

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA M. MALLORY
DIRECTOR

Compensation Review Board

CRB No. 12-022

TAURUS ALEXANDER,
Claimant–Respondent,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
Self-Insured Employer -Petitioner

Appeal from a Compensation Order by
The Honorable Karen R. Calmeise
AHD No. 11-252, OWC No. 678308

William B. Newton, Esquire, for the Claimant/Respondent
Mark H. Dho, Esquire, for the Self-Insured Employer/Petitioner

Before: HENRY W. MCCOY, MELISSA LIN JONES AND LAWRENCE D. TARR, *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. Official 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).

OVERVIEW AND FACTS OF RECORD

This appeal follows the issuance on January 19, 2012 of a Compensation Order (CO) from the Hearings and Adjudication Section, Office of Hearings and Adjudication in the District of

Columbia Department of Employment Services (DOES). In that CO, Claimant's request for temporary total disability wage loss benefits from February 25, 2011 to the present and continuing and causally related medical expenses was granted.

On October 30, 2010, Claimant was working as a bus driver for Employer when a passenger sprayed him with a fire extinguisher. Claimant immediately moved to stick his head out of the driver's side window but slammed his head into the closed window. Claimant developed head, neck, and shoulder pain and sought initial medical treatment from Dr. Michael Williams on November 2, 2010.

Dr. Williams diagnosed cervical strain and recommended that Claimant remain off work until May 31, 2011. As the treating physician, Dr. Williams referred Claimant to physical therapy to address the cervical strain and symptoms of radiculopathy. Claimant was prescribed pain medication and was never released to return to work by Dr. Williams.

At Employer's request, Claimant underwent an independent medical evaluation (IME) by Dr. Kenneth Spence on September 30, 2010. Dr. Spence opined that Claimant had a mild cervical sprain, that he could return to work with no restrictions, and that he required no further medication or treatment.

Based on Dr. Spence's opinion, Claimant returned to work as a bus driver on January 21, 2011. Claimant was assigned to work a split shift. Due to this type of schedule, Claimant was unable to take his prescribed pain medication and also drive a bus. Therefore, Claimant stopped work on February 24, 2011 as he was unable to continue working due to the pain in his neck and has not returned to any work.

On May 23, 2011, Claimant underwent a second IME at Employer's request which was performed by orthopedic surgeon Dr. Richard Conant. Dr. Conant was of the opinion that while Claimant had pre-existing degenerative disc disease of the cervical spine, it was not aggravated by the work injury and that he could return to work without restrictions.

On August 17, 2011, Claimant underwent his own IME by orthopedic surgeon Dr. Leonid Selya. After reviewing Claimant's medical records and MRI of the cervical spine, Dr. Selya opined that Claimant suffered disc herniation at C5-6 and C6-7 and that his cervical pain and radiculopathy was causally related to the work injury.

After a formal hearing, the ALJ determined that as a result of the October 30, 2010 work injury, Claimant continues to experience disabling neck pain that renders him incapable of performing his pre-injury duties as a bus driver. The ALJ further determined that as Employer has not provided evidence of suitable alternative employment, Claimant has established by a preponderance of the evidence his entitlement to the requested ongoing wage loss benefits.¹ Employer has filed a timely appeal with Claimant filing in opposition.

On appeal, Employer argues that the ALJ committed specific errors of law in that she used the incorrect legal standard and burden of proof and the findings made are not supported by

¹ *Alexander v. WMATA*, AHD No. 11-252, OWC No. 675308 (January 19, 2012).

substantial evidence and not in accordance with the law. To the contrary, Claimant argues that the ALJ's findings and conclusions are supported by substantial evidence in the record 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.² See D.C. Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §§ 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.

ANALYSIS

As its first assignment of error, Employer argues that the ALJ in finding that Claimant made the *prima facie* showing under *Logan*³ of proving total disability is not "supported by law or even applicable in this matter."⁴ It is Employer's argument that the burden shifting device employed in *Logan* is inappropriate in considering the nature and extent of temporary total disability, which is the present claim, and the legal analysis under *Logan* is for findings of "total disability." While Employer's legal argument is correct, the application by ALJ of the burden shifting device under *Logan* here is deemed harmless.

The issue for resolution in the instant case is whether Claimant is entitled to temporary total disability benefits from February 25, 2011 to the present and continuing. The ALJ commenced her discussion of the nature and extent of Claimant's disability by stating that no presumption inured to Claimant but rather he was required to show by a preponderance of the evidence that he was entitled to the level of benefits being requested.⁵ In addition, as the competing medical opinions relied upon to assess this issue are provided by physicians other than the treating physician, no preference is applicable.⁶

² "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. D.C. Dept. of Employment Services*, 834 A.2d 882 (D.C. 2003).

³ *Logan v. DOES*, 805 A.2d 237 (D.C. 2002).

⁴ Memorandum of Points and Authorities in Support of Employer's Application for Review, p. 3.

⁵ See *Dunston v. DOES*, 509 A.2d 109 (D.C. 1986).

⁶ See *Washington Hospital Center v. DOES*, 821 A.2d 898, 904 (D.C. 2003).

The evidence in this matter supports the ALJ's findings that Employer's initial IME physician, Dr. Richard Spence, opined on December 30, 2010 that Claimant was able to return to his pre-injury duty, which Claimant did by returning to work on January 21, 2011 and stopping when his work schedule prevented him from taking the pain medication to alleviate his ongoing pain. On May 31, 2011, Claimant underwent another IME by Dr. Conant at Employer's request. Dr. Conant also determined that he could return to his pre-injury job full time without restrictions. There is no evidence in the record that Claimant was released to light-duty by his treating physician.

In determining the nature of Claimant's disability, the ALJ accorded greater weight to the August 17, 2011 IME conducted on his behalf by Dr. Leonid Selya. The ALJ reasoned that Dr. Selya's assessment "closely mirrors" Claimant's own credible testimony of his neck complaints and left and right hand symptoms and that these complaints continue and render him unable to perform his pre-injury bus driving duties. The ALJ also faulted the reports of Employer's IME physicians for failing to fully account for Claimant's lack of neck or cervical spine symptoms prior to the work accident. The questions become whether the ALJ's findings are supported by substantial evidence and whether Claimant has proven his entitlement to benefits by a preponderance of the evidence. Our review shows neither to be the case.

The ALJ particularly noted that Dr. Selya diagnosed herniated discs at C5-C6 and C6-C7. However, the December 28, 2010 MRI found "mild-to-moderate multilevel cervical spondyloarthropathy"⁷ most pronounced at the C5-C6 and C6-C7 levels." As spondyloarthropathy is a disease of the spinal joints, the ALJ does not explain how Dr. Selya's interpretation of the MRI results, which appears to be inherently flawed, is more persuasive than Employer's IME physicians' interpretations diagnosing cervical strain/sprain superimposed on preexisting degenerative disc disease; especially where all of the IME physicians appear to be equally credentialed.

The ALJ also faults the opinions of the Employer's IME physicians for not fully taking into account that Claimant experienced no cervical spine symptoms until after the work accident. This is not supported by the record. Dr. Spence specifically noted in Claimant's past medical history that he "denied any prior complaints referable to his neck and upper extremities."⁸ Likewise, Dr. Conant noted Claimant "denies symptoms in the shoulder or neck prior to this injury."⁹ Thus, the record does not support the ALJ's statement particularly when Dr. Selya bases his opinion on a similar statement that "Prior to the injury, the patient never had any troubles with his neck."¹⁰ If anything, it is Drs. Spence and Conant who take more into account as they reference the lack of prior symptoms in Claimant's neck and upper extremities, and Dr. Selya only references the neck.

The ALJ also found Dr. Selya's opinion more persuasive as his findings more closely mirrored Claimant's credible testimony of his neck and upper extremity complaints. Dr. Selya noted that Claimant presented himself for examination with chief complaints of progressively increasing pain in the low back associated with radiating pain to the left upper extremity down to the fourth and

⁷ Spondyloarthropathy: disease of the joints of the spine. *Dorland's Illustrated Medical Dictionary*, 29th Ed., p. 1684.

⁸ EE #1.

⁹ EE #2.

¹⁰ CE #1.

fifth digits of the left hand. Claimant also complained of tingling in both hands and weakness of the right arm all referable to the October 30, 2010 work accident.

In the tests Dr. Selya performed during the physical examination of Claimant, the only notable findings are tenderness to palpation of the paracervical area on the right and “Lhermitte is positive to extension.” All other tests are negative, normal, or within the accepted range. While Dr. Selya opines that Claimant “suffers with sequelae of injury at work”, it is unclear what “sequelae” is being referenced given the lack of abnormal test results and the ALJ does provide any clarification. This can be corrected on remain.

As to the extent of Claimant’s disability, the record as already noted contains no release to return to work in any capacity from Claimant’s treating physician. The last disability slip from the treating physician appears to has Claimant in an off work status until May 31, 2011.¹¹ In his August 17, 2011 IME, Dr. Selya notes that Claimant is disabled at this moment. On remand, the ALJ shall determine whether this evidence and any other evidence in the record allows for a reasonable inference that Claimant has proven an ongoing disability and explain how that inference rationally flows from that evidence.

CONCLUSION AND ORDER

The findings of fact and the conclusions of law in the January 19, 2012 Compensation Order are not supported by substantial evidence and not in accordance with the applicable law. Accordingly, the Compensation Order is REVERSED AND REMANDED for further consideration in keeping with the above discussion.

FOR THE COMPENSATION REVIEW BOARD:

HENRY W. MCCOY
Administrative Appeals Judge

August 8, 2012
DATE

¹¹ While the referenced disability slip is signed by Dr. Michael Williams and carries the same diagnosis as prior slips, it lacks the Claimant’s name and job classification.