters Retirement and Disability Act.

The same rule should apply under the workers' compensation statute at issue here – the Comprehensive Merit Personnel Act. This allocation of the burden serves the humanitarian purposes of these workers' compensation statutes and accords with general principles of workers' compensation, as well as administrative, law.

Mahoney v. D.C. Public Schools, CRB No. 14-067 (Nov. 12, 2014) (en banc)[2] is a reasonable statutory interpretation that places on employers seeking to terminate benefits the burden of persuasion by a preponderance of the evidence that conditions have changed since benefits were awarded and that those changed conditions justify reducing or terminating the benefits. While that ultimate burden never varies, the burden of production shifts to the claimant under *Mahoney* after the employer has made a *prima facie* case. That shift in the burden of production is reasonable and should be upheld in light of the deference this Court accords CRB interpretations of the workers' compensation statutes the CRB administers.

The *Mahoney* framework is a statutory interpretation and therefore applies to the administrative proceedings below even though they took place before the *Mahoney* decision was issued. Because the ALJ below did not apply *Mahoney*, this matter should be remanded for further administrative proceedings consistent with *Mahoney*.

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[2] For the Court's convenience, a copy of *Mahoney* is attached in the addendum to this brief. CRB decisions are available to the public at http://does.dc.gov/page/compensation-review-board.

ARGUMENT

I. THE FRAMEWORK ADOPTED BY THE CRB IN *MAHONEY* IS REASONABLE WHEN PROPERLY APPLIED.

A. The CMPA is Interpreted Consistently with Other District and Federal Workers' Compensation Statutes.

The District has three closely related workers' compensation statutes. The most general statute, the District of Columbia Workers' Compensation Act, D.C. Code §§ 32-1501 *et seq.* (WCA), provides for benefits for private employees. A narrower statute, the District of Columbia Government Comprehensive Merit Personnel Act, D.C. Code §§ 1-623.01 *et seq.* (formerly D.C. Code §§ 1-624.1 *et seq.* (1981)) (CMPA), covers District employees, including Ms. Ross, *see* R. at DOES 2; *see also* D.C. Code § 1-623.01(1). A still narrower statute, the Police and Firefighters Retirement and Disability Act, D.C. Code §§ 5-701 *et seq.* (PFRDA), "serves as the worker's compensation plan for the District's police and firefighters." *O'Rourke v. D.C. Police & Firefighters' Retirement & Relief Bd.*, 46 A.3d 378, 389 (D.C. 2012).

Although there are some specific differences, treatment of workers' compensation claims under these three statutes is generally similar. This Court interprets all three statutes according to general principles of workers' compensation law, often based upon the leading treatise, Larson's Workers' Compensation Law. *See, e.g.*, *Newell-Brinkley v. Walton*, 84 A.3d 53, 60 n.4 (D.C.

2014) (PFRDA); *Brown v. D.C. Dep't of Employment Servs.*, 83 A.3d 739, 750 n.43 (D.C. 2014) (WCA); *McCamey v. D.C. Dep't of Employment Servs.*, 947 A.2d 1191, 1197-98 (D.C. 2008) (en banc) (CMPA). The ultimate purpose of all three laws "is a humanitarian one," namely "'to provide financial and medical benefits to employees injured in work-related accidents.'" *McCamey*, 947 A.2d at 1197 (quoting *Grayson v. D.C. Dep't of Employment Servs.*, 516 A.2d 909, 912 (D.C. 1986)). These three statutes, like all "'workers' compensation statutes[,] should be liberally construed to achieve their humanitarian purpose.'" *Id.* (quoting *Vieira v. D.C. Dep't of Employment Servs.*, 721 A.2d 579, 584 (D.C. 1998)).

This Court interprets the District's workers' compensation statutes to be consistent with each other. *See Nunnally v. D.C. Metro. Police Dep't.*, 80 A.3d 1004, 1011 & n.14 (D.C. 2013) (interpreting the phrase "performance of duty" in the CMPA based on the interpretation of that same phrase under the PFRDA). This consistent interpretation applies even to instances in which the statutory language is not identical. In *McCamey*, 947 A.2d at 1200-01, this Court held that the "aggravation rule" – the rule that the aggravation of a preexisting condition can constitute a compensable work-related injury under a workers' compensation law – applies under both the WCA and the CMPA, despite the fact that this rule is expressly codified in the WCA but not in the CMPA. In making this identical interpretation from different statutory language, this Court noted that the WCA and

the CMPA are "conceptually close," and that "this court has considered case law under one Act to be 'informative' as to the other." *Id.* at 1199; *see also id.* at 1214 (referring to the singular "legislative history and humanitarian purpose of the D.C. WCA and CMPA").

The CMPA, as the law applicable to most D.C. government employees, is based on "its pre-existing federal counterpart, the Federal Employees' Compensation Act ('FECA')." *Id.* at 1200. Accordingly, "this court has analogized provisions of the CMPA to FECA," and interpreted the CMPA by adopting the corresponding interpretation of the FECA. *Id.*

B. In *Mahoney*, the CRB Imposed a Three-Part Framework for Attempts to Terminate Benefits Under the CMPA.

The CRB established the current approach to CMPA termination requests in *Mahoney v. D.C. Public Schools*, CRB No. 14-067 (Nov. 12, 2014) (en banc). Prior to *Mahoney*, separate panels of the CRB had applied a wide variety of burdens and procedures in this context, including: (1) placing the burden of proof on the employer with no burden shifting, *e.g.*, *Williams v. D.C. Dept. of Parks & Recreation*, CRB No. 08-026, at 3 n.2 (Dec. 13, 2007); *Toomer v. D.C. Dept. of Corrections*, CRB No. 05-202, at 4 (May 2, 2005); (2) applying a two-step process in which the employer bore an initial burden but the ultimate burden of proof was on the claimant, *e.g.*, *Workcuff v. D.C. Housing Auth.*, CRB No. 12-187(1), at 2-3 (Aug. 30, 2013); *Nicholas v. D.C. Public Schools*, CRB No. 08-162, at 5 (May 26,

2009); (3) applying a three-step process terminating in the weighing of evidence without a clear burden of proof, *e.g.*, *Gaston Jenkins v. D.C. Dept. of Motor Vehicles*, CRB No. 12-098, at 5-6 (Aug. 8, 2012); and (4) applying a three-step process with the ultimate burden of proof remaining on the employer, *e.g.*, *Smith v. D.C. Dep't of Public Works*, CRB No. 13-160, at 3, 5 (June 3, 2014). The CRB appropriately sat *en banc* in *Mahoney* to definitively decide the appropriate burden of proof. *See Mahoney*, CRB No. 14-067, at 4; 7 DCMR § 255.8.

Under *Mahoney*, an employer seeking to reduce or terminate workers' compensation benefits must first produce "current and probative evidence that claimant's condition has sufficiently changed to warrant a modification or termination of benefits." *Mahoney*, CRB No. 14-067, at 9. If that burden is met, the claimant must "produc[e] reliable and relevant evidence that conditions have not changed to warrant a modification or termination of benefits." *Id.* If such evidence is produced, the employer can prevail by "proving by a preponderance of the evidence that claimant's benefits should be modified or terminated." *Id*. The CRB explained that the burden of proof is on the employer because it is the party seeking a change in benefits. *Id.* at 7. The CRB borrowed the three-part burden-shifting scheme from an earlier panel decision but did not explain its rationale in doing so. *Id.* at 6-7 (citing *Smith*, CRB No. 13-160).

Two members of the CRB dissented in *Mahoney*. They would have preferred a two-step approach in which the ultimate burden of proof fell on the claimant. *Id.* at 13-14. The dissenters acknowledged that their proposal would create different burdens in public-sector cases (under the CMPA) than in private-sector cases (under the WCA). *See id.* at 12.

C. The *Mahoney* Opinion is a Reasonable Interpretation of the CMPA.

This Court defers to the reasonable construction of the statute by the CRB while retaining the final authority on issues of statutory construction. *See, e.g.*, *Stackhouse v. D.C. Dep't of Employment Servs.*, 2015 D.C. App. LEXIS 96, at *3 (March 19, 2015). "This deferential standard of review means we must uphold the CRB's interpretation of the CMPA even if petitioner advances another reasonable interpretation or if we would have been persuaded by petitioner's interpretation if construing the statute in the first instance." *Sheppard v. D.C. Dep't of Employment Servs.*, 993 A.2d 525, 527 (D.C. 2010).[3] Here, the CMPA is silent with regard to

[3] If *Mahoney* were just another decision by a CRB *panel*, then this usual deference might be considerably lessened by the fact that CRB panels have issued a variety of inconsistent pronouncements on this issue, as noted on pages 8-9, above. But the agency has a mechanism for resolving such conflicts and speaking with a single voice: the CRB can sit *en banc*. *See* 7 DCMR § 255.8. Once an *en banc* decision is issued, prior inconsistent panel decisions are implicitly overruled. Because *Mahoney* is a decision of the CRB sitting *en banc*, it is therefore entitled to this Court's full deference, notwithstanding the existence of older inconsistent decisions by individual panels of the CRB, which are similar to inconsistent decisions by lower-level agency officials and do not detract from the deference due

the applicable burden of proof, and the *Mahoney* framework passes this deferential review.

1. It is Reasonable to Place the Burden of Proof on the Party Seeking to Terminate CMPA Benefits.

In *Kea v. Police & Firemen's Retirement & Relief Bd.*, 429 A.2d 174 (D.C. 1981), this Court addressed the same question regarding the burden of proof for reduction or termination of workers' compensation benefits, but under the PFRDA, rather than the CMPA. This Court held that, after the government had accepted a claim of work-related disability, it bore the burden of proof when it subsequently sought to terminate benefits on the basis that the claimant had recovered. *Id.* at 175; a*ccord Saunders v. Police & Firemen's Retirement & Relief Bd.*, 444 A.2d 16, 18 (D.C. 1982) (following *Kea*). This Court stated that "[i]t is a fundamental principle of administrative, statutory and case law that the 'burden of proof is on the proponent of the rule or order,'" and "there is no justification for finding that this 'fundamental principal' is not applicable to this particular administrative adjudication." *Kea*, 429 A.2d at 175 (quoting D.C. Code 1973 § 1-1509(b) and 5 U.S.C. § 556(d)); *see also Washington Metro. Area Transit Auth. v. D.C. Dep't of Employment Servs.*, 703 A.2d 1225, 1231 (D.C. 1997) (*WMATA*) ("In the context

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to a later decision by the ultimate agency decisionmaker. *Cf. Sidell v. Commissioner*, 225 F.3d 103, 111 (1st Cir. 2000).

of workers' compensation law, the burden of showing a change of conditions has also been held to be on the party claiming the change.").

The reasoning of *Kea* applies here as well. The fundamental principle upon which *Kea* is based – that "the proponent of a rule or order shall have the burden of proof" – has not changed. D.C. Code § 2-509; 5 U.S.C. § 556(d); *see Schaffer v. Weast*, 546 U.S. 49, 57 (2005) (where statute is silent with respect to burdens at administrative hearing, and there is no reason to believe that Congress intended otherwise, "the burden of persuasion lies where it usually falls, upon the party seeking relief"). Moreover, it would be anomalous to have different burdens of proof under the CMPA and the PFRDA. As noted on pages 6-7, above, these two statutes are both workers' compensation statutes with the same "humanitarian purposes" with respect to District employees. *Compare O'Rourke v. D.C. Police & Firefighters Retirement & Relief Bd.*, 46 A.3d 378, 389 (D.C. 2012) (PFRDA), *with McCamey v. D.C. Dep't of Employment Servs.*, 947 A.2d 1191, 1196-1201 (D.C. 2008) (en banc) (CMPA). And there is no specific difference in statutory language between the PFRDA and the CMPA that would warrant departing from the holding of *Kea* here. *See* D.C. Code §§ 1-623.44, 5-714; *cf. McCamey*, 947 A.2d at 1200-01 (aggravation rule applies under both the WCA and the CMPA, despite the fact that this rule is expressly codified in the WCA but not in the CMPA).

Following *Kea* and the fundamental principles of administrative law here is particularly appropriate because the alternative would require claimants to repeatedly prove and reprove that their circumstances have not changed, thus inviting employers "to file repeated applications for modification without basis." *WMATA*, 703 A.2d at 1231. "Such an approach has no basis in reason or fairness and would unduly burden the workers' compensation system." *Id.*

An additional reason to place the burden of proof on the employer here is the fact that the relevant portions of the CMPA were based on the FECA, and this Court has followed the interpretation of the FECA in interpreting the CMPA where both statutes were silent. *McCamey*, 94 A.2d at 1200-01. The FECA and the CMPA are both silent with respect to the burden of proof when the government seeks to reduce or terminate benefits, and the FECA has been interpreted as placing this burden on the employer, *P.J. v. U.S. Postal Serv.*, 2014 ECAB LEXIS 538, at *11-12; *accord, e.g.*, *Hall v. U.S. Postal Serv.*, 45 ECAB 316, 1994 ECAB LEXIS 2920, at *15; *Rykert v. Veterans Admin.*, 40 ECAB 284, 1988 ECAB LEXIS 23, at *24-25; *see also McCall v. United States*, 901 F.2d 548, 549 (6th Cir.), *cert. denied*, 498 U.S. 1012 (1990).

Finally, the reasonableness of the CRB's placing the burden of proof on the employer here is supported by the fact that workers' compensation law generally places this burden of proof on the employer. "The burden of proof of showing a

change in condition is normally on the party, whether claimant or employer, asserting the change, although, in some cases, the burden may shift to the other party once the movant has established its case." 8 Lex K. Larson, Larson's Workers' Compensation § 131.03[3][c] (Matthew Bender, Rev. Ed.) (footnotes omitted). Many States follow this general principle to impose the burden of proof on employers seeking to reduce or terminate benefits.[4] This burden is usually "by a preponderance of the evidence." *Id.*

Nothing in the *Mahoney* dissent demonstrates that the majority's placement of the burden of proof on the employer is unreasonable. The *Mahoney* dissent did

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[4] *See Ga. Pacific Corp. v. Wilson*, 484 S.E.2d. 699, 700-01 (Ga. App. 1997); *Wilfert v. Retirement Bd. of the Firemen's Annuity & Ben. Fund*, 742 N.E.2d 368, 377 (Ill. App. 2000); *C & T of Hazard v. Stollings*, 2013 Ky. Unpub. LEXIS 66, at *5 (Ky. Oct. 24, 2013); *Murray v. Hollywood Casino*, 877 So.2d 199, 201 (La. Ct. App. 2004); *Smith v. Dexter Oil Co.*, 432 A.2d 438, 440 (Me. 1981); *Ferns v. Russ Graham Shell Serv.*, 321 N.W.2d 380, 383 (Mich. 1982); *Violette v. Midwest Printing Co.-Webb Pub.*, 415 N.W.2d 318, 322 (Minn. 1987); *Oham v. Aaron Corp.*, 382 N.W.2d 12, 15 (Neb. 1986); *In re Jackson*, 698 A.2d 1, 5 (N.H. 1997); *In re Harris*, 642 P.2d 1147, 1151 (Or. 1982); *Dep't of Pub. Welfare v. Workers' Compensation Appeal Bd.*, 41 A.3d 53, 54 (Pa. Comm. Ct. 2011); *C.D. Burnes Co. v. Guilbault*, 559 A.2d 637, 639 (R.I. 1989); *Rossello v. K-Mart Corp.*, 423 S.E.2d 214, 216 (Va. Ct. App. 1992).

A small minority of states appears to follow a contrary rule. *See*, *e.g.*, *Grant v. Univ. of Ark.*, 1996 Ark. App. LEXIS 466 (Ark. Ct. App.) (employer does not bear the burden of proving change of conditions in workers' compensation case); *Kopp v. N.D. Workers Compensation Bureau*, 462 N.W.2d 132, 134-45 (N.D. 1990) (noting that numerous states appear to place the burden of proof on a party seeking termination of workers' compensation benefits, but reaching a contrary conclusion based on the specific language of the North Dakota statute).

not rely on any statutory or regulatory language, general principles of workers' compensation law, or analogous burdens under the PFRDA, WCA, FECA, or State workers' compensation laws. Instead, the *Mahoney* dissent relied on two earlier CRB panel decisions. *Mahoney*, CRB No. 14-067, at 12-13 & nn.13-14 (relying on *Jenkins v. D.C. Dep't of Motor Vehicles*, CRB No. 12-098 (Aug. 8, 2012) and *Mahoney v. D.C. Dep't of Employment Servs.*, 953 A.2d 739, 742 (D.C. 2008), in turn citing the CRB decision there under review).[5] These two CRB panel decisions were not binding on the CRB sitting *en banc*. *Cf. Carter v. United States*, 684 A.2d 331, 335 (D.C. 1996) (en banc) ("[S]ince we are sitting en banc, we are not bound by this court's earlier decisions on the issue involved."). Nor are they persuasive; as the *Mahoney* majority pointed out, there was a wide range of prior CRB panel opinions on this issue, including more recent panel opinions placing the burden of proof on the employer, and the dissenters did not explain why the two CRB decisions they proposed to follow were more reasonable than the other CRB decisions they would have wanted to eschew. *See Mahoney*, CRB No. 14-067, at 5-7 (collecting cases); *see also* pages 8-9 above. Thus, the *Mahoney* dissent provides no basis to conclude that the *Mahoney* decision constitutes an unreasonable interpretation of the statute.

[5] The *Mahoney* opinion of this Court involved Otis Mahoney and is separate from the CRB's *Mahoney* decision, which involved Ronald Mahoney.

In a footnote, the *Mahoney* dissent mentions the fact that public-sector workers' compensation plaintiffs, unlike their private-sector counterparts, are not entitled to a presumption of compensability. *Mahoney*, CRB No. 14-067 at 13 n.17. But there is no presumption of compensability under the PFRDA, and the burden is on an employer seeking termination under the PFRDA. *See Kea*, 429 A.2d at 175. In addition, although there is a presumption of compensability under the WCA, *see* D.C. Code § 32-1521, that presumption applies only at the initial phase of a WCA case, and is necessarily "dissolved" by the time a claimant is found to have a work-related injury and is given benefits. *PEPCO v. D.C. Dep't of Employment Servs.*, 77 A.3d 351, 354 (D.C. 2013) (citing *Washington Hosp. Ctr. v. D.C. Dep't of Employment Servs.*, 744 A.2d 992, 998 (D.C. 2000)). The presumption is thus irrelevant by the time an employer seeks to terminate those benefits and is not a valid basis for having one burden of proof under the WCA and a different burden under the CMPA.

2. *Mahoney* Provides a Reasonable Procedure by Which the Burden of Persuasion Remains on the Employer but the Burden of Production Shifts.

For the reasons noted above, the burden of proof rests with an employer seeking reduction or termination of workers' compensation benefits. "The term 'burden of proof' is ambiguous, encompassing two separate burdens: the burden of production and the burden of persuasion." *Green v. D.C. Dep't of Employment*

Servs., 499 A.2d 870, 873 (D.C. 1985). The *Mahoney* three-part procedure treats the burdens of production and persuasion separately, placing the burden of persuasion (by a preponderance of the evidence) at all times on the employer, but shifting a burden of production onto the claimant if (and only if) the employer makes out a *prima facie* case that reduction or termination of benefits is warranted. Specifically, the three steps under *Mahoney* are: (1) the employer must make out a *prima facie* case of a change of circumstances warranting reduction or termination of benefits; (2) if the employer does so, the claimant must produce contrary evidence; and (3) if the claimant does so, the adjudicator must determine whether the employer has proven such a change by a preponderance of the evidence. *Mahoney*, CRB No. 14-067, at 8-9.

This type of three-step process is common and reasonable. *See Gatewood v. D.C. Water & Sewer Auth.*, 82 A.3d 41, 52 nn.59-60 (D.C. 2013). As an initial matter, it places both the burdens of production and persuasion on the party bearing the "burden of proof" by requiring that party to make out a *prima facie* case, which is, by definition, "a sufficient quantum of evidence which, if credited, would permit judgment in his favor unless contradicted by credible evidence offered by the opposing party." *Nader v. de Toledano*, 408 A.2d 31, 48 (D.C. 1979) (quoted in *In re Bedi*, 917 A.2d 659, 665 (D.C. 2007)), *cert. denied*, 444 U.S. 1078 (1980). Only after that quantum of evidence is produced does the

opposing party need to produce any relevant evidence. If such evidence is produced, the adjudicator then considers all the evidence to determine whether the party bearing the burden of persuasion has met that burden. This type of three-step process follows the general rule that "when the party with the burden of persuasion establishes a *prima facie* case supported by 'credible and credited evidence,' it must either be rebutted or accepted as true." *Dir., OWCP v. Greenwich Collieries*, 512 U.S. 267, 279-80 (1994) (quoting H.R. Rep. No. 1980, at 36 (1946)).

Similar three-step procedures apply in a wide range of circumstances. For example, a customer challenging a D.C. water bill before an ALJ has the "burden of proof," meaning that the customer has "the burden of persuasion, which remains always with the customer." *Gatewood*, 82 A.3d at 51, 52. Nonetheless, a three-part procedure applies:

> [T]he customer must present a prima facie case showing that the customer was not responsible for the contested water use. If the customer does so, the burden of production shifts to the opponent – the utility – to respond with credible evidence in rebuttal. If the utility does make a sufficient showing, the customer must trump the utility's response with evidence sufficient to carry the burden of persuasion.

Id. at 52; *see also Larry v. Nat'l Rehab. Hosp.*, 973 A.2d 180, 183 & n.4 (D.C. 2009) (similar three-part procedure when an employer seeks to disqualify a claimant from receiving unemployment insurance benefits for misconduct, with "[t]he ultimate burden of showing misconduct . . . always on the employer.").

The *Mahoney* procedures are reasonable, and, given the deference with which this Court reviews CRB interpretations of the CMPA, should be followed. The ultimate burden of persuasion regarding changed circumstances warranting reduction or termination of workers' compensation benefits rests with, and never shifts from, the employer. Once the employer has made out a *prima facie* case of changed circumstances justifying reduction or termination (step one), the claimant has the burden of producing contrary evidence because in the absence of such evidence, the *prima facie* showing entitles the employer to relief (step two), and the adjudicator weighs the evidence produced in steps one and two to determine whether the employer has proven changed circumstances warranting reduction or termination of benefits by a preponderance of the evidence (step three). *See Mahoney*, CRB No. 14-067, at 9.

Moreover, *Mahoney* fulfills the purposes of workers' compensation statutes in general and the CMPA in particular. The *prima facie* case required under *Mahoney* requires the employer to produce "current and probative evidence that the claimant's condition has sufficiently changed to warrant a modification or termination of benefits." *Id.* Not only must this evidence be new, it must also be evidence of a change, rather than evidence of a current condition without reference to the condition at the time benefits were approved. 8 Lex K. Larson, Larson's Workers' Compensation § 131.03[3][a] (Matthew Bender, Rev. Ed.); *see McArthur*

v. D.C. Dep't of Corrections, CRB No. 14-113, at 3-4 (Feb. 26, 2015) (expert testimony that claimant had no work-related disability insufficient to meet first step because it is not evidence of change or improvement); *GA & FC Wagman, Inc. v. Workers' Comp. App. Bd. (Aucker)*, 785 A.2d 1087, 1092 (Pa. Commw. Ct. 2001) (physician's testimony that claimant was "fully recovered" was insufficient to support termination of benefits because physician failed to fully address the claimant's previously found injuries); *cf. Robinson v. Robinson*, 629 A.2d 562, 567-68 (D.C. 1993) (where statute permitted modification of child support order when there was a substantial and material change in the ability to pay, a modification could not be based on any factor taken into account when the initial order was issued); *Towles v. D.C. Bd. of Zoning Adjustment*, 578 A.2d 1128, 1133 (D.C. 1990) (where question in zoning case was whether there had been a material change in circumstances, evidence of the current situation, by itself, was not relevant). And the new evidence must be relevant in that it must be sufficient to warrant the reduction or termination of benefits.

Only if an employer meets this significant initial burden is the claimant required to "produc[e] reliable and relevant evidence that conditions have not changed to warrant a modification or termination of benefits." *Mahoney*, CRB No. 14-067, at 9. Importantly, "Claimant is not required to establish this by a preponderance of the evidence." *Abu-Bakr v. D.C. Dep't of Pub. Works*, CRB No.

14-042, at 3 (Dec. 10**,** 2014). This minimal burden of production merely ensures that there is something for the adjudicator to consider other than the employer's *prima facie* case when the adjudicator determines whether the employer has proven "by a preponderance of the evidence that claimant's benefits should be modified or terminated." *Mahoney*, CRB No. 14-067, at 9. This burden is easily met by, for example, the expert opinion of a treating physician alone, *e.g.*, *Westrook v. D.C. Public Schools*, 2015 DC Wrk. Comp. LEXIS 191, at *13 (ALJ decision March 23, 2015), *appeal pending*, CRB No. 15-062, or in combination with the claimant's own testimony, *Jones v. D.C. Dep't of Parks & Rec.*, 2015 DC Wrk. Comp. LEXIS 171, at *16 (ALJ decision March 19, 2015), *appeal pending*, CRB No. 15-061.[6]

II. *MAHONEY* SHOULD BE APPLIED RETROACTIVELY TO THIS CASE.

Judicial decisions interpreting statutes are given retrospective effect. *See James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991). Indeed, a Supreme

[6] In one individual case that appears to be an outlier, an ALJ imposed (and the CRB affirmed) far too high a burden on the claimant at this stage. *See Smith v. D.C. Housing Auth.*, CRB No. 14-044, at 5-9 & n.2 (Jan. 28, 2015) (upholding ALJ's decision that claimant had failed to meet burden at the second step of *Mahoney*, despite testimony from claimant and treating physician that claimant continued to be disabled), *petition for review docketed*, No. 15-AA-227 (D.C. Feb. 27, 2015). To the extent that *Mahoney* were read to place such a burden of persuasion on claimants, it would be unreasonable under the CMPA and would fail to implement the legislative intent in this workers' compensation statute. If the Court determines that it would benefit from additional briefing in *Smith*, the Legal Aid Society of the District of Columbia stands willing to participate in that case as an *amicus curiae*.

Court interpretation of a statute "must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule," or "'whether [the] litigants actually relied on [an] old rule.'" *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 95 (1993) (quoting *James B. Beam*, 501 U.S. at 543) (brackets in *Harper*).

Similarly, this Court's "judicial decisions are applied retroactively." *Washington v. Guest Servs.*, 718 A.2d 1071, 1074 (D.C. 1998); *Davis v. Moore*, 772 A.2d 204, 215 (D.C. 2001) (this Court has "a firm rule of retroactivity for our decisions expounding District of Columbia law"). This is true even when "the trial judge's disposition was correct at the time of his ruling." *Washington*, 718 A.2d at 1074. In applying this rule, this Court has regularly applied new statutory interpretations retroactively. *E.g.*, *Otts v. United States*, 952 A.2d 156, 161 n.4 (D.C. 2008); *Washington*, 718 A.2d at 1080.

The CRB has also adopted this rule. *See Whitley v. Howard Univ. & Liberty Mut. Ins.*, 2007 DC Wrk. Comp. LEXIS 102, at *13-14 (CRB decision Feb. 16, 2007) ("With respect to judicially-crafted interpretations in the law, the general rule in the District of Columbia . . . is that such legal pronouncements, because they are considered interpretations of existing law even though not previously applied, have retroactive effect."). Specifically applying this rule to *Mahoney*, the CRB has repeatedly remanded cases decided before *Mahoney* for the application of

Mahoney. *E.g.*, *Massey v. Univ. of D.C.*, CRB No. 14-132, at 3-4 (March 6, 2015) ("[W]e do not fault the ALJ for not using the CRB's analyses in *Mahoney* . . . because that decision was not issued prior to this Compensation Order. On remand the ALJ will have the opportunity to apply the *Mahoney* analysis."); *McArthur*, CRB No. 14-113, at 3, 5 ("remanded for further consideration under *Mahoney*" even though "*Mahoney* was issued after the issuance of the Compensation Order under review"); *Davidson v. D.C. Fire & Emergency Servs.*, CRB No. 14-099, at 4-5 (Feb. 26, 2015); *Glover v. D.C. Public Schools*, CRB No. 14-091, at 6-7, 9-10 (Dec. 16, 2014); *Abu-Bakr*, CRB No. 14-042, at 3.

If this Court determines that *Mahoney* is a proper interpretation of the CMPA, that interpretation should apply retroactively. Accordingly, this Court should either determine itself whether the ALJ followed *Mahoney* (a question addressed in the following Section III) or remand to the CRB to make that determination in the first instance.

III. THE ALJ BELOW DID NOT FOLLOW *MAHONEY*.

The ALJ below did not apply the three-part burden-shifting framework that the CRB adopted in *Mahoney*. The ALJ said that "the employer has the burden to prove modification or termination of benefits," R. at DOES 26, which is correct under *Mahoney*. But the ALJ never seems to have applied this burden. Moreover, immediately after that statement, the ALJ cited *Jones v. D.C. Superior Court*, CRB

No. 10-003, at 2-3 (March 10, 2011), which, contrary to *Mahoney*, employed a two-part burden-shifting test with the ultimate burden on the claimant to "show through reliable, relevant, and substantial medical evidence that her physical condition had not changed and that benefits should continue."

The ALJ below found that Ms. Ross's employer "presented substantial evidence that Claimant can return to work," R. at DOES 27, but did not analyze whether the employer's evidence demonstrated a change in Ms. Ross's condition. This is a far cry from the first step in *Mahoney*, which requires the employer to produce "current and probative evidence that claimant's condition has sufficiently changed to warrant a modification or termination of benefits." *Mahoney*, CRB No. 14-067 at 9. Indeed, the evidence considered by the ALJ below may have done nothing more than reiterate evidence considered when Ms. Ross's claim was first accepted and paid.

After appearing to find that incorrect initial burden met by the employer, the ALJ below determined that Ms. Ross's benefits should be terminated because her evidence was "insufficient to overcome that presented by Employer." R. at DOES 27. This is also not in accord with *Mahoney* because *Mahoney* never requires a claimant to provide sufficient evidence "to overcome that presented by" an employer. The only burden *Mahoney* places on a claimant is the burden "of *producing* reliable and relevant evidence that conditions have not changed to

warrant a modification or termination of benefits." *Mahoney*, CRB No. 14-067, at 9 (emphasis added). This is a burden of production, not of proof. Moreover, under *Mahoney*, the only stage at which the claimant's evidence is weighed against the employer's is the last stage, at which the employer bears the burden. *Id.* Thus, the ALJ did not apply *Mahoney*, and reversal and remand is required. *See Newell-Brinkley v. Walton*, 84 A.3d 53, 60 (D.C. 2014) (remanding to agency to apply proper burden-shifting framework to workers' compensation claim).

CONCLUSION

For the foregoing reasons, the CRB decision should be reversed and the case remanded for further administrative proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing Brief of *Amicus Curiae* to be delivered by first-class mail, postage prepaid, the 13th day of May, 2015, to

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ADDENDUM

Page

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR

F. THOMAS LUPARELLO
ACTING DIRECTOR

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.
>
> * * *
>
> 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.
>
> 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. 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.

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.

---

[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.]
>
> 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

In the Matter of, EDMOND WHITLEY, Claimant -- Petitioner v. HOWARD UNIVERSITY AND LIBERTY MUTUAL INSURANCE, Employer/Carrier -- Respondent.

CRB No. 06-71, OHA No. 03-500, OWC No. 578967

DISTRICT OF COLUMBIA, DEPARTMENT OF EMPLOYMENT SERVICES, COMPENSATION REVIEW BOARD

2007 DC Wrk. Comp. LEXIS 102

February 16, 2007

SUBSEQ-HISTORY: [*1] Appeal from a Compensation Order of Administrative Law Judge Linda F. Jory; OHA No. 03-500, OWC No. 578967

COUNSEL: Heather C. Leslie, Esq., for the Petitioner; Thomas E. Dempsey, Esq., for the Respondent

PANEL: E. COOPER BROWN, Chief Administrative Appeals Judge, SHARMAN J. MONROE and FLOYD LEWIS, *Administrative Appeals Judges.*

SHARMAN J. MONROE, *Administrative Appeals Judge,* on behalf of the Review Panel

OPINION: DECISION AND REMAND ORDER

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board pursuant to D.C. Official Code §§ 32-1521.01 and 32-1522 (2004), *7 DCMR § 230,* and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005). <n1>

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<n1> Pursuant to Administrative Policy Issuance No. 05-01, dated February 5, 2005, the Director of the Department of Employment Services realigned the Office of Hearings and Adjudication to include, *inter alia,* establishment of the Compensation Review Board (CRB) in implementation of the District of Columbia Fiscal Year 2005 Budget Support Act of 2004, Title J, the D.C. Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, sec. 1102 (Oct. 1, 1994), *codified at D.C. Code Ann. § 32-1521.01* (2005). In accordance with the Director's Policy Issuance, the CRB replaces the Office of the Director in providing administrative appellate review and disposition of workers' and disability compensation claims arising under the D.C. Workers' Compensation Act of 1979, as amended, *D.C. Code Ann. §§ 32-1501 to 32-1545* (2005) and the

D.C. Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Code Ann. §§ 1-623.1 to 1.643.7 (2005), including responsibility for administrative appeals filed prior to October 1, 2004, the effective date of the D.C. Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004.

---------- Footnote End ----------

[*2]

BACKGROUND

This appeal follows the issuance of a Compensation Order from the Administrative Hearings Division (AHD) of the Office of Hearings and Adjudication (OHA) in the District of Columbia Department of Employment Services (DOES). In that Compensation Order, which was filed on June 26, 2006, the Administrative Law Judge (ALJ) denied temporary total disability benefits and causally related medical expenses on the bases that the Claimant-Petitioner's (Petitioner) disability was not causally related to his March 13, 1986 work injury and that his claim was not timely filed in accordance with D.C. Official Code § 32-1514. The Petitioner now seeks review of that Compensation Order.

As grounds for this appeal, the Petitioner alleges as error that the Compensation Order is not supported by substantial evidence and is not in accordance with the law.

ANALYSIS

As an initial matter, the standard of review by the Compensation Review Board (CRB) and this Review Panel, as established by 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, [*3] and whether the legal conclusions drawn from those facts are in accordance with applicable law. D.C. Official Code § 32-1521.01 (d)(2)(A). "Substantial evidence," as defined by the District of Columbia Court of Appeals, is such evidence as a reasonable person might accept to support a particular conclusion. *Marriott Int'l. v. District of Columbia Department of Employment Services, 834 A.2d 882 (D.C. App. 2003).* Consistent with this standard of review, the CRB and this Review Panel are constrained 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.*

Turning to the case under review herein, the Petitioner alleges that the ALJ failed to accord him the presumption of compensability in finding that his disability is not causally related to his March 13, 1986 work injury. The Petitioner asserts that the statutory presumption was expanded in *Whittaker v. D.C. Department of Employment Services, 668 A.2d 844 (1995)* [*4] to include a causal relationship between a current disabling condition and a work injury and that, therefore the Respondent has the burden of producing substantial evidence to rebut the presumption of causal relationship. The Petitioner asserts that the medical opinion of Dr. Robert Gordon, upon whom the Respondent relied, is not "specific and comprehensive enough to rebut the presumption." With respect to the finding of untimely claim, the Petitioner agrees that he did not file a claim within one (1) year of the date of his injury. However, he argues that *7 DCMR § 203.3* and the holding of *Proctor v. General Conference of Seventh Day Adventists*, Dir.Dkt. No. 97-46, H&AS No. 95-501, OWC No. 145176 (December 13, 2000) indicate that the limitations period of D.C. Official Code § 32-1514 does not begin to run until the employer sends a copy of its first report to the employee. Therefore, the Petitioner asserts that since the Respondent did not show that it sent a copy of its first report to him via certified mail, the one year limitations period has not begun to run and his April 10, 2002 claim is timely.

The issue of whether the Petitioner's [*5] claim was timely filed is a dispositive jurisdictional issue and will, therefore, be addressed first. If the finding below is upheld, then the question of whether the presumption was correctly applied need not be examined as it is moot. If the finding below is reversed, then the question of whether the presumption was correctly applied must be examined.

On appeal, the Petitioner essentially argues that the legislative changes to D.C. Official Code § 32-1532 <n2>

which were enacted after his injury occurred, should be given retroactive effect thereby making his April 10, 2002 filing of his claim for his March 13, 1986 injury timely. Via the Workers' Compensation Amendment Act of 1998, which became effective April 16, 1999, D.C. Official Code § 32-1532(a) was amended to add a new sentence which states:

> The employer shall send to the employee or the employee's next of kin, by certified mail, return receipt requested, concurrent with the submission of the report to the Department of Employment Services, a statement of the employee's rights and obligations pursuant to this chapter, including the right to file a claim for compensation within one [*6] year from the date of injury or death.

---------- Footnote Begin ----------

<n2> Formerly D.C. Code § 36-332. To facilitate reading, the current citations to the D.C. Code will be used in the text of the decision with a footnote to the former citation.

---------- Footnote End ----------

In finding that the Petitioner's claim herein was not filed timely, the ALJ stated that when the Petitioner injured his knee in 1986, there was no requirement for an employer to send a copy of its first report to an injured employee in order for the time period for filing a claim to begin to run. The ALJ determined that the later amendment to the Act was not retroactively applicable and that there was no precedential case applicable making such a requirement applicable to this case. *See* Compensation Order at pp. 5-6. The ALJ was correct in part.

The CRB recently re-examined the retroactivity of legislation in *Huber v. J.D. Long Masonry, Inc.*, CRB No. 07-03, AHD No. 03-255, OWC No. 580022 (January 11, 2007). Consistent with prior decisions, the CRB held that legislation is considered prospective in nature, unless [*7] there is statutory direction or legislative history for retroactive application. *See also Lloyd v. Giant Food*, Dir.Dkt. No. 03-70 OHA No. 97-110E OWC Nos. 501519, 230297 265731 (September 30, 2004)(legislation must be considered to be prospective in nature, unless retroactive application is the "unequivocal and inflexible import of the [legislation's] terms."); *Nixon v. D.C. Housing Authority*, CRB No. 06-80, AHD No. PBL 06-013, OWC/DCP No. LTUNK0090 (November 29, 2006)(holding in *Lloyd* on the prospective nature of legislation adopted for application to cases under D.C. Official Code § 1-623.1 *et seq.*). Thus, in order for the Petitioner's argument to prevail, the Workers' Compensation Amendment Act of 1998 must show statutory direction or legislative history providing for retroactive application of D.C. Official Code § 32-1532(a).

The legislative history for the Workers' Compensation Amendment Act of 1998 indicates that its provisions are only applicable to workers' compensation injuries occurring *after* the enactment of the legislation. There is no language in the legislative history indicating that the D.C. City Council intended an exception with respect to [*8] the application of D.C. Official Code § 32-1532(a). COMMITTEE ON GOVERNMENT OPERATIONS, REPORT ON THE WORKERS' COMPENSATION ACT OF 1998, Bill 12-192, at 1 and 8 (October 29, 1998). Therefore, the Petitioner's argument for retroactive application of D.C. Official Code § 32-1532(a) is rejected.

However, our examination of the question of timeliness does not end with the 1998 amendments to the Act. Contrary to the ALJ's determination, our review of the law in this jurisdiction on the filing of claim pursuant to D.C. Official Code § 32-1514 <n3> reveals that prior to the enactment of D.C. Official Code § 32-1532(a), the Director issued *Rhodes v. Washington Hospital Center*, Dir.Dkt. No. 92-28, H&AS No. 91-765, OWC No. 0175405 (March 6, 1995). In *Rhodes*, the Director held that the limitations period of the then existing provision of D.C. Official Code § 32-1514 did not begin to run until the employer sends a copy of its first report to the injured employee. The Director revisited the holding of *Harris v. D.C. Department of Employment Services, 592 A.2d 1014 (D.C. 1991)*(*Harris I*),

although that holding was later vacated by the Court <n4>, and [*9] adopted the Court's reasoning, based upon a reading of the then regulations stating:

> Under the regulations, the limitations period does not begin to run until the employer has filed its report with the Agency. *7 DCMR § 203.3* (1986). A document is deemed to be filed only when it is either hand delivered or sent by registered or certified mail to the Agency, and a copy is sent to all interested parties. *Id.* § 228.2. The employee is defined under the regulations as an interested party. *Id.* § 299.1. Accordingly, unless the employer sent a copy of its report to the employee, the limitations period did not begin to run.

Rhodes, supra.

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<n3> Formerly D.C. Code § 36-314.

<n4> *Harris v. D.C. Department of Employment Services*, No. 90-AA-657 (1992)(*Harris II*).

---------- Footnote End ----------

The *Harris I* Court examined both the Act and the regulations. With respect to the Act, the Court stated that while it did not expressly require that a copy of an [*10] employer's report of injury be provided to the injured employee, "consistent with the humanitarian purposes of the Act, it necessarily follows that until the employee has notice that the employer's report has been filed with the Agency, the limitations period of § 36-314 (a) cannot begin to run." *Harris I, 592 A.2d at 1017*. The Court then pointed out D.C. Official Code § 32-1532(g) <n5> which required that DOES, on receiving the employer's report provided by subsection (a), notify the injured employee of the employee's rights and obligations under this chapter and D.C. Official Code § 32-1532(f) <n6> which indicated that the limitations period in § 32-1514(a) shall not begin to run until the employer's report has been furnished as required by the provisions of subsection (a). The *Harris I* Court also realized that the language of D.C. Official Code § 32-1532(f) was identical to the language of *33 U.S.C. § 930*(f) <n7> of the Longshore and Harbor Workers Act, the predecessor to the instant Act, which had been strictly interpreted against the employer because of Congressional concern that:

> reports of injuries [*11] have not been transmitted as required by [§ 30 (a) of] the Longshoremen's Act and, subsequently, when the injured workman has filed [a] claim for compensation after the time limitation fixed in the act has expired, this delay, rather than any lack of merit in the claim, has been relied on to avoid payment of compensation. No doubt in some cases the delay in filing [the] claim has been due to ignorance on the part of the employee, which would have been remedied if the procedures under the act had been set in motion by the filing of the report of injury. It may be that in some cases the report of injury has been withheld by the employer with the intention of defeating the employee's claim through the delay which might thus result. . . . The purpose of this amendment [adding section 30 (f)] is to remove any possible motive to withhold such reports of injury by making the bar of the limitation upon the right to file a claim begin to run only after such report of injury has been filed, in all

> cases in which the employer or insurance carrier in fact possessed the information upon which to make the [*12] report.

Harris I, 592 A.2d at 1018.

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<n5> Formerly D.C. Code § 36-332(g).

<n6> Formerly D.C. Code § 36-332(f).

<n7> *33 U.S.C. § 930*(f) reads:

> Where the employer or the carrier has been given notice, or the employer (or his agent in charge of the business in the place where the injury occurred) or the carrier has knowledge, of any injury or death of an employee and fails, neglects, or refuses to file report thereof as required by the provisions of subdivision (a) of this section, the limitations in subdivision (a) of section 13 of this Act *[33 USCS § 913*(a)] shall not begin to run against the claim of the injured employee or his dependents entitled to compensation, or in favor of either the employer or the carrier, until such report shall have been furnished as required by the provisions of subdivision (a) of this section.

---------- Footnote End ----------

It is reasonable to assume that the Director recognized [*13] and accepted the bases of *Harris I* as sound in revisiting the vacated holding and adopting it anew. *See Proctor, supra.* It should be noted that neither the *Harris I* Court not the Director, while holding that the limitations period did not begin to run until the employer sent a copy of its report to the employee, dispensed with the requirement of D.C. Official Code § 32-1532(g). *See Harris I, 592 A.2d at 1018, n. 7.*

Thus, prior to the enactment of D.C. Official Code § 32-1532(a), the case law in the District of Columbia established that the limitations period of D.C. Official Code § 32-1514, then D.C. Code § 36-314, does not begin to run until the employer sends a copy of its first report to the injured employee or the employee is otherwise notified or on notice that the first report was filed. At this juncture, the question is whether the holding of *Rhodes* is applicable to this case. The Petitioner's injury occurred in 1986, nine (9) years before *Rhodes* was issued.

With respect to judicially-crafted interpretations in the law, the general rule in the District of Columbia, unlike with legislative changes, is that such legal pronouncements, [*14] because they are considered interpretations of existing law even though not previously applied, have retroactive effect. *See Davis v. Moore, 772 A.2d 204, 230 (D.C. 2001).* In *Davis,* the en banc Court discarded the prior rule announced in *Mendes v. Johnson, 389 A.2d 781 (D.C. 1978)* requiring a balancing of four criteria to determine whether a judicial holding was to be applied retroactively either totally or partially or not at all. The Court conformed the District's jurisprudence to that announced by the U.S. Supreme Court in *Griffith v. Kentucky, 479 U.S. 314 (1987)* and *Harper v. Virginia Dept. of Taxation, 509 U.S. 86 (1993).* In *Griffith,* the Supreme Court indicated that retroactivity applies to "criminal cases pending on direct review or not yet final." *Griffith, 479 U.S. at 328.* In *Harper,* the Supreme Court extended *Griffith* to civil cases and indicated that a ruling is to "be given full retroactive effect in all cases still open on direct review and as to all events, regardless of *whether* such events [*15] predate or postdate our announcement of the rule." *Harper, 509 U.S. at 97.*

The Panel recognizes that at the time *Rhodes* was issued, this matter was not pending appeal. *Rhodes,* however, did

not pronounce new law, but merely interpreted the then provisions of the Act and its regulations. Therefore, upon application of the general rule in the District of Columbia on retroactivity of judicial interpretations, the holding of *Rhodes* is applicable to this case.

In the instant case, the ALJ found that the Respondent filed its first report in 1986 at the time the Petitioner sustained his work injury. However, the ALJ made no findings as to whether the Respondent sent a copy of the report to the Petitioner or whether DOES notified the Petitioner that the Respondent had filed the report or whether the Petitioner was otherwise notified of the filing of the report. Without such findings, it cannot be determined if the limitations period of D.C. Official Code § 32-1514 expired before the Petitioner filed his claim on April 10, 2002. The issue of timely claim must, therefore, be remanded for further findings and application of the appropriate law. [*16] <n8>

---------- Footnote Begin ----------

<n8> The evidentiary record suggests that the Petitioner may have been aware in 1986 that the Respondent had filed its first report of injury. See Transcript (TR) at p. 43. However, without the necessary findings, the Panel can take no further action with respect to the merits of the untimely claim issue.

---------- Footnote End ----------

In the event that the ALJ, upon remand, determines that the Petitioner's claim was timely filed, we address the merits of this case and determine that the presumption was not applied correctly. The issue, as stated in the Compensation Order, was whether the Petitioner's alleged disability is causally related to an injury which arose out of and in the course of his employment on March 13, 1986. *See* Compensation Order at p. 2. The Petitioner injured his right knee at work on March 13, 1986. After returning to work, he continued to experience pain and swelling in his knee. He underwent an arthroscopy of his right knee on April 1, 2004 and a total knee replacement on July 23, 2004. The Petitioner asserted that his 2004 [*17] knee problems and surgeries are causally related to his 1986 injury.

The parties stipulated that the Petitioner sustained an accidental injury on March 13, 1986 which arose out of and in the course of his employment. The ALJ correctly stated the law in this jurisdiction on the statutory presumption of compensability, *i.e.*, it is invoked by the claimant's initial showing of an injury and a work place incident with the potential to cause the injury and once invoked, the burden shifts to the employer to present "specific and comprehensive" evidence to rebut the presumption, and the presumption extension to medical causal relationship. The ALJ then recognized that the Respondent stipulated to the work-relatedness of the March 13, 1986 injury. This stipulation had the effect of "invoking" the statutory presumption and leaving the presumption unrebutted. However, in analyzing the facts of this case, the ALJ placed the burden anew on the Petitioner to make the *initial* showing required to invoke the statutory presumption of compensability. The ALJ stated,

> Without some sort of documentation that claimant sustained an injury to his right knee and sought treatment [*18] for such an injury, the undersigned cannot find claimant has met his burden of showing an injury or disease and a work place incident, condition or event that has the potential of causing an injury to is right knee that necessitated surgery. The presumption of compensability is accordingly not invoked and employer retains no further burden to disprove that the 1986 work incident precipitated the need for his knee replacement.
>
> Compensation Order at p. 4.

This burden was improper given the parties' stipulation. The presumption was in place, unrebutted and it, therefore, extended to the medical causal relationship between the Petitioner's current disability and his March 13, 1986 work injury. Under the law in this jurisdiction, the burden was now on the Respondent to produce "specific and comprehensive" evidence to rebut the extended presumption of medical causal relationship, or in other words, to rebut the medical causal relationship between the Petitioner's current disability and his March 13, 1986 work injury. This issue of causal relationship must be remanded for a proper application of the presumption.

CONCLUSION

The Compensation Order of [*19] June 26, 2006 is not supported by substantial evidence in the record and is not in accordance with the law for the reasons stated above

ORDER

The Compensation Order of June 26, 2006 is hereby REMANDED.

On remand, the ALJ shall conduct further proceedings as may be necessary to make further findings of fact and conclusions of law on the question of whether the Petitioner's claim was timely file and shall review the evidence and properly apply the presumption of compensability consistent with the above discussions.

FOR THE COMPENSATION REVIEW BOARD:

SHARMAN J. MONROE
Administrative Appeals Judge

February 16, 2007

IN THE MATTER OF, ARNTRICE D. WESTROOK, Claimant, v. DISTRICT OF COLUMBIA PUBLIC SCHOOLS, Employer.

AHD No.: PBL14-046, DCP No.: 0468-WC-94-0400032

District of Columbia, Office of Employment Services
Hearings & Adjudication Section

2015 DC Wrk. Comp. LEXIS 191

March 23, 2015

COUNSEL: [*1] HAROLD L. LEVI, ESQ., FOR THE CLAIMANT; RAHSAAN J. DICKERSON, AAG, FOR THE EMPLOYER

PANEL: GWENLYNN D'SOUZA, ADMINISTRATIVE LAW JUDGE

OPINION: COMPENSATION ORDER

STATEMENT OF THE CASE

This proceeding arises out of a claim for disability compensation benefits filed pursuant to the provisions of the District of Columbia Government Comprehensive Merit Personnel Act of 1978, D.C. Code, as amended, §§ 1-623.1 et seq. (hereinafter "the Act").

After timely notice, a full evidentiary hearing was held on February 24, 2015, before Gwenlynn D'Souza, Administrative Law Judge. Claimant appeared and testified on her own behalf, and introduced one expert witness. Employer introduced no witnesses. Employer's Exhibits (EE) 1-16 and Claimant's Exhibits (CE) 1-10, 12-13 were admitted into the record. The record closed on March 18, 2015 upon receipt of the Hearing Transcript (HT).

At hearing, Claimant's Exhibit 11, which was a Compensation Order dated June 15, 2007 in the same case, was introduced. After objection on the grounds of relevance by Employer, Exhibit 11 was taken under advisement. At this time, I take judicial notice of Claimant's Exhibit 11, which is relevant to the procedural history of this [*2] case and the scope of the issues at hand.

BACKGROUND AND PROCEDURAL HISTORY

Claimant worked for Employer as a teacher at the Oak Hill facility in a classroom without heat during the winter months. On April 10, 2001, Claimant filed a claim for "Respiratory System, Conditions, Asthma, Influenza, Pneumonia, Multiple Body Parts." The Office of Risk Management/Public Sector Workers' Compensation Program (PSCWCP) accepted Claimant's claim for her "condition", without specific limitation, related to her work environment.

On June 15, 2007, this administrative court found that a causal relationship exists between Claimant current respiratory condition and the January 8, 2001 work injury based on a stipulation of the parties. <n1>

---------- Footnote Begin ----------

<n1> *Westbrook v. District of Columbia Public Schools*, AHD No. PBL 06-003B, DCP No. 761021-3-2006-3 (June 15, 2007).

---------- Footnote End ----------

PSWCP paid disability benefits, most recently, from the time of a recurrence caused by unemployment, until July 8, 2014, when Employer terminated those benefits. On January 16, 2014, [*3] PSWCP issued a notice of determination informing Claimant that the claim for continuing benefits was denied based on the report of Dr. Harvey Schwartz, an internist and allergist, who found the episode of January 8, 2001 was a self-limited episode and is not causing current symptomatology. Claimant requested reconsideration of the termination of benefits on February 12, 2014. On July 8, 2014, PSWCP issued a Final Decision on Reconsideration that denied Claimant's request for reconsideration based on its review of recent medical opinions. On August 7, 2014, Claimant filed a request for formal hearing with the Department of Employment Services, Administrative Hearing Division, Office of Hearings and Adjudication.

CLAIM FOR RELIEF

Claimant seeks an award under the Act of reinstatement of temporary total disability benefits and medical expenses from July 8, 2014, to the present and continuing.

ISSUES

What is the extent of the original claim?

Whether Employer properly terminated benefits because Claimant's current condition is not medically causally related to the previously claimed and accepted condition?

FINDINGS OFF ACT

The parties do not dispute, and I accordingly [*4] find, an employer/employee relationship existed as defined by the Act on the date of injury and jurisdiction is vested in the District of Columbia. The parties have stipulated, and I accordingly find, an accidental injury occurred on January 8, 2001; Claimant's notice of injury was timely; Claimant timely filed her claim of injury; Claimant received temporary total disability benefits and medical expenses since the time of the recurrence through July 8, 2014, and continued receiving some medical expenses since; and Claimant has not returned to work.

As an initial matter, Claimant's testimony is found to be credible. This determination is based upon her demeanor and consistencies between Claimant's version of events and documentary submissions.

At the time of injury, Claimant was employed as a teacher. (CE 1) Prior to injury, Claimant verbally instructed students over a five hour period for approximately five days a week. (HT 98) After working in a work environment without heat for approximately two months, on January 8, 2001, Claimant lost her voice, and was diagnosed with pharangitis, paranasal sinus infection, influenza, walking pneumonia, chronic inflammatory larnygotracheobronchitis [*5] bronchitis, asthma, airflow limitation, and other respiratory system conditions to multiple body parts. (CE 1, EE6, HT

84-88)

When Claimant returned to work from approximately two months in June-July 2001, her condition had not completely resolved. (HT 97-98) She was fatigued and needed to nap during her lunch and planning time periods. (HT 98, 106) Her classroom instruction was impeded by incessant coughing. (HT 97-98) Claimant borrowed leave from a leave bank because she had expended all accrued sick leave. (HT 106-107) On July 29, 2001, Dr. Frank Mayo, an additional medical examiner who is a pulmonologist made a recommendation to remove Claimant from the work environment and found Claimant's then condition was related to the January 8, 2001 injury and her condition required further treatment. (CE6) On August 29, 2001, the PSWCP accepted Claimant's claim without any specific limitation. (CE2, EE1, EE2, EE6)

Claimant sought medical treatment on a regular basis since January 8, 2001. (CE 4 - CE 10) Dr. Steinberg, her treating pulmonologist, diagnosed claimant with chronic asthmathic sinobronchitis. (CE 5) Her condition was characterized by a hyperreactive airway with an incessant [*6] cough. (EE 3, EE 5, HT 59).

On June 15, 2007, this administrative court found that a causal relationship exists between Claimant's then current respiratory condition and the January 8, 2001 work injury based on a stipulation of the parties.

Claimant was hospitalized several times in 2008 and 2009 for wheezing and shortness of breath. (CE 7, CE 8, CE 9) Claimant also underwent several bronchoscopies to clean her airways. (CE 10) On January 15, 2010, Claimant consulted Dr. Ira Tauber an additional medical examiner, who is also a pulmonologist and complained of waking from sleep, choking, and wheezing on a daily basis in the morning. (CE 7) Spirometry results improved post-nebulization. (CE 7) Dr. Tauber found Claimant would have a lifelong medical restriction of a clean and temperature controlled environment and Claimant was unable to perform lecturing since lecturing would be interfered with by incessant coughing and throat clearing. (CE 7) Dr. Tauber found that it was surprising that Claimant had measured obstructive disease based on a pulmonary function test while having a normal ventilatory phase on lung scan. (CE 7)

Dr. Steinberg opined that an infection can trigger a chronic [*7] hyperreactive airway. (CE5, HT 58) Specifically, that there is a causal relationship in that the initial intense exposure sensitized her respiratory tract so that she evolved into a circumstance where she has a chronic ongoing respiratory problem. (HT 41) In recent years, he observed Claimant's airway several times during bronchioscopy and found it to be abnormal, in the sense, it was hyperreactive, even when no mucous was present. (CE 10, HT 49) He has observed Claimant coughing persistently in his office, in the hospital, and at hearing, and noticed no change in the coughing pattern. (HT 39, HT 59)

On July 11, 2011, Dr. Ross S. Myerson, an additional medical examiner who specializes in occupational medication, determined that the condition was not causally related. (EE 3) On June 27, 2012, Harvey Schwartz an additional medical examiner who specializes in allergies, but performed no allergy testing, issued a similar opinion. (EE 5) In 2013 and 2014, Claimant was hospitalized for asthma exacerbation. (CE 5, CE 9)

Currently, Claimant is impaired in her ability to teach while coughing persistently. (EE 3, EE 5, CE 7) Although Claimant naps several times a day because of fatigue, [*8] testing results indicate oxygen levels are normal. (HT 98, HT 106, CE 7, EE 3)

DISCUSSION

The proceedings before the Office of Hearings and Adjudications are *de novo* proceedings, and it is irrelevant whether the termination of benefits is rationally based or not. *Njomo v. D. C. Department of Youth Rehabilitation Services*, CRB No. 12-106, AHD No. PBL11-002, DCP No. 3009114587-0001 (August 9, 2012). An administrative law judge is "to make an independent decision based on the evidence at the hearing." *Id*. In a case where there is timely notice of a claim, an ALJ is not limited to "reviewing the decision made by the Program" and is permitted to "go beyond the

decision [in the Final Determination] to reach a conclusion regarding the merits of the case." *Carrington v. District of Columbia Public Schools*, CRB No. 13-093, AHD No. PBL12-041, DCP No. 30100942563-0001 (August 29, 2013)(brackets in original). This administrative court, however, is constrained to address only the defenses raised and decided in the Notice of Determination and jurisdictional challenges. *Murray v. District of Columbia Dept. of Youth Rehabilitation Servs.*, AHD NO. PBL 13-037, DCP. No. 30100886102-0001(November [*9] 26, 2014).

The undersigned has reviewed and considered the totality of the evidence, as well as the arguments, presented by the parties on the issues presented for resolution. To the extent an argument is consistent with the findings of fact, analysis, and conclusions of law contained herein, it is accepted; to the extent an argument is inconsistent therewith, it is specifically rejected.

I. JURISDICTION OVER ACCEPTED CLAIMS

The District of Columbia Government Comprehensive Merit Personnel Act of 1978, D.C. Code § 1-623.1 *et seq.*, as amended, governs this case. Employer contends that this administrative court may not address any body part that was not part of the accepted claims. *Ashton v. District of Columbia Dep't of Motor Vehicles*, CRB No. 10-193, AHD No. PBL 10-065, DCP No. 30100438785-0001 (July 7, 2011).

Although Employer contended that this claim is limited to upper respiratory infection, bronchitis, laryngitis, and pneumonia, it has provided no documentary support for this allegation. The accepted claim was not limited (CE2), and, therefore, Employer accepted the full claim as stated in the claims forms. Therefore, the claim consisted of pharangitis, paranasal [*10] sinus infection, influenza, pneumonia, asthma, airflow limitation, and other respiratory system conditions to multiple body parts. (CE 1-2) Employer understood that the claim was for "respiratory conditions resulting from the work environment" because it noted that phrase as the accepted claim in the notice of determination dated January 16, 2014. (EE 1) Accordingly, I find the accepted claim consists of respiratory system conditions related to the work environment.

II. MEDICAL CAUSATION

In this case, the issue of medical causation has been decided once before. On June 15, 2007, this administrative court found that a causal relationship existed between Claimant's then current respiratory condition and the January 18, 2001 work injury based on a stipulation of the parties. This finding is the law of the case, <n2> and the scope of the issue before this court is, therefore, constrained. Therefore, I limit the issue of medical causation to whether Claimant's current condition is medically causally related to Claimant's January 8, 2001 respiratory system conditions based on a changed of condition since June 15, 2007.

---------- Footnote Begin ----------

<n2> The law of the case doctrine recognizes that "once the court has decided a point in a case, that point becomes and remains settled unless it is reversed or modified by a higher court." *Kritsidimas v. Sheskin, 411 A.2d 370, 371 (D.C. 1980).*

---------- Footnote End ----------

[*11]

In a public sector case, once a claim for disability compensation has been accepted and benefits have been paid, a three-prong burden-shifting analysis is applied. As the Compensation Review Board recently stated:

> 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 injured worker's benefits continue unmodified or terminated.
>
> If the employer meets its initial burden, then the clamant (*sic* 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 preponderance of the evidence that claimant's benefits should be modified or terminated.

Mahoney v. District of Columbia Public Schools, CRB No. 14-067 (November 12, 2014) (*en banc*).

Here, Employer satisfied its initial burden. Employer produced current and [*12] probative evidence that Claimant's condition sufficiently changed to warrant a termination of benefits. D.C. Code § 1-623.24(d)(4) provides, in part, that an award for compensation may be terminated in the event the disabling condition is no longer related to the employment. <n3> Employer posited the May 21, 2013 report of Dr. Schwartz, which indicated, that after a physical examination of Claimant, Dr. Schwartz opined that an infection triggers only a temporary exacerbation of an underlying airway condition. (EE 7) This showing is sufficient for Employer to meet its initial burden.

---------- Footnote Begin ----------

<n3> D.C. Code § 1-623.24(d)(4) reads:

(4) An award for compensation may not be modified because of a change to the claimant's condition unless:

(A) The disability for which compensation was paid has ceased or lessened;

(B) The disabling condition is no longer causally related to the employment;

(C) The claimant's condition has changed from a total disability to a partial disability;

(D) The employee has returned to work on a full-time or part-time basis other than vocational rehabilitation under § 1-623.04; or

(E) The Mayor or his or her designee determines based upon strong compelling evidence that the initial decision was in error.

---------- Footnote End ----------

[*13]
At the next step, Claimant must produce reliable and relevant evidence that her disabling condition has not changed. Claimant posited evidence, through Dr. Steinberg, who testified that a work environment such as Claimant's work environment may cause an infection which may trigger a chronic hyperreactive airway. (CE5, HT 58) With this evidence, Claimant satisfied her burden of showing reliable and relevant evidence of a causal connection by providing the expert opinion of a treating pulmonologist.

The third and final step requires that in order for the Employer to prevail the Employer must show by a preponderance of the evidence that Claimant's benefits should be terminated based on a change of condition since June 15, 2007. Preponderance of the evidence is defined as the greater weight of the evidence, not necessarily established by the

greater number of witnesses testifying to a fact, but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other. *Black's Law Dictionary*, (9th [*14] ed). In this regard, the administrative law judge may, of course, consider the reasonableness of the testimony and whether or not particular testimony has been contradicted or corroborated by other evidence. *McCamey v. District of Columbia Dept. of Employment Servs., 947 A.2d 1191, 1214 (2008).*

In this case there are conflicting medical opinions <n4> as to whether an infection may trigger a chronic hyperreactive airway rather than a temporary hyperreactive airway. Drs. Myerson and Schwartz determined that an infection could not result in more than a temporary hyperreactivity of an airway, but do not provide any alternative cause for Claimant's condition. (EE 3 - EE 7) Dr. Myerson speculated about the implications of the results of a CT scan of Claimant's sinus. (EE 4) However, the CT scan, which was reviewed by Dr. Schwartz, did not provide evidence of an alternative pathology. (EE 5, EE 7) Dr. Myerson also speculated about allergies as an alternative cause, but the record reveals no allergy testing was done. (EE 3)

---------- Footnote Begin ----------

<n4> In making an assessment of medical causation, the treating physician preference is no longer applicable in public sector worker's compensation cases. *District of Columbia Public Schools v. District of Columbia Employment Servs., 95 A.2d 1284, 1288-1289 (2014); Downing v. District of Columbia Public Schools*, CRB No. 12-004, AHD No. PBL 11-015, DCP No. 30090824958-0001. Therefore, the competing physicians' reports must be weighed without benefit of any treating physician preference. However, an administrative law judge is permitted to find the treating physician opinion persuasive without affording the opinion a preference. *Ware v. District of Columbia Dept. of Corrections*, CRB No. 14-098, AHD No. PBL 96-083E, DCP No. 761032-0001-1999-0003 (August 18, 2014).

---------- Footnote End ----------

[*15]

I find Drs. Myerson and Schwartz's opinions on causation unpersuasive because they did not personally observe Claimant's airways, they did not determine an alternative cause for Claimant's abnormal condition, and their determination is contrary to the law of the case. Assuming the law of the case, particularly that Claimant's condition was medically causally related until July 15, 2007, Dr. Schwartz's opinion -- that Claimant should have been able to return to work approximately one month after the workplace exposure was eliminated -- must be discounted. Based on the law of the case, the weight of the evidence is that Claimant's current disability was medically causally related for 7 years, and Employer has not shown any change in medical condition since July 15, 2007.

On the other hand, Dr. Steinberg determined that Claimant's work environment could cause an infection that in a minority of cases, like Claimant's, could trigger a chronic hyperreactive airway, and Dr. Tauber appeared to agree. Dr. Steinberg based his opinion on his personal observation of the airway, a lack of similar episodes prior to the January 8, 2001 injury, Claimant's continuous treatment for the symptoms [*16] since 2001, his research, and his clinical observations of other patients. (HT 58-59). He, however, acknowledged that majority of cases involving exposures to irritants in a workplace would result in transient symptoms that eventually resolve, but a minority of the cases involving exposures could result in respiratory conditions which become chronic, such as in Claimant's case. (EE 15) Dr. Tauber identified objective evidence of obstruction of an airway and determined a causal connection based on a lack of pre-injury episodes. (CE 7) I find Drs. Steinberg's opinion persuasive because he continuously treated Claimant for several years, he personally observed Claimant's airways, and his opinions are consistent with several prior IME doctors. Based on the testimony received and the observations of Claimant at hearing, I find Claimant's incessant coughing continued unabated from January 8, 2001, to the present, without modification since July 15, 2007. Therefore,

I conclude Claimant's current disabling condition is medically causally related to the January 8, 2001 injury.

CONCLUSIONS OF LAW

Based on the evidence presented, I find the accepted claim consists of respiratory system [*17] conditions related to the work environment and hereby conclude that Employer has not proven by a preponderance of the evidence that Claimant's current condition is no longer causally related to the workplace injury.

ORDER

It is **ORDERED**, Claimant's claim for relief to reinstate her temporary total disability benefits and medical expenses from December 16, 2012, to the present and continuing be, and hereby is, **GRANTED**.

GWENLYNN D'SOUZA

ADMINISTRATIVE LAW JUDGE

LOAD-DATE: April 20, 2015

In the Matter of, PLANCHITTA JONES Claimant, v. DISTRICT OF COLUMBIA DEPARTMENT OF PARKS AND RECREATION, Employer.

OHA/AHD No.: PBL 13-024, ORM/DCP No.: 30100393140-0001

District of Columbia, Office of Employment Services
Hearings & Adjudication Section

2015 DC Wrk. Comp. LEXIS 171

March 19, 2015

COUNSEL: [*1] MATTHEW T. FAMIGLIETTI, ESQ., FOR THE CLAIMANT; LINDSAY NEINAST, AAG, FOR THE EMPLOYER

PANEL: FRED D. CARNEY, JR., ADMINISTRATIVE LAW JUDGE

OPINION: COMPENSATION ORDER
STATEMENT OF THE CASE
This proceeding arises out of a claim for disability compensation benefits filed pursuant to the provisions of the District of Columbia Government Comprehensive Merit Personnel Act of 1978, D.C. Code, as amended, §§ 1-623.1 *et seq*. (hereinafter "the Act").

After timely notice, a full evidentiary hearing was held on April 3, 2013 and on May 6, 2013, before Fred D. Carney, Jr., Administrative Law Judge. Claimant appeared and testified on her own behalf. Employer introduced one witness. Employer's Exhibits (EE) 1-13 and Claimant's Exhibits (CE) 1-5 were admitted into the record. The Hearing Transcript (HT) was received on May 16, 2013.

On February 19, 2015, the undersigned issued a show cause order ordering the Parties to show cause why the Claim for Compensation marked as Employer's Document Production Tab 4 at 1-4 and the February 28, 2013 Operative Report of Dr. George Aguiar marked as Employer's Document Production Tab 3 should not be marked and admitted, respectively, as ALJ Exhibit 1 and ALJ Exhibit [*2] 2. Claimant responded with no objection. Employer responded that the documents were already part of Claimant's Exhibits. However, the list of exhibits in the transcript indicates otherwise. Therefore, to avoid confusion, on February 26, 2015, the Claim for Compensation was marked and admitted as ALJ 1 and the February 28, 2013 Operative Report of Dr. George Aguiar was marked and admitted as ALJ 2, and the record was closed.

BACKGROUND AND PROCEDURAL HISTORY

Claimant worked for Employer as a Recreation Specialist. On February 22, 2010, Claimant slipped and fell on a concrete surface. The Office of Risk Management/Public Sector Workers' Compensation Program (PSCWCP) accepted Claimant's claim for the injury to the upper back and the left leg, which includes the left knee and left thigh.

On October 5, 2012, PSWCP issued a notice of determination informing Claimant that the claim for continuing benefits was denied based on the report of Dr. Robert Franklin Draper, an orthopedic surgeon, who found Claimant had reached maximum medical improvement, Claimant was able to perform her pre-injury job as a recreation specialist on a full-time basis, and any need for work restrictions [*3] would be due to preexisting degenerative disease. PSWCP paid disability benefits until December 15, 2012 <n1> shortly after Employer issued an Amended Final Decision on Reconsideration, in which the October 5, 2012 decision to suspend benefits was upheld. On December 18, 2012, Claimant filed a request for formal hearing with the Office of Hearings and Adjudication ("AHD").

---------- Footnote Begin ----------

<n1>The parties stipulated that disability benefits were received through December 15, 2012, and the Amended Final Decision on Reconsideration reflects that disability benefits were terminated as of December 3, 2012. I rely on the stipulation to determine when benefits were suspended.

---------- Footnote End ----------

CLAIM FOR RELIEF

Claimant seeks an award under the Act of reinstatement of temporary total disability benefits and medical expenses from December 16, 2012, to the present and continuing.

ISSUE

Whether this administrative court has jurisdiction over a claim related to a shoulder injury?

Whether Employer properly suspended benefits based on the nature and extent of Claimant's [*4] current condition?

Whether Employer properly terminated benefits because Claimant's current condition is not medically causally related?

FINDINGS OF FACT

The parties do not dispute, and I accordingly find, an employer/employee relationship existed as defined by the Act on the date of injury. The parties have stipulated, and I accordingly find, an accidental injury occurred on February 22, 2010; Claimant's notice of injury was timely; Claimant timely filed her claim of injury to the left leg, left knee, upper left thigh, and upper back; Claimant received temporary total disability benefits and medical expenses through December 15, 2012; and Claimant has not returned to work.

As an initial matter, Claimant's testimony is found to be credible. This determination is based upon her demeanor and consistencies between Claimant's version of events and documentary submissions. The Claimant was visibly impaired on her right shoulder while testifying to the extent she had difficulty moving her neck, although the hearing was post-operation.

At the time of injury, Claimant was 37 years old and employed as a recreation specialist. Prior to injury, Claimant taught an adult aerobics [*5] class and was able to run and walk long periods of time. Claimant was able to bend to pick-up games, sports equipment, or a bag of clothes. Claimant could bend to assist children. On February 22, 2010, Claimant slipped and fell backward hitting her head, right shoulder, and left leg against a concrete surface. The Physician's Report of Employee's Injury and Disability (Form 3) indicates a left leg, back, and neck injury. The

PSCWCP accepted Claimant's claim for the injury to the left leg, left knee, upper left thigh, and upper back.

On August 5, 2011, Dr. Rida N. Azer, an orthopedic surgeon, reported that Claimant complained of a pain in the neck and that an x-ray of the cervical spine showed a narrowing of the medial and lateral joint spaces.

On July 30, 2012, Dr. Sameer B. Shammas, an orthopedic surgeon designated for treatment by Employer, noted Claimant's treatment authorization was for the shoulder and knee. He noted Claimant's chief complaint was persistent left knee pain, especially with any attempt to do any extra activity to include any standing and walking; persistent cervical spine pain with right upper extremity radiculopathy <n2> to include the right shoulder girdle [*6] area extending distally to include pain and numbness to the index, middle and ring fingers; and persistent right shoulder pain especially with any active range of motion. <n3>

---------- Footnote Begin ----------

<n2>Radiculopathy is a disease of the nerve roots. *See* DORLAND'S 29th Edition, p. 1551.

<n3>Although Claimant indicates, in her Memorandum of Law, that treatment of the shoulder began with a referral for physical therapy at Capital Orthopedics in or around April 2010, no testimony or evidence was submitted into the record.

---------- Footnote End ----------

On or about May 4, 2012, Dr. Draper, an additional medical examiner, reviewed certain medical records. He noted that the July 19, 2011 MRI of the cervical spine showed a mild to moderate left C5-6 foraminal stenosis <n4> secondary to uncovertebral joint <n5> hypertrophy. <n6> He did not review the June 3, 2010 MRI of the cervical spine. Dr. Draper diagnosed Claimant with cervical strain, but related the condition to osteoarthritis <n7> of the uncovertebral joint that is not accident related. Dr. Draper also diagnosed Claimant with [*7] thoracic strain.

---------- Footnote Begin ----------

<n4>Spinal stenosis is the abnormal narrowing of the vertebral canal, nerve root canals, or intervertebral foramina of the lumbar spine caused by encroachment of bone upon the space. *See* DORLAND'S 29th Edition, p. 1698. A foramen is a natural opening or passage. *See* DORLAND'S 29th Edition, p. 696.

<n5>The uncovertebral joint is a lateral edge of one of the C3 to T1 joints of the anterior column of the spine. *See* DORLAND'S 29th Edition, pp. 931,932.

<n6>Hypertrophy is the enlargement of a joint, which appears spurlike. *See* DORLAND's 29th Edition, p. 859, 932.

<n7>Osteoarthritis is a noninflammatory degenerative joint disease seen mainly in older persons, characterized by degeneration of the articular cartilage, hypertrophy of bond at the margins, and changes in the synovial membrane. *See* DORLAND'S 29th Edition, p. 1286.

---------- Footnote End ----------

Dr. Draper noted the March 21, 2011 x-ray <n8> of the right shoulder showed no evidence of shoulder fracture or focal

bone bruise. He diagnosed Claimant with right shoulder [*8] strain.

---------- Footnote Begin ----------

<n8>Dr. Shammas referred to a March 21, 2012 MRI. (EE 9) Dr. Draper referred to a March 21, 2011 x-ray. Neither record was produced as part of the record, but Dr. Draper testified about the March 21, 2011 x-ray.

---------- Footnote End ----------

Dr. Draper noted the July 19, 2011 MRI of the left <n9> knee showed a thinning of the anterior cruciate ligament (ACL), but no full thickness tear. Upon examination, he noted a negative vertical compression test and zero degrees of extension. He found Claimant had left knee strain.

---------- Footnote Begin ----------

<n9>Dr. Draper corrected his report as to the "right" (*sic* left) leg during live testimony.

---------- Footnote End ----------

On August 14, 2012, Dr. Shammas noted an earlier June 3, 2010 MRI of the cervical spine showed disc bulges at two separate levels from C5 through T1 and that an earlier April 15, 2010 MRI to the left knee showed bone marrow edema which was attributed to bone contusion.

On December 14, 2012, [*9] Dr. Ziyad K. Haddad, a radiologist, after conducting a MR arthrogram, <n10> diagnosed Claimant with mild supraspinatus <n11> tendinosis, <n12> and moderate teres minor <n13> muscle atrophy <n14> based on an MRI of the right shoulder. On January 4, 2013, Dr. George Aguiar, an orthopedist, diagnosed Claimant with right shoulder quadrilateral space syndrome, moderate right shoulder teres minor atrophy, and right shoulder impingement syndrome and tendinosis.

---------- Footnote Begin ----------

<n10>An arthrogram is a radiographic record taken after introduction of opaque contrast material into a joint. *See* DORLAND'S 29th Edition, p. 152.

<n11>Supraspinatus refers to the muscle which extends from the top of the shoulder blade to back of the neck. *See* DORLAND'S 29th Edition, p. 1145. Although Dr. Draper testified that the supraspinatus had a partial tear (HT 63). However, the record indicates Dr. Aguiar's post-operative diagnosis was a subscapularis tear. (ALJ 2)

<n12>Tendinosis refers to micro tears of the tendon caused by overuse. *See* http://www.webmd.com/first-aid/tc/tendon-injury-tendinopathy-topic-overview.

<n13>The teres minor muscle is the normally long and round muscle located to the side of the shoulder blade near the underarm. *See* DORLAND'S 29th Edition, p. 1145, 1800.

<n14>Atrophy refers to the wasting of a body part. *See* DORLAND'S 29th Edition, p. 170.

---------- Footnote End ----------

[*10]

On January 28, 2013, Dr. Shammas determined Claimant had persistent chronic pain following an injury on the job that she sustained back on February 22, 2010.

On February 28, 2013, Dr. Aguiar performed surgery to resolve the issues shown on the December 14, 2012 MRI. He confirmed quadrilateral space syndrome <n15> with a partial tear of the subscapularis tendon, the right shoulder teres minor atrophy, the impingement of the axillary nerve. He determined there was no arthritis of the shoulder. He did not confirm arthritis in the area observed during surgery.

---------- Footnote Begin ----------

<n15>Quadrilateral space is characterized by fibrous bands in the quadrilateral space of the right shoulder. (HT 55)

---------- Footnote End ----------

The Job Description for a Recreation Specialist reflects the work is highly energetic and very active in nature and requires some walking, stooping, jumping, running, and bending in the promotion and leadership of sports and leisure time activities. A recreation specialist was required to stand up to 4-5 hours a day. Currently, Claimant is unable to stand for [*11] more than an hour, bend at times, or raise her arm to wash her hair. Claimant is unable to bend or squat sufficiently to perform mat exercises, to lift tables, or to set-up chairs. Claimant is unable to stay alert because of medication.

DISCUSSION

The proceedings before the Office of Hearings and Adjudications are, in actuality, *de novo* proceedings, and it is irrelevant whether the termination of benefits is rationally based or not. *Njomo v. D.C. Department of Youth Rehabilitation Services*, CRB No. 12-106, AHD No. PBL11-002, DCP No. 3009114587-0001 (August 9, 2012). An administrative law judge is "to make an independent decision based on the evidence at the hearing." *Id*. In a case where there is timely notice of a claim, an AU is not limited to "reviewing the decision made by the Program" and is permitted to "go beyond the decision [in the Final Determination] to reach a conclusion regarding the merits of the case." *Carrington v. District of Columbia Public Schools*, CRB No. 13-093, AHD No. PBL12-041, DCP No. 30100942563-0001 (August 29, 2013)(brackets in original). This administrative court, however, is constrained to address only the defenses raised and decided [*12] in the Notice of Determination and jurisdictional challenges. *Murray v. District of Columbia Dept. of Youth Rehabilitation Servs.*, AHD NO. PBL 13-037, DCP. No. 30100886102-0001(November 26, 2014).

The undersigned has reviewed and considered the totality of the evidence, as well as the arguments, presented by the parties on the issues presented for resolution. To the extent an argument is consistent with the findings of fact, analysis, and conclusions of law contained herein, it is accepted; to the extent an argument is inconsistent therewith, it is specifically rejected.

I. JURISDICTION OVER ACCEPTED CLAIMS

The District of Columbia Government Comprehensive Merit Personnel Act of 1978, D.C. Code § 1-623.1 *et seq.*, as amended, governs this case. The Compensation Review Board has held this administrative court may not address an

injury which is not part of the accepted claims. *Ashton v. District of Columbia Dep't of Motor Vehicles*, CRB No. 10-193, AHD No. PBL 10-065, DCP No. 30100438785-0001 (July 7, 2011).

Employer disputes whether the shoulder is part of the accepted claim because it contends that the upper back is limited to the thoracic spine and the cervical [*13] spine. However, the accepted claim was, *inter alia*, for the upper back. (EE 1, ALJ 1) The back is defined as "the posterior part of the trunk from the neck to the pelvis." *See* DoRLAND's 29th Ed., p. 185. Using this definition, the subscapularis muscle and the teres minor muscle are located in the upper back. *See* DORLAND'S 29th Ed., p. 1145. Moreover, around June 2012, Employer referred Claimant to Dr. Shammas who indicated Claimant's treatment authorization was for *her shoulder* and her knee. (EE 9) Based on these facts, I find that the upper back is not limited to the spinal area, and does include muscles over and around the shoulder blade, particularly the area from the subscapularis to the teres minor muscle. In addition, I find the supraspinatus muscle extends from the cervical spine. Therefore, the accepted claim includes the body parts over and around the thoracic spine, cervical spine, and right shoulder blade, particularly the backside right shoulder.

II. NATURE AND EXTENT OF CURRENT CONDITION

When assessing a claimant's continuing disability, disability is an economic concept. *The Washington Post v. District of Columbia Department of Employment Servs., 675 A.2d 37, 41 (D.C. 1996).* [*14] In a public sector case, once a claim for disability compensation has been accepted and benefits have been paid, a three-prong burden-shifting analysis is applied. As the Compensation Review Board recently stated:

> 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 injured worker's benefits continue unmodified or terminated.
>
> If the employer meets its initial burden, then the clamant (*sic* 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 preponderance of the evidence that claimant's benefits should be modified or terminated.

Mahoney v. District of Columbia Public Schools, CRB No. 14-067 (November 12, 2014) (*en banc*).

Here, Employer satisfied its initial burden. Employer produced current and [*15] probative evidence that Claimant's condition sufficiently changed to warrant a termination of benefits. D.C. Code § 1-623.24(d)(4) provides, in part, that an award for compensation may be terminated in the event a claimant's disability has ceased or lessened. <n16> After a physical examination of Claimant, the additional medical examiner, Dr. Draper, maintained Claimant "has reached maximum medical improvement for the accident which took place on February 22, 2012 ... and can certainly perform her job as a recreation specialist." (EE 3) He recommended a medical restriction of not lifting more than 75 pounds based on preexisting osteoarthritis of the neck. (EE 3) This evidence is sufficient for Employer to satisfy its burden of producing current and probative evidence of a change in Claimant's condition.

---------- Footnote Begin ----------

<n16>

D.C. Code § 1-623.24(d)(4) reads
(4) An award for compensation may not be modified because of a change to the claimant's condition unless:
(A) The disability for which compensation was paid has ceased or lessened;
(B) The disabling condition is no longer causally related to the employment;
(C) The claimant's condition has changed from a total disability to a partial disability;
(D) The employee has returned to work on a full-time or part-time basis other than vocational rehabilitation under § 1-623.04; or
(E) The Mayor or his or her designee determines based upon strong compelling evidence that the initial decision was in error.

---------- Footnote End ----------

[*16]
At the next step, Claimant must produce reliable and relevant evidence that her disabling condition has not changed. On January 28, 2013, Dr. Shammas determined Claimant had persistent chronic pain following an injury on the job that she sustained back on February 22, 2010. (CE 3) After the termination of benefits, Claimant underwent surgery for her right shoulder. Claimant testified that she is still unable to perform activities related to her job functions as a recreation specialist such as bending at times, standing for more than an hour, raising her arms sufficiently to do aerobics exercises, squatting to perform mat exercises, lifting tables or chairs for activities, and staying alert to monitor children. (HT 75-85) Through this evidence and testimony, Claimant satisfied her burden of showing she still is limited in her ability to perform certain job functions.

The third and final step requires that in order for the Employer to prevail the Employer must show by a preponderance of the evidence that Claimant's benefits should be terminated. Preponderance of the evidence is defined as the greater weight of the evidence, not necessarily established by the greater number of witnesses [*17] testifying to a fact, but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other. *Black's Law Dictionary*, (9th ed). In this regard, the administrative law judge may, of course, consider the reasonableness of the testimony and whether or not particular testimony has been contradicted or corroborated by other evidence. *McCamey v. District of Columbia Dept. of Employment Servs., 947 A.2d 1191, 1214 (2008).*

Taking into consideration all the testimony and evidence, the record does not support Employer's contention that Claimant's overall disability has ceased or lessened significantly to the point that she can return to work. In his May 4, 2012 report, Dr. Draper diagnosed a left knee strain, but did not discuss the pathology for the thinning of the ACL, which was shown in the July 19, 2011 MRI. It appears, however, that the thinning of the ACL is not related to osteoarthritis because the ACL is a ligament and not a joint, bone, or cartilage. As a result, [*18] Employer provided little to no evidence that Claimant's disability to the left knee lessened or resolved at some point in time.

In his May 4, 2012 report, Dr. Draper diagnosed Claimant with thoracic strain, cervical strain, and right shoulder strain, but he did not indicate when the upper back condition resolved related to the February 22, 2010 injury. (EE 3) Instead, he initially stated that the present symptoms to the neck are related to the osteoarthritis of the uncovertebral joint on the left side and Claimant no longer needs to administer hydrocodone, a pain medication. (EE3) Dr. Draper later revised his opinion to reflect that Claimant also experienced several other conditions, namely, right shoulder quadrilateral space syndrome which was caused by fibrous bands, an acromion which was caused by a curved bone, bursitis which was caused by pressure, a tear of the supraspinatus (*sic* subscapularis), <n17> moderate right shoulder teres minor atrophy due to fibrous bands, and right shoulder impingement syndrome caused by a blocked axillary nerve. (HT 55-57).

---------- Footnote Begin ----------

<n17>According to the operative report, the subscapularis, not the supraspinatus, was torn. (ALJ 2)

---------- Footnote End ----------

[*19]
In explaining the newly diagnosed conditions, Dr. Draper stated he initially assumed that the trauma was to the cervical and thoracic spine based on the medical records he reviewed, including the March 21, 2011 x-ray. But it is unclear based on the records whether these x-rays were of a type that could show a deep muscle condition such as fibrous bands or whether an MR arthrogram would have been more accurate. Around the time Dr. Draper issued his opinion, however, Drs. Shammas and Aguiar suspected right shoulder impingement syndrome based on physical examination of the Claimant. (EE 9, ALJ 2)

Based on the record as a whole, I credit Dr. Aguiar's report about the conditions related to Claimant's upper back which is based on his physical observations during surgery. No other doctor had such a clear view of the objective evidence regarding the alleged injury to the human frame. I discredit Dr. Draper's view on Claimant reaching maximum medical improvement because it was inaccurate and also because his report did not reflect a thorough physical examination. Crediting Dr. Aguiar's report, I find that Claimant suffered from quadrilateral syndrome, bursitis, a subscapularis tear, teres [*20] minor atrophy, and impingement of the axillary nerve, and that the disability of the upper back has not resolved or lessened.

Although Dr. Draper determined Claimant was able to perform a job that did not require her to lift more than 75 pounds because of preexisting arthritis, it is apparent he was in error about Claimant's overall condition, particularly the nature of Claimant's current upper back condition, and he failed to discuss the extent of the disability of the knee, if any. Based on the misinformation in Dr. Draper's report, I find Claimant's overall condition continues to be disabling.

III. MEDICAL CAUSATION

Regarding the cause of these newly discovered conditions, Employer is limited to the grounds specified in the notice of determination. *See Murray v. District of Columbia Department Of Youth Rehabilitation Services*, CRB No. 14-088 (November 26, 2014). The notice of determination referred to grounds of medical causation, particularly that "[Claimant's] current restrictions are related to [Claimant's] preexisting degenerative disease" - in other words, osteoarthritis resulting in a muscular strain. (EE 2) Because this case is heard *de novo* all evidence [*21] pertaining to medical causation will be considered.

At hearing, when discussing the newly designated upper back-related conditions, Dr. Draper simply stated "when you get old, stuff happens." However, Dr. Aguiar's Operative Report did not indicate any pre-existing disease. Dr. Aguiar specifically noted no finding of arthritis in the shoulder area. Based on this evidence, it appears unlikely that osteoarthritis could affect upper back muscles. When weighing the evidence, I find Dr. Aguiar's evidence more persuasive than any inference of a pre-existing disease because Dr. Aguiar had a clear view of the area in question during surgery.

Although Dr. Draper maintained that the newly designated upper back-related conditions quadrilateral syndrome, bursitis, a muscle tear, teres minor atrophy, and impingement of the axillary nerve -- were all "developed" and not caused by trauma, I am disinclined to accept Dr. Draper's opinion because of his earlier erroneous assumption about the non-existence of these conditions that he now finds were "developed". His current finding of a developed condition is inconsistent with his earlier assumption of no other conditions. Further, his attention to [*22] detail is questionable. His oral testimony about a supraspinatus tear was inconsistent with the record evidence of subscapularis tear, which was located on the upper backside of the body. *Compare* HT 63 and ALJ 2. Based on these errors, I accord little weight to Dr. Draper's opinion and do not infer that a very deep tissue condition and nerve damage on the backside of the body would develop in the ordinary course. Based on this record, I am not persuaded that the Claimant's current condition is no longer related to a traumatic work place injury.

CONCLUSIONS OF LAW

Based on the evidence presented, it is concluded that Employer has not proven by a preponderance of the evidence that it was justified in terminating Claimant's benefits. I find that Claimant complained of injury to the upper back, which included the backside shoulder area. I further find Claimant did not reach maximum medical improvement and her overall medical condition continues to be disabling. Employer has not proven that Claimant's current condition is no longer causally related to the workplace injury.

ORDER

It is **ORDERED**, Claimant's claim for relief for temporary total disability benefits and [*23] medical expenses from December 16, 2012, to the present and continuing be, and hereby is, **GRANTED**.

FRED D. CARNEY, JR.
ADMINISTRATIVE LAW JUDGE

LOAD-DATE: April 20, 2015

P.J., Appellant and U.S. POSTAL SERVICE, POST OFFICE, Brooklyn, NY, Employer

2014 ECAB LEXIS 538

Docket No. 13-1998

April 14, 2014, Issued

PANEL: [*1] Before: COLLEEN DUFFY KIKO, Judge; PATRICIA HOWARD FITZGERALD, Judge; JAMES A. HAYNES, Alternate Judge

COUNSEL: Case Submitted on the Record Paul Kalker, Esq., for the appellant

Office of Solicitor, for the Director

OPINION:

DECISION AND ORDER

JURISDICTION

On August 29, 2013 appellant, through her attorney, filed a timely appeal from a June 25, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act n1 (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether OWCP met its burden of proof to terminate appellant's eligibility for wage-loss compensation benefits on the grounds that she no longer had any disability causally related to her accepted employment-related injury; and (2) whether appellant has established that she is entitled to disability compensation for the period June 18 to July 27, 2012.

FACTUAL HISTORY

On May 3, 2012 appellant, then a 41-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that on that same date [*2] she sustained an injury when she missed a step while delivering mail and fell on her right hand. She notified her supervisor, first sought medical treatment and stopped work on that same date. On May 9, 2012 by Form CA-16, OWCP authorized Dr. Leon Bernstein, Board-certified in orthopedic surgery, to treat appellant's right wrist condition for up to 60 days. The Form CA-16 noted that there were limited-duty assignments available.

By decision dated June 1, 2012, OWCP accepted the claim for right hand sprain. It noted that the claim had initially been accepted as a minor injury with minimal or no time lost from work. OWCP advised appellant to submit a Form CA-1 for any time lost from work.

On July 27, 2012 OWCP referred appellant, the case record, a series of questions and a statement of accepted facts to Dr. Philip D'Ambrosio, a Board-certified orthopedic surgeon, for a second opinion examination. On July 30, 2012 appellant filed a claim for compensation (Form CA-7) for leave without pay for the period June 18 to July 27, 2012.

In an August 10, 2012 report, Dr. D'Ambrosio reported that appellant was a right-handed woman who was employed as a letter carrier for the postal service and [*3] he related her history of injury. He noted that she complained of pain in the right hand. In particular, appellant complained of a sharp stabbing pain at the lateral aspect, fifth metacarpal. She sought physical therapy treatment three times a week. Dr. D'Ambrosio reviewed Dr. Bernstein's handwritten notes and noted no prior history of injury to the right hand. Upon physical examination, he reported that the right hand revealed slight swelling over the lateral aspect, fifth metacarpal. Dr. D'Ambrosio further noted range of motion of the right wrist at 80 degrees of dorsiflexion, 80 degrees of palmar flexion with full pronation and supination, good grip and pinch strength and intact right hand neurovascular. He diagnosed contusion of the right hand and opined that the condition had resolved. Dr. D'Ambrosio reported that appellant required no further treatment and could return to full-duty work without restrictions.

By letter dated August 13, 2012, OWCP informed appellant that the evidence of record was insufficient to establish her claim for compensation for the period June 18 to July 27, 2012. Appellant was advised of the medical evidence needed and provided 30 days to submit additional [*4] information.

In treatment notes dated July 3 to August 16, 2012, Dr. Bernstein noted some swelling of the right hand and reported that appellant complained of pain with activities of daily living. In an August 16, 2012 Form CA-17, he reported that she was totally disabled as a result of her right hand sprain and could not return to work.

By decision dated September 4, 2012, OWCP terminated appellant's entitlement to wage-loss compensation benefits effective that same date based on Dr. D'Ambrosio's opinion that her right hand sprain had resolved and she could resume full-duty work. It noted that the weight of the medical evidence rested with Dr. D'Ambrosio who established that appellant no longer had any disability or residuals due to her accepted work-related condition. n2

In a September 6, 2012 note and Form CA-17, Dr. Bernstein reported that appellant could return to work on September 10, 2012 with restrictions.

By decision dated September 14, 2012, OWCP denied appellant's disability compensation for the period June 18 to July 27, 2012.

By letter dated March 18, 2013, appellant, through counsel, requested reconsideration [*5] of the September 4, 2012 decision terminating entitlement to wage-loss compensation and the September 14, 2012 decision denying disability compensation for the period June 18 to July 27, 2012. Counsel argued that Dr. D'Ambrosio's examination revealed swelling which was inconsistent with his findings that appellant's condition had resolved. He further stated that further diagnostic testing should have been ordered. Counsel stated that he was submitting medical evidence from appellant's physicians which established that her injury was more severe than a right hand sprain. He noted that the physicians provided a diagnosis of median nerve neuropathy at or distal to the wrist, right hand.

In an August 22, 2012 report, Dr. Bernstein reported that he last examined appellant on August 6, 2012. The examination revealed swelling and stiffness along the ulnar border of the right hand. Range of motion of the fingers was good and neurovascular findings were grossly normal. A repeated x-ray of the right hand revealed normal bone structures. Dr. Bernstein opined that appellant's current condition was consistent with her initial May 3, 2012 trauma. Appellant remained on total disability because her [*6] occupation required constant manual handling. She was impaired from performing such an activity because she reported that there was no activity at her employment that would basically eliminate the need to use the right hand repetitively. Dr. Bernstein opined with reasonable medical certainty that appellant was totally disabled from her regular gainful employment based on her history and physical findings which showed continued swelling. He found her current status to be consistent with her original injury.

In a September 10, 2012 medical report, Dr. Abraham Glasman, a Board-certified neurologist, related appellant's history of injury. He noted her complaints of tingling and sharp pains in the hand and was previously diagnosed with right hand sprain. Dr. Glasman recommended a magnetic resonance imaging (MRI) scan of the right hand and electrodiagnostic (EMG) study of the right upper extremity.

In an October 6, 2012 diagnostic report, Dr. Richard Silvergleid, a Board-certified diagnostic radiologist, reported that an MRI scan of the right hand was within normal limits.

In an October 11, 2012 diagnostic report, Dr. Glasman reported that an EMG study of the right upper extremity revealed [*7] findings consistent with right median neuropathy at or distal to the wrist. In a November 6, 2012 report, he reported that physical examination revealed slight warmth and swelling of the right hand compared to left, as well as positive Tinel's sign at the right wrist with weakness of hand grasp. Dr. Glasman diagnosed hand injury with subsequent median neuropathy and possible reflex sympathetic dystrophy/complex regional pain syndrome. He stated: "It appears [appellant] is unable to work subsequent to this injury."

In a January 18, 2013 medical report, Dr. Yardley P. Shoulton, a treating physician, reported that appellant sustained a work-related right hand injury on May 3, 2012 when she was climbing a flight of stairs and fell on her hand. He first treated her on September 10, 2012 and noted right hand swelling with complaints of numbness and pain upon examination. Dr. Shoulton reviewed the prior medical reports and provided summarized findings based on the reports of Dr. Bernstein and Dr. D'Ambrosio. He noted that, at the time of appellant's injury, only an x-ray of the right hand was completed and she was not referred for a neurological evaluation or an MRI scan to determine her [*8] injury and limitations in her ability to perform her work duties. Dr. Shoulton found that the prior physicians failed to exhaust clinical measures to appropriately diagnose her injury. He stated that appellant's case could not be conclusive without adequate diagnostic testing. Dr. Shoulton stated that he did not believe that her right hand contusion had resolved given that Dr. D'Ambrosio's examination found "slight swelling over the lateral aspect fifth metacarpal" over three months after the initial injury. He stated that appellant should have been referred to a hand surgeon for diagnostic testing given that Dr. D'Ambrosio's physical examination revealed problems of pain, swelling and numbness.

Dr. Shoulton disagreed with Dr. D'Ambrosio's findings and found that appellant could not have returned to work full duty as she had limited use of her right hand. He noted that the swelling in her right hand was still evident from the May 3, 2012 injury. Dr. Shoulton reported that, while appellant's right hand x-ray excluded fracture, it could not determine nerve damage. Appellant's MRI scan was used to evaluate structural damage which also revealed negative. The EMG study was performed to [*9] rule out focal neuropathy or neuropathic injury due to trauma of her fall. Dr. Shoulton found that appellant's EMG findings were consistent with a right median neuropathy at or distal to the wrist which he opined was due to her May 3, 2012 work injury. He reported that she was totally disabled and could not return to regular duty since she continued to have swelling of her hand eight months after the injury with limited use of the right hand. Dr. Shoulton concluded that appellant's neuropathic injury was a result of her May 3, 2012 fall, that her injury was permanent and that she could no longer perform her job as a letter carrier.

In a May 6, 2013 medical report, Dr. Ignatius Daniel Roger, a Board-certified plastic surgeon and subspecialty Board-certified hand surgeon, reported that he first began treating appellant on November 26, 2012. He noted that she injured her right hand when she fell while ascending a flight of stairs. Dr. Roger provided a summary of his examination findings for the dates he treated appellant. He reviewed her prior medical reports and provided findings regarding her diagnostic studies. Dr. Roger diagnosed right hand contusion and right median neuropathy (carpal [*10] tunnel syndrome). He opined that appellant's conditions were causally related to the May 3, 2012 work injury because she struck her right hand at the level of the metacarpal accounting for the pathology present at the right hand and wrist. Dr. Roger further stated that there were persistent ongoing impairments arising from the May 3, 2012 accident which included restrictions of manipulative activities with the dominant right hand as well as deficient sensations and wrist motions which prevented her from performing the full scope of her employment duties. He noted that he disagreed with Dr. D'Ambrosio's report which failed to describe any testing specifically pertinent to her neurological complaints. Dr. Roger further stated that Dr. D'Ambrosio reported wrist motion in excess of that seen in his own clinical examinations,

as well as those performed by other physicians. He stated that repeated clinical examinations and objective testing confirmed the defects associated with appellant's right median neuropathy. Dr. Roger recommended surgical neurolysis of the right median nerve and stated that he could not ascertain the level of permanency as surgery could improve her condition.

By decision [*11] dated June 25, 2013, OWCP affirmed both the September 4, 2012 decision terminating entitlement to wage-loss compensation benefits and the September 14, 2012 decision denying disability compensation for the period June 18 to July 27, 2012. It reviewed the additional evidence and stated, "A conclusory statement attributing the swelling to an incident that occurred months earlier and that the condition was so severe that it was permanently disabling was insufficient to establish that the median nerve neuropathy and disability were causally related to the May 3, 2012 fall." OWCP found Dr. Roger's opinion insufficient to establish causal relationship because he failed to explain how he arrived at his conclusion which was based on EMG studies obtained six months postinjury.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP has accepted a claim and pays compensation, it bears the burden to justify modification or termination of benefits. n3 Having determined that an employee has a disability causally related to his or her federal employment, OWCP may not terminate compensation without establishing either that the disability [*12] has ceased or that it is no longer related to the employment. n4 Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background. n5

ANALYSIS -- ISSUE 1

OWCP accepted appellant's claim for right hand sprain as a result of the May 3, 2012 employment incident. By decision dated June 25, 2013, it affirmed its September 4, 2012 decision terminating her entitlement to wage-loss compensation on the grounds that the accepted right hand sprain had resolved. The Board finds that OWCP failed to meet its burden of proof to terminate appellant's entitlement to wage-loss benefits effective September 4, 2012.

The Board notes that appellant continued to submit treatment notes from her treating physician, Dr. Bernstein from July 3 to August 16, 2012 wherein he noted the continued swelling of hers right hand and continued to report that she remained totally disabled. In its September 4, 2012 and June 25, 2013 decisions, OWCP determined that appellant no longer experienced disability [*13] from her May 3, 2012 injury finding that the weight of the medical evidence rested with Dr. D'Ambrosio, the second opinion physician. The Board finds, however, that Dr. D'Ambrosio's opinion is insufficient to resolve the question of whether appellant continued to suffer from disability causally related to the accepted May 3, 2012 injury.

In his August 10, 2012 report, Dr. D'Ambrosio reported that on May 3, 2012, appellant slipped on steps and struck the lateral aspect of her right hand. Upon physical examination, he found that the right hand revealed slight swelling over the lateral aspect, fifth metacarpal. Dr. D'Ambrosio diagnosed contusion of right hand which had resolved. He further stated that appellant required no further treatment and could return to full-duty work.

The Board finds that the opinion of Dr. D'Ambrosio is not well rationalized. Dr. D'Ambrosio opinion that appellant's right hand contusion had resolved contradicted his examination findings which revealed slight swelling over the lateral aspect. He provided no opinion regarding why she could return to work full duty, which required repetitive handling of mail, despite evidence of continued swelling more than three [*14] months after the date of injury. Dr. D'Ambrosio opinion is not sufficiently rationalized to establish that appellant's condition ceased with no residuals of her employment-related injury. n6 His opinion was vague and speculative, failing to provide any explanation regarding why her right hand contusion had resolved with no further disability. The Board has consistently held that a medical opinion not fortified by rationale is of limited probative value. n7 Given the deficiencies in Dr. D'Ambrosio's report, OWCP failed to meet its burden of proof to terminate appellant's wage-loss compensation benefits effective September 4, 2012. n8 The termination decision will be reversed. n9

LEGAL PRECEDENT -- ISSUE 2

Under FECA, n10 the term disability is defined as incapacity, because of employment injury, to earn the wages that the employee was receiving [*15] at the time of injury. n11 Disability is not synonymous with a physical impairment which may or may not result in an incapacity to earn the wages. An employee who has a physical impairment causally related to a federal employment injury but who nonetheless has the capacity to earn wages he or she was receiving at the time of injury has no disability as that term is used in FECA. n12

Whether a particular injury causes an employee to be disabled and the duration of that disability are medical issues which must be proved by a preponderance of the reliable, probative and substantial medical evidence. n13 Findings on examination are generally needed to support a physician's opinion that an employee is disabled for work. When a physician's statements consist only of a repetition of the employee's complaints that excessive pain caused an inability to work, without making an objective finding of disability, the physician has not presented a medical opinion on the issue of disability or a [*16] basis for payment of compensation. n14 The Board will not require OWCP to pay compensation for disability without any medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow employees to self-certify their disability and entitlement to compensation. n15

ANALYSIS -- ISSUE 2

In its June 25, 2013 decision, OWCP denied appellant's claim for disability compensation for the period June 18 to July 27, 2012. The Board further notes that it has yet to issue a decision regarding whether any additional conditions should be accepted as employment related. The Board finds that appellant has not established that she was disabled from June 18 to July 27, 2012 due to her accepted right wrist strain.

The only physician of record who evaluated appellant during the time period in question was Dr. Bernstein. While Dr. Bernstein submitted handwritten progress notes dated July 3 and 26, 2012, which continued to note swelling of appellant's right hand and to report that she was [*17] totally disabled, his reports are of limited probative value. He offered no medical explanation as to why she would be unable to perform her job duties. In his August 22, 2012 narrative report, Dr. Bernstein noted that he had examined appellant on August 6, 2012. Upon examination, appellant's range of motion of the fingers was good, neurovascular findings were grossly normal and repeat x-ray of the right hand revealed normal bone structures. Dr. Bernstein did not provide objective medical findings and medical rationale which would substantiate her inability to work during the period June 18 to July 27, 2012, based upon her accepted condition of right wrist strain.

CONCLUSION

The Board finds that OWCP did not meet its burden of proof to terminate appellant's wage-loss benefits on September 4, 2012. It further finds that appellant has not established that she is entitled to wage-loss benefits for the period June 18 to July 27, 2012.

ORDER

IT IS HEREBY ORDERED THAT the June 25, 2013 decision of the Office of Workers' Compensation Programs is reversed in part and affirmed in part.

Issued: April 14, 2014
Washington, DC

Colleen Duffy Kiko, Judge

Employees' Compensation [*18] Appeals Board

Patricia Howard Fitzgerald, Judge

Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge

Employees' Compensation Appeals Board

FOOTNOTES:

n1 5 U.S.C. § 8101 *et seq.*

n2 On September 4, 2012 OWCP notified appellant of a proposal to terminate her medical benefits based on Dr. D'Ambrosio's opinion that she could resume full-duty work because her right hand sprain had resolved. It provided him 30 days to submit additional information. The Board notes that no final termination decision has been issued with respect to the September 4, 2012 proposed termination of medical benefits.

n3 *Bernadine P. Taylor*, 54 ECAB 342 (2003).

n4 *Id.*

n5 *See Del K. Rykert*, 40 ECAB 284 (1988).

n6 *V.C.*, Docket No. 11-1561 (issued February 15, 2012).

n7 *A.D.*, 58 ECAB 149 (2006).

n8 *J.K.*, Docket No. 13-327 (issued August 7, 2013).

n9 *D.H.*, Docket No. 12-1975 (issued June 5, 2013).

n10 5 U.S.C. §§ 8101-8193.

n11 *See Prince E. Wallace*, 52 ECAB 357 (2001).

n12 *Cheryl L. Decavitch*, 50 ECAB 397 (1999); *Maxine J. Sanders*, 46 ECAB 835 (1995).

n13 *See Fereidoon Kharabi*, 52 ECAB 291, 293 (2001); *Edward H. Horton*, 41 ECAB 301, 303 (1989).
[*19]

n14 *G.T.*, 59 ECAB 447 (2008); *see Huie Lee Goal*, 1 ECAB 180, 182 (1948).

n15 *Id.*

U.S. DEPARTMENT OF LABOR
Employees' Compensation Appeals Board

In the Matter of CURTIS HALL and U.S. POSTAL SERVICE, POST OFFICE, Capital Heights, Md.

45 ECAB 316; 1994 ECAB LEXIS 2920

Docket No. 92-683

January 11, 1994, Issued

PANEL: MICHAEL J. WALSH, WILLIE T.C. THOMAS, MICHAEL E. GROOM

OPINION:

DECISION and ORDER

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to rescind acceptance of appellant's claim of an employment-related disabling emotional condition.

On August 29, 1988 appellant, then a 52-year-old mail clerk, filed a claim alleging that he sustained a major depression with inappropriate mood and severe psychotic features which he attributed to factors of his federal employment. Appellant stopped work on December 28, 1987.

In an August 28, 1988 statement, appellant attributed his emotional condition to a confrontation with a coworker, identified as a Black Muslim, who objected to appellant's bible reading during work breaks. Appellant also alleged that, on March 19, 1987, a toxic substance had been placed in his chair causing severe burns and rashes over his body. He also attributed disability to two prior employment injuries to his left knee and to his weight, then 340 pounds. n1

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n1 The record contains a December 12, 1985 statement, in which appellant reviewed his left knee injury of April 16, 1981 sustained while in the performance of duty. Thereafter, he returned to light-duty work. Appellant noted that he was an ordained minister and that he made a commitment to teach the bible and do other ministerial works. He contended that his light-duty schedule interfered with these activities and, generally, that his treatment was unfavorable in comparison to other light-duty workers.

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[*2]

In support of his claim, appellant submitted an August 5, 1988 report by Dr. Lawrence Y. Kline, a Board-certified psychiatrist. He reviewed appellant's history of knee injuries with resultant surgery, n2 and commented that appellant

related he had been in good mental health prior to March 19, 1987. Dr. Kline noted that it was appellant's custom to read his bible on lunch breaks and to distribute religious materials to interested persons. Appellant recounted that his problems began several days prior to March 19, 1987 when he was accosted by a fellow employee who professed the Muslim faith and who took exception to appellant's bible reading. On the next two days, the gentleman was equally disdainful and, on March 19, 1987 upon returning from his break, appellant claimed that glue was placed on his seat, resulting in searing pain and a rash which subsequently spread.

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n2 The record contains a December 27, 1982 report of Dr. Nathan Price who reviewed appellant's history of knee injuries and found that a December 15, 1982 arthrogram revealed no intrinsic defect. Dr. Price noted that appellant suffered severe emotional disturbances and recommended a psychiatric evaluation.

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[*3]

Dr. Kline also noted that appellant had developed elaborate notions of being persecuted by Black Muslims in collusion with postal service officials and even his physicians. Appellant related that he could not sleep and became anxious. Dr. Kline noted that, during this period, his wife left him but later returned. He stated that appellant's past history and family history did not reveal mental illness. His mental status examination revealed appellant to be alert and oriented but with no insight into "the apparent bizarreness of some of his complaints." Psychological and personality testing was not performed. Dr. Kline stated that appellant was totally disabled due to depression due to his delusions of persecution. He also commented on appellant's knee condition, poorly controlled diabetes, hypertension, and possible heart failure as rendering him totally disabled. Dr. Kline also stated that appellant's immobility due to his knee injuries contributed to his increasing weight and, with it, his increasingly uncontrollable diabetes and that the need to transfer from carrier work, due to his knee condition, to sorting work on the graveyard shift further exacerbated the loss of control [*4] of the diabetes. These afflictions left appellant with a sense of vulnerability and doom, increasing his turning to religion and, consequently, the likelihood that this would lead to an unpleasant encounter. The incident with the Muslim employee triggered the onset of a severe delusional depression.

In an August 5, 1988 report, Dr. Richard H. Pollen, Board-certified in both internal medicine and in endocrinology, stated that appellant's diabetes began in 1984, which was treated with insulin, and that appellant had a positive family history of the disease. He noted that appellant recounted that his diabetes was worse since a dispute at work in 1987, but noted that appellant's blood sugars had been fairly good and that appellant had not had any insulin reactions. Dr. Pollen reviewed appellant's present insulin program, noting that it was not very rational or ordinary, but he would make no effort to change it as he was not the treating physician. He reported, however, that appellant's Glycohemoglobin test, which measured control of blood sugar over the preceding three months, was at the level of "good" control and that thyroid function tests were normal. He opined that appellant's diabetes [*5] predated the confrontation with his coworker and was not disabling for work. Dr. Pollen also stated that, while appellant has residuals of his leg injury, he was able to perform his job as a mail sorter within the work rules pertaining to light duty.

Dr. Pollen also recounted appellant's history of "the incident which occurred last year, in which one day during his lunch break he was reading aloud from his bible and trying to interest fellow workers in religious matters, when he was confronted aggressively (but not physically attacked, he told me) by a co-worker who is a Muslim," and opined that appellant experienced a breakdown of his personality. The physician also noted that appellant advised him of his chair being tampered with glue and of his home being damaged to harass him. As appellant discussed these events, Dr. Pollen noted that appellant became upset, displaying intensity of speech and mixing one event up with another and one year with another. Appellant showed a scrapbook to Dr. Pollen, which was filled with materials related to appellant's disability claim, including photographs of purported damage to his home and bloody dressings attributed to bleeding episodes from [*6] his hands and feet. He opined that appellant had a severe personality deterioration that could be called an agitated depression with some psychotic features, noting:

"To what degree there may have been underlying predispositions to this breakdown I cannot say, though there very likely were predisposing personality features which led to his decompensation under the stress of attack upon his principal life identities. The bizarre and at times unbelievable details to his story suggest to the listener that there is an intent of the claimant to make more of his disability than there really is, however, in the final analysis it is clearly my opinion that there is no intent to malinger, and that the patient's mental state is genuinely as he presents it, and that at this time he is unable to work."

In letters dated September 6 and 7, 1988, the employing establishment controverted appellant's claim. Paul C. Craig, the supervisor of the injury compensation program, noted that on numerous occasions since 1982 appellant had visited his office and telephoned with complaints of knee pain and ill health. He stated that appellant would speak in a lengthy tirade and end up weeping and that these tendencies [*7] were frequent during late 1986 and early 1987. Mr. Craig said he was unaware of any altercation with a coemployee at work, as alleged. The employing establishment reviewed appellant's past left knee injuries of April 17, 1981 and October 22, 1982 and noted that recurrence of disability claims related to his left knee condition had been adjudicated and denied. Mr. Craig noted that appellant was permanently rehabilitated as a modified distribution clerk on Tour I, the night shift, and, on March 19, 1987, had alleged that someone placed super glue on his rest-stool. A claim related to this incident was denied on November 18, 1987. With regard to appellant's allegation of a confrontation with an unidentified coemployee, noted only as a Black Muslim, the employing establishment noted that there was no evidence that the alleged incident had occurred. The employing establishment submitted personnel documents, noting that appellant was originally offered a modified position on Tour III (mid afternoon to late evening) in 1984, but he had requested to remain on Tour I in order that he could attend to his ministerial and religious activities. The employing establishment contended that appellant's [*8] emotional condition was not related to the performance of his duties and that there was no evidence that he was disabled from performing the duties of the modified distribution clerk position due to his physical condition.

On November 17, 1988 an Office medical adviser reviewed the case file and noted that additional medical evidence was required to formulate an opinion on appellant's physical condition. He indicated that the file should be referred to a specialist with regard to appellant's claimed emotional condition.

On March 15, 1989 the Office prepared a statement of accepted facts, including a description of the mail clerk duties and his left knee injuries of 1981 and 1982. With regard to appellant's emotional condition claim, the statement of accepted facts noted:

"The claimant cites the following situations as factors bearing on his condition: A confrontation with a co-worker at the work site, a Black Muslim, who objected to his bible reading during work breaks. Shortly thereafter, someone placed a highly toxic substance, presumably glue, in his chair causing severe burning and rashes that spread over the claimant's body."

The Office noted that the 1981 employment-related [*9] knee injury was accepted for internal derangement and subsequent claims for recurrence of disability were denied. The Office also noted that the claim involving an injury to his buttocks on March 19, 1987 when he allegedly sat on super glue had also been denied. The Office referred the statement of accepted facts, together with the case record and a list of questions to be resolved, to Dr. Bruce Smoller, a Board-certified psychiatrist.

In an April 1, 1989 report, Dr. Smoller reviewed appellant's history of employment, injury and the medical reports provided to the record. He also reviewed appellant's work situation involving a confrontation with a coworker over reading the bible and notions of being persecuted by Black Muslims. In response to the Office's questions, Dr. Smoller noted:

"(1) Is there sufficient medical evidence which supports a causal relationship between the condition of the claimant and the claimant's factors of employment?

"If altercations on the job are sufficient for causality, then this patient is disabled at the present time and his disability is causally related to the factors of federal employment. Dr. Kline has rationalized clearly along with Dr. Pollen a [*10] train of events culminating in an altercation with a fellow worker leading to persecutory ideation, depression, and a dysfunctional state severe enough so as to prevent his further occupation at least temporarily. Therefore, in a well-rationalized way this patient has been shown to have a work-related psychiatric disability.

"(2) The condition was due to approximate causation.

"(3) What is the claimant's condition causing disability? The patient is psychotically depressed.

"(4) Does the medical evidence in the case support that the claimant is unable to perform his duties as a file clerk? The patient was totally disabled from work.

"(5) What are your recommendations? I would support Dr. Kline's efforts at psychotherapy, with the use of psychotropic medication and intensive psychotherapy. Please query Dr. Kline as to the status of this case."

By letter dated April 13, 1989 appellant was advised that his claim was accepted by the Office for a depressive reaction. Appellant was advised that medical bills could be resubmitted to the Office for consideration of payment and that any claim for compensation due to his injury should be supported by medical evidence for the period disability [*11] was sought.

On June 13, 1989 the employing establishment requested further review of appellant's claim, contending that his depression was not related to his employment. The employing establishment enclosed an April 2, 1987 report of Dr. Augusto P. Rodriquez, a Board-certified family practitioner and employing establishment physician, which stated:

"This obese hypertensive diabetic male sat on a 0.07 oz. super glue pen container which belongs to him. He claimed glue caused his contact dermatitis, hypertension, and diabetes mellitus and was a job-related incident.

"In my opinion the incident will not cause hypertension or diabe[tes] mellitus, and is not job related.

"There was some glue left in the pen container. The super glue is not issued and used in the performance of his job."

By letter dated June 26, 1989, the Office responded to the employing establishment noting that, on further review, it had been determined that the case was accepted prematurely and, following review of the file on the Director's own motion, a new decision would be issued.

By compensation order dated August 11, 1989, the Office found that appellant's emotional condition did not arise out of factors of his [*12] federal employment. The Office found that the alleged confrontation between the claimant and a co-worker was not considered to be a factor of his job as having sufficient relationship to the employment so as to place his emotional reaction within the scope of employment. Further, the medical evidence submitted was found to be unrationalized with regard to the physicians' stated opinion on causal relationship.

Appellant requested an oral hearing before an Office hearing representative. In a March 16, 1990 letter, his representative contested the "turnabout" by the Office in accepting and then rejecting the claim. Appellant's representative also requested that the hearing representative subpoena several employees from the employing establishment, including appellant's supervisors and the injury compensation specialist.

By letter decision dated June 12, 1990, the Office declined to exercise its discretionary subpoena authority under *5 U.S.C. 8126.* The Office found that appellant presented no persuasive argument or evidence which would compel the conclusion that the presence of the requested individuals at the hearing was necessary for a full presentation [*13] of his compensation case, or that their presence at the hearing would achieve the desired end.

Prior to the hearing, appellant submitted an August 16, 1990 chronological account of accidents, injuries and related problems encountered in his employment. At the August 29, 1990 hearing, appellant testified, as did Dr. Kline and Florine King, a co-worker. n3

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n3 At the hearing, appellant's representative noted that appellant was not seeking compensation for his knee injuries or for physical injury related to sitting on glue on March 19, 1987.

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By decision dated and finalized February 7, 1991, the Office hearing representative found that the March 15, 1988 statement of accepted facts made no factual findings with regard to appellant's allegations of confrontation with a coemployee or placement of super glue on his chair but merely listed a recitation of the claim as presented by appellant. The hearing representative discussed in detail the evidence concerning the alleged incidents and concluded that they were not established [*14] as factual in the time, place or in the manner described by appellant. n4 The medical reports of Dr. Smoller were found to be based on an inaccurate history and therefore of little probative value. The hearing representative also noted that, with regard to his physical condition, the reports of the physicians of record did not find appellant disabled for his position.

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n4 The hearing representative went on to note that, "even allowing the fact of its occurrence for the sake of argument, the factual evidence in the record compels a finding that any such occurrence did not occur in the course of employment and, therefore, did not occur in the performance of duty."

---------- Footnote End ----------

The Board finds that the Office met its burden of proof to rescind its acceptance of appellant's claim for an employment-related disabling emotional condition.

The Board has upheld the Office's authority to reopen a claim at any time on its own motion under section 8128(a) of the Federal Employees' Compensation Act and, where supported by the evidence, [*15] set aside or modify a prior decision and issue a new decision. n5 The Board has noted, however, that the power to annul an award is not an arbitrary one and that an award for compensation can only be set aside in the manner provided by the compensation statute. n6 It is well established that once the Office accepts a claim, it has the burden of justifying termination or modification of compensation. n7 This holds true where, as here, the Office later decides that it has erroneously accepted a claim for compensation. To justify rescission of acceptance, the Office must establish that its prior acceptance was erroneous based on new or different evidence or through new legal argument andor rationale. n8

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n5 Eli Jacobs, 32 ECAB 1147 (1981).

n6 Shelby J. Rycroft, 44 ECAB ____ (Docket No. 92-814, issued June 21, 1993).

n7 See Frank J. Mela, Jr., 41 ECAB 115 (1989); Harold S. McGough, 36 ECAB 332 (1984).

n8 See Laura H. Hoexter (Nicholas P. Hoexter), 44 ECAB ____ (Docket No. 92-2000, issued September 20, 1993); Alphonso Walker, 42 ECAB 129 (1990), petition for recon. denied, 42 ECAB 659 (1991); Beth A. Quimby, 41 ECAB 683 (1990); Roseanna Brennan, 41 ECAB 92 (1989), petition for recon. denied, 41 ECAB

371 (1990); Daniel E. Phillips, 40 ECAB 1111 (1989), petition for recon. denied, 41 ECAB 201 (1990).

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[*16]

In the present case, the Office accepted that appellant sustained an emotional condition, a depressive reaction, causally related to several factors of his federal employment. The record reflects that in the March 15, 1989 statement of accepted facts referred to Dr. Smoller, an Office psychiatric consultant, the Office merely listed appellant's allegations with regard to a confrontation with a coworker, identified only as a Black Muslim who objected to his bible reading during work breaks, and the placement by unidentified individuals of a toxic substance, presumably super glue, in his chair which resulted in burning and a rash. In turn, Dr. Smoller relied upon these allegations as factual in arriving at his medical opinion.

The Board notes that prior to acceptance of appellant's claim, the Office did not determine whether the allegations made by appellant were supported by the factual evidence of record. n9 It is well-established that mere perceptions of harassment or discrimination do not constitute a compensable factor of employment. A claimant must establish a basis in fact for the claim by supporting his or her allegations with probative and reliable evidence. n10 The Board [*17] has underscored that, when working conditions are alleged as factors in causing disability, the Office, as part of its adjudicatory function, must make findings of fact regarding which working conditions are deemed compensable and are to be considered by a physician when providing an opinion on causal relationship and which working conditions are not deemed factors of employment and may not be considered. n11 The Office has the obligation to make specific findings with regard to the allegations raised by a claimant. When a claimant fails to implicate a compensable factor of employment, the Office should make a specific finding in that regard. If a claimant does implicate a compensable factor of employment, the Office should then determine whether the evidence of record substantiates that factor. Perceptions and feelings, alone, are not compensable. Only when the matter asserted is a compensable factor of employment and the evidence establishes the truth of the matter asserted may the Office then base its decision to accept or reject the claim on an analysis of the medical evidence. n12

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n9 This case is analogous to Shelby J. Rycroft, supra note 6, in which the Office developed the claim with regard to the medical issue of whether the employee's right foot condition was causally related to a February 25, 1989 traumatic incident without specifically addressing the factual issue of whether fact of injury had been established. Following acceptance of the employee's claim, additional evidence was obtained which supported that the claimed traumatic incident could not have occurred as alleged. Based on this evidence, the Office properly reopened the employee's claim and rescinded acceptance of fact of injury. Having found that the incident did not occur as alleged, medical reports premised on a factual history of the incident would have no probative value.

n10 Frank A. McDowell, 44 ECAB ____ (Docket No. 92-1074, issued February 24, 1993); Margaret S. Krzycki, 43 ECAB ____ (Docket No. 91-1266, issued February 24, 1992); Ruth C. Borden, 43 ECAB ____ (Docket No. 91-915, issued October 22, 1991).

n11 Norma L. Blank, 43 ECAB ____ (Docket No. 91-680, issued January 13, 1992).

n12 Id. See also Gregory J. Meisenburg, 44 ECAB ____ (Docket No. 92-1098, issued February 24, 1993).

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[*18]

The record reflects that, following acceptance of appellant's claim, the employing establishment submitted new

evidence to the Office, the April 2, 1987 report of Dr. Rodriquez who performed an examination of appellant contemporaneous to his allegation of a toxic substance being placed on his chair by unknown or unidentified individuals. The report of Dr. Rodriquez notes, however, that appellant sat on a .07 ounce super glue pen container which belonged to him. The physician noted that there was some glue left in the pen container and stated that it had not been issued or used in performance of appellant's duties and that it would not cause hypertension or diabetes mellitus. In reopening appellant's claim and rescinding its prior acceptance, the Office also provided new legal rationale for its determination. The Office found that the allegations made by appellant concerning the implicated work-related incidents were not established as factual by the weight of evidence of record. The hearing representative extensively reviewed appellant's allegations of harassment and mistreatment, which he contended were motivated by hostility to his various ministerial and religious activities. [*19]

In rejecting appellant's claim, the Office hearing representative found that the "statement of accepted facts makes no findings as to the critical factors of employment implicated by the claimant in the development of his condition." The Office hearing representative reviewed the statement of accepted facts and found that it made "no findings whether the reported circumstances, events and incidents occurred as reported, and if they occurred, whether they constitute factors of employment...." He found that appellant's allegations that he was the victim of harassment by coworkers and supervisors at the employing establishment were unsupported by the record. He noted that, with regard to all the events described by appellant as having occurred between March 1987 to January 1988, appellant was, in fact, suffering from delusions as was noted by Dr. Kline.

The Board finds that the Office's determination to rescind appellant's claim was proper. The factual evidence of record establishes that, on the morning of March 19, 1987, appellant sat on some sticky substance at work. The evidence from Dr. Rodriquez, who treated appellant on April 2, 1987, clearly identified the substance as super [*20] glue coming from a .07 ounce pen container which belonged to appellant. Appellant has not submitted any factual evidence to support his allegations that the glue was spread onto his chair by any of his coworkers. Rather, the report from Dr. Rodriquez clearly provides a history that appellant sat on his own pen while at work. The Board finds that the history of the incident as related by Dr. Rodriquez is uncontroverted by any other evidence of record. For this reason, the Office properly found that the March 19, 1987 incident did not factually occur as alleged by appellant.

Additionally, there is no evidence to support appellant's contention that he was approached by a coemployee, identified in the record only as a Black Muslim, on or about March 4, 1987. As noted by the hearing representative, this allegation by appellant was not raised until August 29, 1988 when he filed his claim. The employing establishment received no contemporaneous complaint of any such incident and there are no contemporaneous witness statements identifying with specificity the time, place, manner and parties involved. As such, appellant's allegation constitutes a mere perception or generally stated assertion [*21] of dissatisfaction with certain coemployees and superiors at work which does not support his claim for an emotional disability. n13 For this reason, the Office properly determined that the matter constituted a perception of appellant and was not factually established. n14

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n13 See Kathleen D. Walker, 42 ECAB 352 (1991); David W. Shirey, 42 ECAB 783 (1991).

n14 The Board notes that, to the extent that the Office hearing representative allowed "for the sake of argument" the occurrence of the incidents alleged and went on to discuss whether the incidents arose in the performance of duty, such language constitutes dicta which is not necessary to the disposition of this case.

---------- Footnote End ----------

The decision of the Office of Workers' Compensation Programs dated February 7, 1991 is hereby affirmed.

Dated, Washington, D.C.

January 11, 1994
Michael J. Walsh
Chairman
Willie T.C. Thomas
Alternate Member
Michael E. Groom
Alternate Member

LOAD-DATE: August 11, 1998

U.S. DEPARTMENT OF LABOR
Employees' Compensation Appeals Board

In the Matter of DEL K. RYKERT and VETERANS ADMINISTRATION, VETERANS ADMINISTRATION HOSPITAL, Batavia, N.Y.

40 ECAB 284; 1988 ECAB LEXIS 23

Docket No. 87-1230; Submitted on the Record

November 22, 1988, Issued

PANEL: Before MICHAEL J. WALSH, GEORGE E. RIVERS, WILLIE T.C. THOMAS

OPINION:

The issue is whether appellant had any disability causally related to the conditions accepted by the Office of Workers' Compensation Programs as having resulted from the September 14, 1981 employment injury and/or a cervical condition related to the September 14, 1981 employment injury on or after October 22, 1985, the date the Office terminated his compensation benefits.

On September 14, 1981 appellant, then a 32-year-old registered nurse, filed a claim for traumatic injuries sustained on that date when he was assaulted by a patient. Appellant alleged he sustained injuries including "1/2 [inch] laceration right eye brow, swollen ecchymotic right eye, right front tooth broken off, abrasions of both lips right side, abrasion and ecchymos left rib cage." Appellant stated that he had received approximately 10-12 blows to his head and right side while pinned to the floor of a van and trapped between a seat and the side of the van. A witness' statement described the incident stating:

> "We were transporting patient to VAMC. The patient became loud and started to beat Mr. Rykert in the face. [*2] I stopped the van and we then restrained the patient."

Appellant was hospitalized from September 14 to September 16, 1981. Based on the initial medical report submitted with appellant's claim the Office of Workers' Compensation Programs approved appellant's claim for contusion and hematoma of the right eye and broken incisor tooth. Subsequent medical reports indicated that appellant also sustained post-concussion syndrome and post-traumatic neurosis casually related to his employment injury. The Office accepted that these conditions were the result of the original injury. Appellant received compensation benefits through November 23, 1981.

By report dated October 21, 1981 Dr. Martin H. Feldman, a Board-certified neurologist and employing establishment physician, stated that appellant was assaulted, repeatedly being struck "in the right temporal area, without loss of consciousness, with subsequent dizzy spells, difficulty with equilibrium, and now with 'memory loss,' short attention span and occasional right temporal headaches." Dr. Feldman noted that EEG test results were normal.

Dr. C. Newton, a Board-certified neurologist, submitted an October 21, 1981 report which indicated [*3] appellant "was dazed but not truly rendered unconscious" from the employment incident. Dr. Newton diagnosed appellant had sustained a concussion syndrome.

On December 2, 1981 appellant filed a notice of recurrence of disability alleging that he sustained a recurrence of his September 14, 1981 injury on November 31, 1981. The claim form noted that appellant had returned to work on November 23, 1981 and stopped work on November 30, 1981 due to an increase in headache pain. The Office accepted appellant's November 30, 1981 recurrence claim and paid compensation benefits for intermittent time lost from work during the period November 30, 1981 to January 27, 1982.

By CA-20 attending physician's report dated February 24, 1982 the initial treating employing establishment physician diagnosed appellant had sustained post-concussion syndrome and indicated that he anticipated meningeal headaches as a permanent effect. In an earlier January 6, 1982 report he indicated that appellant's September 14, 1981 employment incident "caused some crowding of consciousness without loss of consciousness."

By report dated December 7, 1981 the employing establishment physician noted that appellant's headache [*4] condition had improved. The physician indicated appellant stated: "I didn't realize before but my neck is stiff too, and I hear vertebrae pop and click once in a while." The physician noted that appellant was "rubbing neck and holding head during interviews." Clinic notes dated January 13, 1982 reported that appellant complained of vertebraes clicking on range of motion, headaches and neck stiffness.

By report dated March 24, 1982 Dr. Newton indicated that he continued to treat appellant who complained of recurrent headache, mild depressive syndrome, memory difficulty and easy fatigability. Dr. Newton diagnosed post-concussion syndrome made on a clinical basis based on appellant's history of injury and the classical following consequences.

By report dated September 1, 1982 Dr. C.R. Salamone, a Board-certified neurologist, indicated that appellant sustained a concussion when assaulted by a patient on September 14, 1981. Dr. Salamone noted that appellant complained of memory loss, increased headaches and fear of losing his temper. He also noted that x-rays of the cervical spine taken on August 31, 1982 revealed a well-developed cervical curve and very minimal narrowing at the C5 interspace [*5] "which would be unlikely to be related to the head injury in view of the time frame." Dr. Salamone stated:

> "Detailed neurological examination again is entirely normal. The patient is obviously anxious, exhibits many nervous movements and talks in a rush of words.
>
> "Clinical Impression: I believe the problem is more in the realm of a post-traumatic neurosis which is seriously aggravated by his current job situation and I would recommend psychiatric evaluation and treatment."

On September 10, 1982 an employing establishment staff psychiatrist evaluated appellant and noted the following signs and symptoms: inability to concentrate; poor attention span; anxiety and nervousness; poor memory; headaches; loss of balance; blackouts; neck stiffness; vertebrae clicking; and irritability. The psychiatrist diagnosed "post-traumatic stress neurosis which seems to be reinforced by unconscious secondary gain from being sick. Patient needs regular psychiatric care mostly supportive. Psychotherapy."

The Office accepted the psychiatric diagnosis and authorized psychiatric treatment for a period of six months through April 27, 1983.

On December 6, 1982 appellant sustained a muscle strain in his [*6] lower back while lifting a patient. Appellant was diagnosed as having sustained an acute lumbar muscle strain and was found partially disabled until December 16, 1982. The Office accepted appellant's claim for a lumbar muscle strain on January 12, 1983.

On January 10, 1983 appellant sought treatment by Dr. James N. Schmitt, a preventive medicine specialist, for his lumbosacral strain. n1 Dr. Schmitt recommended physical therapy. In a follow-up report dated January 20, 1983 Dr. Schmitt opined that appellant "has cervical spondylosis and/or tension headaches secondary to original injury sustained in 1981."

n1 Dr. Schmitt had earlier treated appellant for a lumbosacral strain sustained on April 7, 1979. By report dated April 9, 1979 Dr. Schmitt found that appellant's lumbosacral strain had subsided with no residuals, indicated no therapy was needed, stated that appellant could continue working and discharged appellant from his care.

By report dated September 27, 1983 Dr. Schmitt stated:

"The patient is a 34-year-old [*7] . . . male employee who had been undergoing physiotherapy under the direction of the Rehabilitation Medicine Service for a work-related lumbosacral strain. The patient made an excellent response to therapy. Upon discharge from his therapeutic regimen he consulted me on January 19, 1983. At that time the patient was asymptomatic referable to his lumbosacral spine. The patient at that time however stated that he had chronic neck pain since an original work-related injury sustained September 14, 1981 at which time the patient sustained a rather severe head and neck injury, work related, after being struck by a patient. X-rays of the cervical spine were ordered on August 31, 1982. These x-rays were reviewed and revealed disc space narrowing in the cervical spine indicative of discogenic disease. Physical examination at that time revealed spasm of the paracervical muscles of the cervical spine with pain elicited on ROM of the cervical spine in all directions. The extremes of all cervical movements were guarded. The foramen test was positive and the patient's symptoms were relieved by traction on the mandibles. On further questioning the patient could not give me any other history pertaining [*8] to neck trauma other than the previously mentioned work-related injury sustained on September 14, 1981.

"In my opinion the patient sustained a whiplash-type injury when he was struck by the patient and as a result of this injury I feel that his symptomatology on January 19, 1983 was directly related to his original trauma. The diagnosis being cervical spondylosis and/or discogenic disease of the cervical spine. The patient was subsequently placed on a therapeutic regimen three times weekly consisting of hot packs to the cervical spine and both shoulders, transcutaneous electrical nerve stimulation to the paracervical muscles and upper trapezia bilaterally and cervical traction. The patient made an excellent response to therapy and was discharged from Rehabilitation Medicine Service on July 1, 1983.

"In essence, I feel that Mr. Rykert's cervical spondylosis is a result of the whiplash-type injury he sustained on September 14, 1981."

On January 27, 1984 appellant filed a notice of recurrence of his September 14, 1981 employment injury sustained on that day. Appellant lost no time from work due to the recurrence.

By report dated January 30, 1984 Dr. Schmitt stated:

"The patient [*9] was last seen by me on January 27, 1984. At the present time, the patient is complaining of severe headaches and pain in the cervical spine. Pain is elicited on rotation of the cervical spine in both directions and on flexion and extension. The patient also complains of shoulder pain and abduction of both arms is limited to approximately 90 degrees. Upon hyperextension of the neck, the patient notices vertigo. The patient sustained a severe injury to his cervical spine on September 14, 1981, at which time he was assaulted by a patient and sustained a rather severe whiplash-type injury to his

cervical spine.

"Further physical examination at the time, reveals the Foramen Test to be positive and the patient's headache and cervical spine pain is relieved by traction on the mandibles. Radiologically, the patient has a moderate degree of cervical spondylosis.

"In my opinion, the patient sustained a whiplash-type injury when he was struck by the patient on September 14, 1981 and his present symptomatology and physical findings are a direct result of that incident."

Dr. Schmitt's progress notes were submitted indicating that he examined appellant on several occasions in February 1984, and [*10] consistently found that appellant's cervical condition was due to whiplash injury sustained on September 14, 1981.

By letter decision and order dated June 19, 1984 the Office rejected appellant's claim for compensation for his low back and cervical condition finding that appellant had failed to establish the fact of injury to the low back and cervical regions in the time, place and manner alleged.

Appellant disagreed with the Office's decision and requested a hearing before an Office hearing representative. Appellant submitted a June 12, 1984 report by an employing establishment physician, Dr. Hari Dadlani, a Board-certified orthopedic surgeon, who described the history and treatment of appellant's September 14, 1981 employment injury noting that "[appellant's] neck symptoms have continued all along to bother the patient with dizziness and severe pain on any movements of the head or lifting the patients with the result that he has not been able to function effectively on the job." He stated that appellant "could very well have cervical myelopathy secondary to traumatic cervical spondylosis," and noted that appellant complained of continuous headaches and neck pain. Dr. Dadlani stated: [*11]

"On direct palpation of the ligament nuchae the patient definitely had tenderness over the area and over the articular joints of the cervical spine. Pressure of the ligament nuchae brought about occipital pain like he has on movements. My impression at that time was that the patient had tears in the ligament nuchae secondary to the trauma that he had suffered and also sprain of capsular ligaments of the cervical articular joints. He also has post-traumatic stress syndrome even though the patient's x-rays, scans and EEG's are normal. There is no definite neurological deficit that one could point out. He has enough grounds for his complaints. I recommended him for light duties which do not involve lifting of heavy objects."

On December 10, 1984 the Office set aside its June 19, 1984 decision and remanded the case for further development. The Office noted that appellant had reported an injury on December 6, 1982 to the lower back and that this case should be obtained and doubled into the current record because of the continuing treatment for that condition. The Office requested that the following action be taken:

"1. The claimant should be asked when he first began to notice [*12] problems with his neck and lower back and why he attributed these conditions to the injury.

"2. The original CA-1 for the December 6, 1982 injury should be obtained from the agency and doubled into this file.

"3. The Office must compile a completely detailed statement of accepted facts. The Office is particularly directed to review the CA-1 of September 14, 1981 where the claimant describes his injury and the fact that he received 10 to 12 blows on the right side of his face.

"4. A copy of claimant's job description including physical requirements.

"5. A referral to an independent orthopedic specialist for an opinion on causal relation and disability for work."

By letter to the Office dated January 29, 1985 appellant stated:

"Ever since my September 14, 1981 injury I've had multitude of symptoms that have continued since that injury and being made to work on a heavy physical work situation progressively caused further deterioration and increase in symptomatology due to chronic neck problems I have."

Appellant indicated that as of June 7, 1984 he was only found fit for light duty. He indicated that due to the ongoing care needed for his chronic condition the employing establishment [*13] sent him home on July 26, 1984 indicating that a light-duty position was not available. Appellant has not returned to work. n2

n2 Appellant received compensation for this period since the employing establishment could not provide a light-duty assignment subsequent to July 26, 1984.

On November 16, 1984 appellant sought treatment by Dr. Walter D. Hoffman, a Board-certified orthopedic surgeon, who submitted a November 24, 1984 report. Dr. Hoffman stated:

"Physical examination shows a well-developed, well-nourished 35-year-old . . . male. Examination of the cervical spine reveals flexion of about 45 degrees, extension of about 35 degrees, lateral rotation to the right is possible to 45 degrees and to the left to 45 degrees. There is generalized tenderness over each trapezius muscle. There is no neurologic deficit in either upper extremity. There is no weakness, there is no sensory loss, no evidence of poor coordination although by history, the patient states that fine movements are much more difficult for him to do. [*14] Further examination reveals that he does have some exophthalmus. However, no thyroid can be palpated in the neck area.

"Review of x-rays shows that the patient has a congenital fusion of the spinous processes of C2 and C3. The anterior vertebral bodies, however, are separated and the disc spaces between them are normal. There are some arthritic changes below C3, and at the C3-4 level on forward flexion one almost gets the idea of a possible pseudospondylolisthesis at this level.

"In summary, we have a 35-year-old male with considerable complaints referrable to his neck. He complains of clicking, frequent headaches, aching across the shoulder area and a loss of coordination of his upper extremities. X-rays demonstrate that the patient has congenital fusion of the spinous processes of C2 and C3 and some resultant spondylitic changes at the C3-4 level. I feel this is congenital and existed prior to his injury in 1981.

"However, the patient was asymptomatic before 1981. Thus, this industrial accident in which he was beaten up apparently aggravated the preexisting condition and made what was asymptomatic, symptomatic. Because of persistent problems over a three-year period, I would have [*15] to say that this patient is unqualified for heavy work. Team nursing work which requires lifting, pushing and pulling is probably beyond this patient's capabilities. He is going to have further difficulty. He should be retrained or be put in a nursing position which requires lighter duty. On a lighter-duty job, he should be able to function and be perfectly employable.

"The only further medical treatment I would recommend at this time is that the patient have a home traction unit which he can use frequently at home, and exercise to maintain the range of motion of the cervical spine."

On June 3, 1985 the Office referred appellant to Dr. Anthony S. Marano, a Board-certified orthopedic surgeon, who submitted a June 10, 1985 report. Dr. Marano reviewed appellant's history of injury and reported his finding upon physical examination. He indicated that appellant removed his cervical collar for examination. Dr. Marano stated:

> "Examination of the cervical spine disallowed no muscle spasm. The range of cervical movement was normal in all directions, but the extremes of all cervical movements caused him to become dizzy. The examiner had to hold the patient to keep him from falling. The [*16] function of both shoulders was normal, but elevation of both shoulders at the extremes of movement caused subjective discomfort on both sides of the neck. Palpation of the neck did not disclose any areas of localized tenderness. There was no spasm of the muscles of the neck, scapulae or dorsal or lumbar spine. The Adson maneuver was normal. There was no evidence of any cervical neuropathy or vascular abnormality.
>
> "Examination of the back revealed no muscle spasm and no impairment of lumbar movement. The back was not tender to palpation. The leg leverage tests were completely normal.
>
> "X-rays: I reviewed multiple x-rays of this patient. X-rays of the cervical spine made on June 20, 1984 show only an odontoid view of the cervical spine; it appears normal. Skull x-rays were made on September 14, 1981 and are normal. X-rays of the cervical spine were made on August 31, 1982. There is a congenital fusion between C1 and C2. No other abnormality is noted in the cervical spine. X-rays of the lumbar spine, made on December 7, 1982 were reviewed. There are six lumbar vertebra. Slight scoliosis was present with convexity to the right. Sacrum, coccyx and lumbar spine x-rays made on April 9, 1979 [*17] reveal no other abnormality.
>
> "CONCLUSION: This patient states that he was injured on September 14, 1981 when he was struck on the head by several blows. When I examined him, the musculoskeletal system was within normal limits. I found no evidence of any orthopedic or musculoskeletal abnormality. It was my opinion that he could do the work of a registered nurse without any limitations. From a physical point of view, because of a lack of any objective abnormality, it is my opinion that he has recovered from all past accidents."

By letter dated July 11, 1985 the Office advised appellant that he was entitled to compensation for the period October 25, 1984 through February 15, 1985; and authorized appellant to apply for leave buy back for the period July 26, 1984 to October 24, 1984. The letter indicated that there was a conflict in the medical evidence between Dr. Marano, who found appellant had recovered from all past injuries, and Dr. Dadlani, who found appellant could only perform light-duty work.

On August 20, 1985 appellant was referred together with the case record, a statement of accepted facts and a list of specific questions to be answered, to Dr. David R. Cooper, a Board-certified [*18] neurological surgeon, for an impartial medical evaluation. Dr. Cooper submitted an August 22, 1985 report which listed appellant's physical complaints and reviewed appellant's history of present illness and past medical history. Upon examination Dr. Cooper found appellant was a calm appearing individual who was mentally quite intact, on brief mental status examination. There was no evidence of delusional or hallucinatory content and concentration was unimpaired. Ability to follow multiple stage instructions was unimpaired although there were occasions when the claimant stopped for a moment before answering such simple questions about sensations, as though he wanted to think it over before responding. Cranial nerve evaluation was entirely normal except for auditory function. He noted appellant had excellent strength, normal deep tendon reflexes and posture normal, no fasciculations, full range of back and neck motion, normal straight leg raising, normal strength in plantar responses. He stated appellant had a normal neurological examination except for subjective loss of hearing on the right side of the body. He stated he did not find any neurological evidence of ongoing disability [*19] or deficit of the organic type.

By letter dated September 12, 1985 the Office requested clarification by Dr. Cooper of his medical report particularly with respect to whether or not appellant sustained a concussion at the time of the injury and whether the

evidence established a cervical injury occurred on September 14, 1981. The Office also noted that conditions which antedated the injury should be identified with an opinion as to any aggravation, permanent or temporary and a date for the latter when, with reasonable medical certainty, they reverted or should have reverted to the *status quo ante*. It also asked him to identify problems which arose after the injury and were not related thereto. Dr. Cooper was asked to submit a supplemental report, as his August 22, 1985 report did not provide definitive opinions, with rationale, in support of his medical findings.

In his reply of September 26, 1985, Dr. Cooper stated he did find a normal neurological examination except for two subjective matters and stated based on review of the other reports, he could not conclude appellant had a cerebral concussion. He stated appellant gave confusing information about loss of consciousness but [*20] did not relate it to the exact time of injury. He stated appellant had anteceding cervical disc degenerative disease and osteoarthritic spurs and they have not progressed nor will they progress as a consequence of the injury of September 14, 1981. He stated that it was accepted appellant suffered contusions and hematomas about the right eye and a broken tooth and such complaints could produce post-traumatic neurosis but he found no evidence of a post-traumatic neurosis ongoing at the time of his examination. He stated he believed this condition has subsided. Dr. Cooper stated any temporary symptom production from appellant's underlying cervical disc space narrowing and spurring would have been temporary and subsided within six to twelve weeks from the time of the injury. He did find it inconsistent that the Office accepted a post-contusion syndrome and a post-traumatic neurosis when the record showed appellant was dazed but not rendered unconscious. He stated the latter dismissed a diagnosis of concussion. Dr. Cooper found that appellant was not totally disabled.

By letter decision order dated October 22, 1985 the Office rejected appellant's claim for compensation with respect to [*21] his alleged recurrence of January 27, 1984 finding that the weight of the medical evidence established that there was no causally related disability at the time of the claimed recurrence.

By letter to the Office dated November 11, 1985 appellant requested a hearing before an Office hearing representative. Appellant indicated that early x-rays taken of him evidencing abnormalities had been misplaced by the employing establishment. Accordingly, these x-rays were not available for review by Dr. Cooper at the time of his physical examination.

Appellant submitted a January 14, 1985 report by Dr. F.J. Crimmings, a Board-certified orthopedic surgeon, who examined appellant on referral of his treating physician. Dr. Crimmings noted upon removal of the cervical collar that appellant demonstrated essentially a normal range of motion of the cervical spine. He noted appellant tended to get dizzy when he hyperextended his neck at 50 degrees. On palpation, appellant stated his muscles relaxed and Dr. Crimmings found there was no real tenderness on palpation over the paracervical areas trapezius. Appellant stated he had mild tenderness in these areas. Deep tendon reflexes were normal. Dr. Crimmings [*22] found no unusual sensory changes in either hand. He stated appellant's history suggested a sprain and strain of the muscles and ligaments of the cervical spine. Accompanying the report were the results of cervical spine x-rays taken in January 1985. The report noted fusion of the second and third cervical vertebral bodies, narrowing of the C5-6 intevertebral disc space and minor degenerative changes.

By report dated November 18, 1985 Dr. Dadlani found appellant's condition unchanged and continued to recommend light-duty work.

A hearing was held on May 22, 1986 in which appellant testified, represented by his authorized counsel. Appellant submitted numerous medical reports, some of which were already a matter of record, a medical history summary, and general medical literature. At the hearing Dr. Dadlani testified that he believed appellant was still disabled due to post-traumatic neurosis, post-concussion syndrome and a cervical condition which he related to appellant's September 14, 1981 employment injury. Dr. Dadlani gave a history of injury that appellant was unconscious at the time of injury.

By decision dated June 26, 1985, and finalized June 27, 1985, the Office hearing representative [*23] affirmed the Office's October 22, 1985 decision finding that appellant's disability beginning January 27, 1984 was not causally

related to the September 14, 1981 employment injury.

By letter dated November 17, 1986 appellant requested reconsideration of the Office's June 27, 1985 decision. In support of his claim appellant submitted the September 29, 1986 affidavit of Thomas Adams, the driver of the van at the time of appellant's 1981 injury, and a November 13, 1986 affidavit by appellant. n3 Mr. Adams stated in his affidavit that on the date in question, he stopped the van when appellant was attacked. Mr. Adams then stated that he pulled the patient from appellant and restrained him. He further stated that, at that time, Mr. Rykert was lying on the floor, without making noise, with closed eyes and a "blank look on his face. He remained like this for approximately three minutes before regaining consciousness."

n3 Appellant also submitted evidence previously of record which was considered by the Office in its prior decision.

[*24]

By letter decision order dated February 18, 1987 the Office reviewed the case on its merits and denied modification of its prior decision finding that the evidence submitted in its support was of a repetitious nature, irrelevant and immaterial.

The Board finds that the Office has not met its burden of proof in terminating appellant's compensation benefits.

Appellant has the burden of proving by reliable, substantial and probative evidence that there exists a causal relation between an alleged recurrence of disability and the employment-related injury. n4 This burden includes the necessity of furnishing medical opinion evidence of a cause and effect relationship based upon a proper factual and medical background. However, in the present case, the Office accepted appellant's recurrence claim, by letter dated July 11, 1985, and paid appellant compensation benefits.

n4 *Bobby Melton*, 33 ECAB 1305 (1982).

Once the Office accepts a claim it has the burden of justifying termination or modification of compensation. After [*25] it has determined that an employee has disability causally related to his employment, the Office may not terminate compensation without establishing that the disability has ceased or that the disability was no longer related to the employment. n5

n5 *Anna M. Blaine (Gilbert H. Blaine)*, 26 ECAB 351 (1975).

The Office found that there was a conflict in the medical evidence and referred appellant to Dr. Cooper for examination and opinion as to whether appellant had any continuing disability causally related to the September 14, 1981 employment injury. Dr. Cooper concluded in an August 22, 1985 report that appellant had no neurologic evidence of ongoing disability or deficit of the organic type. The Office reviewed Dr. Cooper's report and found that it failed to provide definite opinions, with rationale, in support of his medical findings. By supplemental report dated September 26, 1985 Dr. Cooper stated that appellant had preexisting cervical disc degenerative disease and osteoarthritic spurs which have not progressed [*26] nor would they progress as a consequence of the September 1, 1981 employment injury; he found no evidence of post-traumatic neurosis at the time of his examination; and opined that any temporary symptom production of appellant's would have been temporary and subsided within six to twelve weeks from the time of the injury. Dr. Cooper failed to explain the basis for his medical opinion. He stated upon examination that appellant's post-traumatic neurosis condition had subsided, was temporary and that appellant was not totally disabled. Dr. Cooper

failed to respond to the issue of whether such condition caused any partial disability. Dr. Cooper's reports are of diminished probative value as they failed to provide any rationalized medical opinion evidence establishing that appellant's ongoing disability had ceased. Accordingly, the Office has failed to meet its burden of proof in terminating appellant's compensation benefits.

The February 18, 1987 decision of the Office of Workers' Compensation Programs is hereby reversed.

LOAD-DATE: April 23, 1999