

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services
Labor Standards Bureau

Office of Hearings and Adjudication
COMPENSATION REVIEW BOARD



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CRB No. 06-66

PAUL RIDLEY,

Claimant – Petitioner,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,

Self- Insured Employer – Respondent.

Appeal from a Compensation Order of
Administrative Law Judge Terri Thompson Mallett
AHD/OHA No. 06-173, OWC No. 617609

Heather C. Leslie, Esquire for the Petitioner

Alan D. Sundburg, Esquire, for the Respondent

Before LINDA F. JORY, FLOYD LEWIS *Administrative Appeals Judges* AND E. COOPER BROWN ,
Chief Administrative Appeals Judges .

LINDA F. JORY, *Administrative Appeals Judge*, on behalf of the Review Panel

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 (1994), and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005).¹

¹ 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 20024, Title J, the 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, 32-1522 (2005). In accordance with

Pursuant to 7 D.C.M.R. § 230.04, the authority of the Compensation Review Board extends over appeals from compensation orders including final decisions or orders granting or denying benefits by the Administrative Hearings Division (AHD) or the Office of Workers' Compensation (OWC) under the public and private sector Acts.

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 13, 2006, the Administrative Law Judge (ALJ), concluded Claimant – Petitioner (Petitioner) sustained a compensable accidental injury to his right knee on August 31, 2005. The ALJ further concluded that as a result of the injury, Petitioner was temporarily and totally disabled from September 9, 2005 through September 30, 2005 but that surgical repair of the right knee was necessary and reasonable.

As grounds for this appeal, Petitioner alleges the Administrative Law Judge's decision as it pertains to the nature and extent of disability is inconsistent with the substantial evidence in the record, therefore the finding should be vacated and the entire claim for relief granted. Respondent asserts the ALJ's decision is rational, supported by substantial evidence in the record and in accordance with the law and must therefore be affirmed.

ANALYSIS

As an initial matter, the scope of review by the Compensation Review Board (CRB) and this Review Panel (hereafter, the 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, 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. 2003). Consistent with this scope of review, the CRB and this panel are bound to uphold a Compensation Order that is supported by substantial evidence, even if there is also contained within the record under review substantial evidence to support a contrary conclusion, and even where the reviewing authority might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

Petitioner has asserted in his Application for Review, that the ALJ's failure to find the treating physician's opinion (that Petitioner could not perform his light duty capacity until his knee

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. Official Code §§ 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.

problems resolved) as substantial evidence necessary to entitle him to an award of ongoing temporary total disability benefits, is reversible. In support thereof, Petitioner cites to Dr. Philip H. Omohundro's October 24, 2005 and December 5, 2005² reports wherein Petitioner asserts Dr. Omohundro opined that Petitioner was placed on permanent light duty restrictions and that he was aware of the extent of Petitioner's work injury as well as his work capabilities. Petitioner asserts that because of the extent of his injury, Dr. Omohundro recommended arthroscopic surgery which was denied by the carrier.

Respondent asserts Petitioner's credibility was at issue as to the physical requirements of Petitioner's job and as the trier of fact who had the opportunity to directly hear Petitioner's testimony; the ALJ was in the best position to render a judgment regarding the credibility of Petitioner's testimony. Respondent further asserts the ALJ properly concluded that Petitioner's testimony that he was standing or walking 70 percent of the time as a station manager was not credible, as according to Respondent, Petitioner principally works in a kiosk where he is provided with a chair.

At the outset, the Panel must acknowledge that the Compensation Order is replete with overlooked typographical errors with regard to the date of injury and dates of medical service. The Panel, accordingly, must infer that the ALJ intended to state: **September 9, 2005** in last sentence of column one, page 3; **September 16, 2005**, in the last sentence of the continued paragraph in column two on page 8; **August 31, 2005**, in the first sentence of the Conclusions of Law on page 8; and **September 9, 2005**, in the first sentence of the Order on page 9.

Pursuant to the Court of Appeals decision in *Otis Dunston v. District of Columbia Department of Employment Services*, 509 A.2d 109 (D.C. 1986), it has been consistently held in this jurisdiction that our Act does not provide claimant with a presumption regarding the nature and extent of his disability, and claimant has the burden of proving by substantial credible evidence that he is entitled to ongoing temporary total disability benefits. Thus, as the ALJ pointed out, Petitioner must affirmatively show the "nature and extent" of his disability. However, in *Thomas Logan v. District of Columbia Dept. of Employment Services*, 805 A.2d 237 D.C. (D.C. 2002)(hereinafter *Logan*), citing *Dunston, supra*, the Court set forth a burden shifting analysis or test to utilize when evaluating evidence regarding the "extent" of claimant's disability which the ALJ has failed to follow in the instant matter. Citing the District of Columbia Circuit Court in *Crum v. General Adjustment Bureau*, 238 U.S. App. D.C. 80, 738 F.2d 474 (1984), the Court in *Logan* held "Once the claimant demonstrates an inability to perform his/her usual job, a *prima facie* case of total disability is established, which the employer may then seek to rebut by establishing the availability of other jobs which the claimant could perform". *Logan, id* at 240. Where employer meets this evidentiary burden, claimant, in order to sustain a disability finding, must either successfully challenge the legitimacy of the employer's evidence of available employment, or demonstrate diligence, but lack of success, in obtaining other employment. *Logan, supra* at 243. Employer can also rebut claimant's case by presenting opposing medical evidence as to the extent of claimant's disability.

In concluding that Petitioner had not met his burden of establishing entitlement to ongoing temporary total disability benefits, the ALJ accepted only the opinion of Dr. Mychelle Shegog,

orthopedist with Kaiser Permanente who examined Petitioner on September 16, 2005 and found a right knee effusion with possible repeat tear of the cruciate ligament. Dr. Shegog gave instructions of no weight bearing until seen; use crutches at all times; and no work until seen by orthopedics. Attached also was a disability certificate completed by Dr. Shegog verifying treatment on September 16, 2005 and indicating Petitioner may return to work in two weeks “as he tolerates”. Dr. Shegog however also made a referral for Petitioner to be seen by orthopedics; referred Petitioner for 8 visits of physical therapy; and ordered an MRI which was performed on September 21, 2005.

The record reveals Petitioner sought treatment thereafter from Dr. Philip Omohundro on September 26, 2005. Dr. Omohundro reviewed the MRI which he found revealed a right torn lateral meniscus, right torn medial meniscus and degenerative arthritis of right knee.

The ALJ rejected the reports of Dr. Philip H. Omohundro, submitted by claimant as well as those submitted by employer, wherein Dr. Omohundro stated Petitioner should be able to return to work once his knee problems are resolved, as the ALJ found Dr. Omohundro failed to “describe such problems”. CO at 8. The ALJ further discredits the opinion in a footnote stating:

[Ppetitioner] has not presented evidence that Dr. Omohundro is aware of the physical requirements of his pre-injury position. Absent such evidence, this trier of fact is unwilling to infer that Dr. Omohundro is opining upon Petitioner’s capacity to perform said requirement.

The Panel concludes to the contrary that the MRI clearly details Petitioner’s problems which Dr. Omohundro itemizes as a torn lateral meniscus, right; torn medial meniscus, right, patella-femoral chondrosis, bilateral, greater on the right and degenerative arthritis knee, right. Without consideration of the September 21, 2005 MRI, which the panel finds is completely absent from the ALJ’s analysis of the medical evidence of record, the Panel finds Dr. Shegog’s September 16, 2005 report which stated Petitioner could return to work in two weeks “as he tolerates” insufficient to establish that that Petitioner has only established entitlement to 4 weeks of disability. As Dr. Shegog did not have the benefit of the MRI she prescribed when she provided Petitioner his disability slip, the Panel simply cannot find her advice for claimant to try to return to work in two weeks sufficient to limit Petitioner’s entitlement to benefits to only 4 weeks. As such the Panel cannot conclude the ALJ’s finding Petitioner was temporarily and totally disabled for only the period of September 9 through September 30, 2005 to be supported by substantial evidence nor was it in accordance with the prevailing case law. Stated otherwise, the Panel concludes the ALJ’s findings of no disability after September 30, 2005 not supported by substantial evidence.

In so concluding, the Panel is mindful that the ALJ’s credibility determinations are to be given special deference, (*see Lincoln Hockey, LLC v. District of Columbia Dep’t. of Employment Services and Jeffrey Brown, intervenor*, 831 A.2d 913 (D.C. 2003) and particularly mindful that the ALJ found Petitioner’s testimony regarding the necessity for crutches was not credible, CO at 6, HT at 32, and that his testimony that as a station manager³ he was required to stand and

³ With regard to the actual physical requirements of a station manager, the ALJ has found Petitioner’s testimony to be inconsistent and she has gone into great detail to explain the unlikelihood that claimant spends 70% of his work

walk 70 percent of the work day was rejected. As there is no evidence in the record that Petitioner misrepresented his duties to Dr. Omohundro and Dr. Shegog specially advised Petitioner to use crutches at all times, the Panel finds these conclusions by the ALJ are not supported by substantial evidence of record.

In that Dr. Omohundro's disability slips are consisted with the MRI report of record, the Panel concludes Dr. Omohundro's medical reports establish a *prima facie* case of total disability under *Logan*, thereby shifting the evidentiary burden to Respondent. Accordingly, on remand the ALJ shall weigh Dr. Omohundro's opinions against any opposing medical evidence (excluding the opinion of Dr. Shegog that Petitioner can return to work as he tolerates in September 2005) as to the extent of claimant's disability.

CONCLUSION

The ALJ's conclusion in the Compensation Order of June 13, 2006 that Petitioner was not entitled to wage loss benefits after September 30, 2005 is neither supported by substantial evidence nor in accordance with the law.

ORDER

The specific finding that Petitioner was temporary and totally disabled only from September 9, 2005 through September 30, 2005 is vacated and remanded to OHA. On Remand, the ALJ shall weigh the opinions of the treating physician, Dr. Omohundro against any opposing evidence with regard to the extent of Petitioner's disability pursuant to *Logan, supra*⁴, as well as reassess her credibility determinations. The remaining unopposed conclusions contained in the Compensation Order are hereby **AFFIRMED**.

FOR THE COMPENSATION REVIEW BOARD:

LINDA F. JORY
Administrative Appeals Judge

November 2, 2006
Date

day on his feet by estimating how much time is required to actually perform the duties of watching the monitor verses the travel time.

⁴ The Panel further reminds the ALJ of the preference afforded the treating physician in evaluation the medical evidence of record. See *Harris v. Dep't. of Employment Services*, 746 A.2d 297, 302 (D.C. 2000); *Stewart v.. Dep't. of Employment Services Dep't.*, 606 A.2d 1350, 1353 (D.C. 1992).