

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA M. MALLORY
DIRECTOR

Compensation Review Board

CRB No. 12-092

**EBONY ACTY,
Claimant–Respondent,**

v.

**THE WASHINGTON HOME AND HOSPICE AND LIBERTY MUTUAL INSURANCE CO.,
Employer/Carrier-Petitioners**

Appeal from a Compensation Order on Remand by
The Honorable Gerald D. Roberson
AHD No. 10-402A, OWC No. 656979

Michael J. Kitzman, Esquire, for the Claimant/Respondent
Christopher R. Costabile, Esquire, for the Employer/Carrier-Petitioners

Before: HENRY W. MCCOY, HEATHER C. LESLIE,¹ AND JEFFREY P. RUSSELL,² *Administrative Appeals Judges.*

HENRY W. MCCOY, *Administrative Appeals Judge*, for the Compensation Review Board.

DECISION AND REMAND ORDER

JURISDICTION

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

¹ Judge Leslie has been appointed by the Director of the DOES as an interim CRB member pursuant to DOES Administrative Policy Issuance No. 12-02 (June 20, 2012).

² Judge Russell has been appointed by the Director of the DOES as an interim CRB member pursuant to DOES Administrative Policy Issuance No. 12-01 (June 20, 2012).

FACTS OF RECORD AND PROCEDURAL HISTORY

On January 29, 2009, Claimant was working for Employer as a certified nurse assistant when she sustained an injury to her low back while assisting with the transfer of a patient to a bed. Claimant had previously injured her back on June 7, 2008.

Claimant filed a claim for benefits and received temporary total disability for an unspecified period of time, which subsequently was terminated at some point, also unspecified by the record. A formal hearing was held at Claimant's request resulting in a September 20, 2011 Compensation Order (CO) denying her request for temporary total disability benefits from March 18, 2010 to the present and continuing.³ Claimant timely appealed this decision to the CRB.

On April 19, 2012, the CRB issued a Decision and Remand Order (DRO).⁴ The CRB concluded that the Administrative Law Judge's (ALJ) denial of the claim for TTD benefits on the basis that Claimant had failed to present evidence that the instant work injury caused her present disability was not in accordance with the law in light of the stipulation of the parties to causal relationship. In addition, the CRB also concluded that the ALJ's determination that Claimant had terminated entitlement to ongoing TTD benefits by resigning from her position was not supported by substantial evidence in the record and not in accordance with the law.

On May 10, 2012, the ALJ issued a Compensation Order on Remand (COR) where he concluded Claimant retained a disability resulting from her work injury that entitled her to TTD benefits from January 21, 2011 to the present and continuing.⁵ Employer filed a timely appeal with Claimant filing in opposition.

On appeal, Employer takes issue with the CRB decisions in the DRO that (1) once medical causal relationship has been stipulated to by the parties it is improper to inject the issue of causal relationship in the determination of whether the claimed disability is related to the work injury; and (2) Claimant's refusal to accept modified work precluded her from receiving TTD benefits.⁶ As these issues have already been decided by the CRB and are repeated by Employer solely to preserve them for further appeal, they remain the law of the case and will not be addressed.

For our purposes here, Employer argues that the ALJ on remand failed to assess the claim for wage loss benefits in accordance with the burden shifting analysis prescribed by the DCCA in *Logan*⁷ and also failed to determine whether Claimant's receipt of a schedule award for her legs

³ *Acty v. Washington Home and Hospice*, AHD No. 10-402A, OWC No. 656979 (September 20, 2011).

⁴ *Acty v. Washington Home and Hospice*, CRB No. 11-106, AHD No. 10-402A, OWC No. 656979 (April 19, 2012) (DRO).

⁵ *Acty v. Washington Home and Hospice*, AHD No. 10-402A, OWC No. 656979 (May 10, 2012) (COR).

⁶ Employer notes in fn. 1 and fn. 2 of its *Memorandum of Points and Authorities* that these issues are being raised to preserve them for appeal to the D.C. Court of Appeals.

⁷ *Logan v. DOES*, 805 A.2d 237 (2002).

precluded further entitlement to TTD benefits. In opposition, Claimant argues that the ALJ's reasoning is supported by substantial evidence and should be affirmed.

STANDARD OF REVIEW

The scope of review by the CRB, 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.⁸ See D.C. Workers' Compensation Act of 1979, as amended, D.C. Code §§ 32-1501 to 32-1545 (2005), at § 32-1521.01(d)(2)(A). 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.

We first address Employer's argument that the ALJ erred by not weighing the evidence as to the nature and extent of Claimant's disability in accordance with the burden shifting device established by the DCCA in *Logan* and as noted by the CRB in fn. 2 of the April 19, 2012 DRO. We find no merit in this argument.

Claimant originally requested disability benefits from March 18, 2010 to the present and continuing. The ALJ found that the physician treating Claimant on May 5, 2010 at the George Washington University Hospital (GWUH) Emergency Department determined that she could return to work the next day without restrictions. CE 1, p. 12. The ALJ further determined that this status remained after a subsequent examination on May 27, 2010. While Dr. Phillips performed an independent medical evaluation (IME) on June 1, 2010 that gave permanent lifting and bending restrictions, the ALJ discounted this opinion saying no explanation for these restrictions was provided. It was not until the January 21, 2011 examination by Dr. Mandana Hashefi at GWUH's Department of Medicine Specialties that the ALJ determined that permanent lifting, pulling and pushing restrictions were provided. CE 1, p. 1.

Accordingly, the ALJ determined that on January 21, 2011:

...Dr. Hashefi provided medical restrictions related to the work incident, which precluded a return to pre-injury employment. Dr. Hashefi completed a disability certificate dated January 21, 2011, which contains the restriction of no lifting greater than 20 pounds or pushing greater than 40 pounds permanently or indefinitely. CE 1, p. 1. As such medical evidence from Dr. Hashefi serves as the basis for establishing Claimant's entitlement to

⁸ "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 International v. DOES*, 834 A.2d 882 (D.C. 2003).

temporary total disability benefits beginning January 21, 2011 to the present and continuing.⁹

While the ALJ has not undertaken a strict *Logan* analysis, a review of the entire record shows that such an analysis has occurred. As required by *Logan*, the ALJ has determined based upon Dr. Hashefi's report of January 21, 2011 that Claimant is totally disabled from performing her pre-injury job. As such, the burden shifted to Employer to refute that evidence by either by showing that Claimant can perform her pre-injury job, that it offered suitable alternative employment, or that suitable employment exists in the relevant labor market.

While it was previously established that Employer offered Claimant transitional employment for the period July 27, 2009 to August 28, 2009, it is noted that this period precedes the date Claimant seeks to have disability started. Employer does not assert on appeal that it at any time after March 18, 2010 offered Claimant any typed of modified or alternative employment. Employer merely repeats its contention that Claimant's refusal to accept the offered modified transitional employment, not only voluntarily limited her income, which the CRB acknowledged, but also constituted a resignation from her position, which the CRB determined was not supported by the evidence, and thus constituted a permanent bar to the receipt of wage loss benefits.

As Employer did not refute the determination that Claimant was totally disabled from performing her pre-injury job, the burden did not shift back to Claimant. Thus, the ALJ's determination that Claimant is entitled to TTD benefits from January 21, 2011 to the present and continuing is supported by substantial evidence in the record.

There remains however the issue of whether Claimant should be precluded from receiving further TTD benefits because she has already received a schedule award for her legs. In the instant appeal, Employer asserts that insofar as the ALJ did not address this issue on remand and because the CRB noted in fn. 2 of the April 12, 2012 DOR that it would not express an opinion on the issue until the ALJ did so on remand, this must be returned to the ALJ for a determination as to whether Claimant's receipt of a schedule award precludes a further award of TTD benefits. We agree.

In his closing arguments at the formal hearing (HT 36-37), Employer's counsel argued that the case of *Cherrydale Heating & Air Conditioning v. DOES* stood for the proposition that except under unusual circumstances, a claimant having received a schedule award cannot receive additional TTD benefits.¹⁰ In the September 20, 2011 CO, the ALJ made the following finding:

Claimant received permanent partial disability benefits for both lower extremities as a result of a stipulated agreement between the parties in December 2010.¹¹

⁹ COR at p. 6.

¹⁰ *Cherrydale Heating & Air Conditioning v. DOES*, 722 A.2d 31 (D.C. 1998).

¹¹ CO at 3.

However, while the ALJ made this specific finding, he did not address the underlying issue for which it was cited by Employer. As the CO was being returned to address the overriding issue of the nature and extent of Claimant's disability, the CRB deemed it an appropriate time for the ALJ to resolve the matter. A review of the COR reveals that the ALJ has again failed to address the issue and until that deficiency has been corrected, we are constrained to remand for that purpose.

CONCLUSION AND ORDER

The Compensation Order on Remand of May 10, 2012 is AFFIRMED IN PART and REVERSED AND REMANDED IN PART. As the ALJ properly determined that Claimant proved entitlement to temporary total disability benefits from January 21, 2011 to the present and continuing, that portion of the COR is AFFIRMED. As the ALJ failed to determine whether Claimant's entitlement to those benefits is precluded by having received a schedule award for her legs, the COR is REVERSED and REMANDED to make that determination.

FOR THE COMPENSATION REVIEW BOARD:

HENRY W. MCCOY
Administrative Appeals Judge

January 18, 2013
DATE