

**DISTRICT OF COLUMBIA COURT OF APPEALS**

No. 15-AA-1055

JACQUELINE O. LLEWELLYN, PETITIONER,

v.

DISTRICT OF COLUMBIA DEPARTMENT OF EMPLOYMENT SERVICES, RESPONDENT,

and

DENNIS O'LEARY, D.D.S. and TRAVELERS INSURANCE CO., INTERVENORS.

Petition for Review of a Decision of the Compensation Review Board of the  
District of Columbia Department of Employment Services  
(CRB-064-15)

(Submitted June 24, 2016)

Decided August 11, 2016)

Before BLACKBURNE-RIGSBY and EASTERLY, *Associate Judges*, and REID,  
*Senior Judge*.

**MEMORANDUM OPINION AND JUDGMENT**

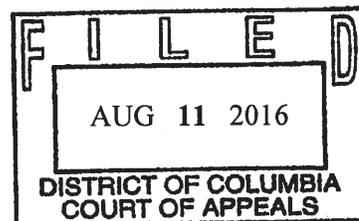
PER CURIUM: Petitioner Jacqueline O. Llewellyn petitions for review of a decision of the Compensation Review Board ("CRB") denying her claim for temporary total disability benefits based on her failure to establish a *prima facie* case of total disability arising from her employment with intervenor, Dennis O'Leary, D.D.S ("employer").<sup>1</sup> Petitioner argues that uncontroverted medical evidence established she was unable to perform her work duties as a dental assistant and, therefore, was totally disabled. We affirm.

**I. Background**

From February 2005 to April 2013, petitioner worked as a full-time dental assistant for employer. Petitioner's employment duties included cleaning instru-

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<sup>1</sup> Employer's insurer, Travelers Insurance Co., has also intervened in this case.



ments and treatment rooms with Cetylcode-II, a common bacterial disinfectant used in medical facilities. Pursuant to industry safety protocols, petitioner was required to wear protective gloves while performing her duties, but she had a preexisting allergy to latex. Employer offered her a variety of alternatives, including vinyl, nitrile, and synthetic gloves and cotton glove liners. Although petitioner experienced ongoing allergic reactions and, beginning in 2006, sought medical treatment for her condition from various doctors, she was able to continue working as a dental assistant for over six years with the alternative protective wear.

Petitioner's temporary total disability claim arises from her allegation that her allergic condition worsened in the spring of 2013 to the point that she could no longer work as a dental assistant. The medical evidence from the relevant time period is limited. In February 2013, petitioner saw Dr. Alan Moshell for the first time, and he confirmed petitioner's allergies to latex and Cetylcode-II. She did not seek treatment again until May 31, 2013, and Dr. Moshell provided no opinion regarding petitioner's ability to continue her work as a dental assistant at either the February 2013 visit or May 2013 visit.

Petitioner was terminated by employer on April 4, 2013. Dr. O'Leary testified that petitioner had an "unprofessional" altercation with a co-worker and expressed general unhappiness about working in the office. Petitioner testified that she told employer that she needed the following day (April 5, 2013) off work to see a doctor about an allergic reaction affecting her hands, but he told her she could not have the time off, and, when petitioner pressed the issue, Dr. O'Leary fired her.<sup>2</sup> Petitioner presented no evidence that she actually sought treatment during the month of April 2013. The ALJ ultimately found that petitioner's termination was "for reasons other than her work exposure injury or a disability stemming from her work injury."

Petitioner sought temporary total disability benefits from April 23, 2013, to February 1, 2014. Dr. Ross Myerson performed an independent medical evaluation on petitioner at the request of employer. He confirmed petitioner's allergies and noted that her allergic symptoms on her hands worsened in 2006. [App. 292-93] Dr. Myerson was not overly concerned about petitioner's latex allergy because "glove allergies are very common" and, in his experience, some trial and error would lead to an acceptable alternative glove. He believed, with proper gloves, petitioner could return to her duties as a dental assistant. On the

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<sup>2</sup> On cross examination, however, petitioner admitted that her termination was not the result of "an unhealthy work environment."

other hand, Dr. Moshell wrote the following in an addendum from November 2014: “I have recommended avoidance of the workplace to prevent the risk of Ms. Llewellyn’s allergic contact dermatitis from recurring. This is because[,] since she cannot wear the gloves most commonly used to protect allergic individuals, she has little available protection . . . .”

In the compensation order, the ALJ concluded that “compelling evidence” indicated that petitioner suffered a workplace injury on November 3, 2006, when the aggravation of her preexisting allergies reached the point that she needed medical treatment and special accommodations. Accordingly, the ALJ granted petitioner’s claim for causally-related medical expenses.<sup>3</sup> The ALJ found that the 2006 injury was not totally disabling, however, and that petitioner’s termination did not reflect a medical inability to perform her work because she was terminated for other reasons. Specifically, the ALJ observed that petitioner did not demonstrate an inability to perform her pre-injury duties because she “continued to perform her usual job as a dental assistant for several years” from 2006 to 2013 until terminated for a reasons unrelated to her allergic condition. Therefore, the ALJ denied her claim for temporary total disability benefits.

Petitioner appealed the ALJ’s compensation order to the CRB, arguing that she had made a *prima facie* case of temporary total disability. The CRB affirmed the ALJ’s decision, noting that (1) petitioner “did not proffer evidence that she sought medical treatment . . . any time during April 2013;” (2) Dr. Moshell did not “indicate that [petitioner] was unable to perform her duties as a dental assistant” as of May 31, 2013; and (3) the ALJ permissibly credited employer’s explanation for petitioner’s termination (“repeated volatile behavior”) over petitioner’s testimony that her termination was related to her need for medical treatment. This petition for review followed.

## II. Analysis

“Our review of a final order of the CRB is limited to determining whether the decision is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” *Reyes v. District of Columbia Dep’t of Emp’t Servs.*, 48 A.3d 159, 164 (D.C. 2012) (internal quotation marks omitted). Although we review the decision of the CRB, we do not ignore the ALJ’s compensation order. *Id.* We sustain the ALJ’s factual findings “if they are supported by substantial

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<sup>3</sup> No party challenges the medical expenses award.

evidence in the record as a whole.” *Wash. Post v. District of Columbia Dep’t of Emp’t Servs.*, 675 A.2d 37, 40 (D.C. 1996).

Disability, for purposes of the Workers’ Compensation Act, “means physical or mental incapacity because of injury which results in the loss of wages.” D.C. Code § 32-1501 (8) (2012 Repl.). While there is a presumption that a workplace injury is compensable, *see* D.C. Code § 32-1521 (1) (2012 Repl.), there is no presumption that a workplace injury is totally disabling. A claimant must demonstrate an inability to perform her usual job, by a preponderance of the evidence, in order to make a *prima facie* case of temporary total disability. *See Logan v. District of Columbia Dep’t of Emp’t Servs.*, 805 A.2d 237, 242 (D.C. 2002). Petitioner argues that she established a *prima facie* case of disability because her inability to perform her usual job as a dental assistant was “an uncontested medical fact.” We disagree.

Petitioner failed to prove by preponderance of the evidence that she could not perform her usual job in April 2013. On the other hand, substantial evidence supported the ALJ’s finding that petitioner suffered only one workplace injury (in November 2006) and continued to work for over six years with a variety of non-latex gloves available to her. Even after her termination, Dr. Myerson noted that she could return to work, despite her allergies to workplace chemicals, with proper gloves. Moreover, Dr. O’Leary’s testimony that petitioner was unhappy with her job and had been fighting with a coworker, coupled with petitioner’s admission that she “didn’t resign because of an unhealthy work environment,” supported the ALJ’s finding that her termination in April 2013 was unrelated to her allergies. Finally, the ALJ’s conclusion that petitioner was not totally disabled flows from the factual findings.<sup>4</sup>

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<sup>4</sup> Even if the limited evidence from Dr. Moshell could have supported a finding that petitioner was completely unable to work as a dental assistant in April 2013, it does not compel that result. *See Wash. Metro. Area Transit Auth. v. District of Columbia Dep’t of Emp’t Servs.*, 926 A.2d 140, 147–48 (D.C. 2007) (“[T]he existence of substantial evidence to the contrary does not permit the CRB [or this court] to substitute its judgment for that of the [ALJ].” (internal quotation marks and alterations omitted)).

Accordingly, we deny the petition for review.<sup>5</sup>

ENTERED BY DIRECTION OF THE COURT:



JULIO A. CASTILLO  
Clerk of the Court

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<sup>5</sup> We deny petitioner's pending motion requesting oral argument as moot.