COMPENSATION REVIEW BOARD

CRB No. 12-065

HALIDE ALTINAY,
Claimant–Petitioner,

v.

B&B CATERING SERVICE, INC.,
Self-Insured Employer -Respondent

An Appeal from a March 28, 2012 Compensation Order by
Administrative Law Judge Anand Verma
AHD No. 12-019, OWC No. 560460

Shawn M. Nolan, Esquire, for the Claimant/Petitioner
Cheryl D. Hale, Esquire, for the Self-Insured Employer/Respondent

Before: HEATHER C. LESLIE, JEFFREY RUSSELL, and MELISSA LIN JONES, *Administrative Appeals Judges*.

HEATHER C. LESLIE, *Administrative Appeals Judge*, for the Compensation Review Board.

DECISION AND REMAND ORDER

OVERVIEW

This case is before the Compensation Review Board (CRB) on the request for review filed by the Claimant - Petitioner (Claimant) of the March 28, 2012, Compensation Order (CO) issued by an Administrative Law Judge (ALJ) in the Office of Hearings and Adjudication of the District of Columbia Department of Employment Services (DOES). In that CO, the Claimant's request for permanent total disability wage loss benefits from August 30, 2010 to the present and continuing was denied. The CO did grant the Claimant's request for ongoing medical care to the right knee. We VACATE and REMAND.

FACTS OF RECORD AND PROCEDURAL HISTORY

On October 4, 2000, the Claimant was working as a banquet coordinator when she twisted and hurt her left knee. The Claimant sought medical care from Dr. Jeffrey Sabloff who recommended an MRI. After undergoing the MRI, the Claimant was diagnosed with a large tear of the posterior horn of the medial meniscus and meniscal degeneration of the posterior horn of the lateral meniscus. Dr. Sabloff recommended surgical intervention which the Claimant underwent on March 8, 2002.

After the surgery, the Claimant began to develop pain in her right knee which she alleged was a result of her left knee injury and surgery. The Claimant continued to treat with Dr. Sabloff for both knees.

The Claimant returned to work after her injury until March 2005. Thereafter, because of her knee injury Dr. Sabloff restricted the Claimant from returning to work and from standing for 8 hours a day. Dr. Sabloff recommended a total knee replacement.

The Claimant underwent a functional capacity evaluation (FCE) on November 28, 2006 where she was restricted to sedentary employment. On May 10, 2011, the Claimant's new treating physician, Dr. Edward Chan, permanently restricted the Claimant from returning to work in the catering business and opined she was unable to stand or walk for a prolonged period of time.

On September 21, 2010, the Claimant attended an independent medical evaluation (IME) with Dr. Mark Scheer. Dr. Scheer took a history of the Claimant's injury, reviewed medical records, performed a physical examination, and reviewed diagnostic studies. Dr. Scheer opined the Claimant was at maximum medical improvement and that her left knee condition was related to pre-existing arthritis.

A full evidentiary hearing was held on February 14, 2012. At the hearing, the Claimant sought an award of permanent total disability from August 30, 2010 to the present and continuing, as well as authorization for ongoing treatment to the Claimant's right knee.[1] The Employer contested the nature and extent of the Claimant's disability as well as the medical causal relationship between the right knee condition and the injury. Hearing transcript at 6. A CO was issued on March 28, 2012 denying the Claimant's request for permanent total disability benefits but granting the Claimant's request for authorization for medical treatment to the Claimant's right knee, having found the right knee condition to be causally related to the injury.[2]

The Claimant timely appealed. On appeal, the Claimant argues the CO is arbitrary, capricious, unsupported by the substantial evidence in the record and not in accordance with the law. Specifically, the Claimant contends that the Employer did not submit any rebuttal evidence as required by the burden shifting scheme as enunciated in *Logan v. DOES*[3] (hereinafter *Logan*), and

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[1] The claim for relief in the CO states,

> Claimant seeks an award under the Act of permanent total disability benefits from August 30, 2010 and medical expenses for right knee treatment.

We note that the Claimant, through counsel, stated also authorization for ongoing treating to the right knee at the formal hearing was sought as a claim for relief. Hearting transcript at 7. We will also assume for purposes of this appeal that the ALJ meant to say, pursuant to the claim for relief as stated at the formal hearing, that ongoing treatment to the right knee was being sought, rather than medical expenses. We note that in the decision section theat ALJ did award authorization for treatment to the right knee.

[2] The Employer did not appeal the finding that the Claimant's right knee condition is medically casually related to the injury.

[3] 805 A.2d 237 (D.C. 20002)

that the ALJ applied *Logan* incorrectly. The Employer opposes, arguing that the Claimant did not meet her *prima facie* case in establishing her entitlement to permanent total disability and that the Claimant had voluntarily retired.

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.[4] *See* D.C. Workers' Compensation Act of 1979, as amended, D.C. Code §§ 32-1501 to 32-1545, as amended (the Act) , 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 a preliminary matter, we note that the Claimant attached several exhibits to the application for review including medical reports. The Employer attached the hearing transcript. The parties are reminded that 7 DCMR § 258.3, states,

> An Application for Review must include the following:
>
> (a) An original and three (3) copies of the Application for Review, and
>
> (b) An original and three (3) copies of a supporting memorandum of points and authorities setting forth the legal and factual basis for requesting review.

While the parties attaching documents they deem helpful for our review is appreciated, it would be helpful if in its submission the Claimant and Employer would acknowledge that only documents admitted into the record have been attached, and they should be identified by the exhibit numbers that were assigned to them at the formal hearing. Only such documents as were admitted into the record can be considered in assessing whether the Compensation Order is supported by substantial evidence.

Turning to the merits of the arguments, we are mindful that "a disability is *permanent* if it 'has continued for a lengthy period, and it appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period.'" *Smith v. DOES* 548 A.2d 95, 98 n. 7 (D.C. 1988). (emphasis added) (citing *Crum v. General Adjustment Bureau*, 238 U.S. App. D.C. 80, 86 738 F.2d 474, 480 (1984); *see also* 4 ARTHUR LARSON, LARSON'S WORKERS' COMPENSATION § 80.04, at 80-13 (Matthew Bender ed. 2002) ("Permanent means lasting the rest of claimant's life. A condition that, according to available medical opinion, will not improve during the claimant's lifetime is deemed to be a permanent one."). In closing argument, the Employer conceded that the Claimant was at maximum medical improvement and that her condition was permanent in nature. Specifically, Employer's counsel argued that,

[4]"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).

> [t]his is not a case where permanent totally disability should be presumed. It's a case of permanent partial. She received all of her payments while she was treating. She got to the last point where she was at MMI, and the last part of this case is for her to get her permanent partial disability award." Hearing transcript at 48.

["A] claimant suffers from *total* disability if his injuries prevent him from engaging in the only type of gainful employment for which he is qualified." *Washington Post v. DOES,* 675 A.2d 37, 41 (D.C. 1996) (emphasis added); *see also Washington Metro. Area Transit Auth. v. DOES,* 703 A.2d 1225, 1229 (D.C. 1997). "Total disability does not mean absolute helplessness, . . . and the claimant need not show that he is no longer able to do any work at all." *Washington Post*, 675 A.2d at 41. Instead, "an employee who is so injured that he can perform no services other than those which are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist, may well be classified as totally disabled." *Id.* (quoting 4 LARSON, *supra* § 83.01, at 83-2). In other words, once a claimant establishes a *prima facie* case of total disability, the employer must present sufficient evidence of suitable job availability to overcome a finding of total disability. *Logan, supra at* 243.

Under *Logan, a prima facie* case of total disability is made when a claimant presents evidence that he or she cannot perform the duties of the job held at the time of the injury. The burden then shifts to the employer to refute that evidence, either by showing that the claimant can in fact perform the pre-injury job, that it offered suitable modified employment to the claimant which the claimant refused to accept, or that there exist jobs in the relevant labor market, considering the claimant's age, education, experience and physical capacity, for which the claimant could compete and for which if he applied he would likely obtain. Such a showing by the employer shifts the burden back to the claimant to overcome the employer's evidence by, for example, attacking the suitability of the proffered modified employment, the suitability of the identified alternate jobs, or by showing that the supposedly available other jobs are not actually available. This last showing could be by presenting labor market evidence contradicting that of the employer, or showing a diligent yet unsuccessful job search. See, *Logan* at 243.

Keeping in mind the burden shifting analysis above, a review of the CO reveals that the ALJ determined, through the medical evidence from her treating physicians, the Claimant established a *prima facie* case of her inability to return to her pre-injury employment, contrary to the Employer's assertion in argument that the CO found the Claimant failed to meet her *prima facie* case. We affirm this conclusion. The ALJ then continued, stating,

> The burden then shifts to Employer to establish suitable alternate employment opportunities available to Claimant. The proffered evidence of record does not disclose that Employer has identified any suitable alternate job opportunities consistent with the FCE recommendations and, therefore, Claimant's eligibility to receive temporary total disability benefits has not been rebutted. Nonetheless, inasmuch as the instant claim involves a request for an award of permanent total disability benefits only, the undersigned has no authority, *sua sponte*, to award temporary total disability benefits. See *Transportation Leasing v. DOES,* 690 A. 2d 487 (D.C. 1997).

> Insofar as Claimant's claim for permanent total disability benefits, although both of Claimant's treating physicians, Dr. Sabloff and Dr. Chan opined she could not return to her pre-injury employment in catering, neither physician unequivocally noted she was totally disabled to earn any wages in an alternative employment. Indeed, both the FCE recommended sedentary employment and Dr. Chan's clear proscription of Claimant to return to her catering job based on her inability to withstand prolonged standing/walking affirm her ability to work in a sedentary job. Accordingly, Claimant has not sustained her burden by a preponderance of the evidence supporting her entitlement to an award of permanent total disability benefits.

CO at 7-8.

We find the ALJ's analysis above to be in error insomuch as it is apparent the ALJ is under the misapprehension that because the physicians and the FCE restricted her to sedentary employment only, she cannot be permanent and totally disabled. This is in error. As we have stated before,

> As has been made clear by the DCCA[5] a physician's opinion as to whether a claimant can "work" is not controlling on the issue of whether a claimant is disabled under the Act; disability being a vocational matter, the physician's medical opinion as to a claimant's physical capacity can *inform* a disability determination, but it can not control it.[6]

Moreover, as the Court in *Logan* points out,

> As we have said, "'The degree of disability in any case cannot be considered by physical condition alone, but there must [also] be taken into consideration the injured [person's] age, his industrial history, and the availability of the type of work which he can do.'" *Washington Post*, 675 A.2d at 40-41 (quoting *American Mut. Ins. Co. v. Jones*, 138 U.S. App. D.C. 269, 271, 426 F.2d 1263, 1265 (1970)); *see also Crum*, 238 U.S. App. D.C. at 85, 738 F.2d at 479 (in determining extent of disability, relevant factors include "the claimant's age, physical condition, work experience, and [the] availability of other work").[7]

Thus, it was incumbent upon the ALJ to consider not only the medical opinions but also the Claimant's age, her industrial history, and the availability of the type of work which she could do, and any other vocational factors as may be appropriate. This task the ALJ failed to do. However, we find this error harmless.

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[5] See *Negussie v. DOES*, 915 A.2d 391 (D.C. 2007).

[6] *Venable v. Safeway Inc*., CRB No. 10-145, AHD No. 08-137B (February 28, 2012).

[7] *Logan*, supra at 242.

We find this error harmless because after finding the Claimant had presented a *prima facie* case of total disability, the burden then shifted to the Employer to refute this finding. As we stated above, the Employer may refute this either by showing that the claimant can in fact perform the pre-injury job, that it offered suitable modified employment to the claimant which the claimant refused to accept, or that there exist jobs in the relevant labor market, considering the claimant's age, education, experience and physical capacity, for which the claimant could compete and for which if he applied he would likely obtain. As the ALJ stated, the Employer has not presented any evidence of any suitable alternate job opportunities consistent with the FCE recommendations or the treating physician's recommendations. As the Employer failed in refuting the Claimant's *prima facie* showing of total disability, there can be but one result, the Claimant is permanently and totally disabled.

The Employer argues, in support of the denial of permanent total disability benefits, that as the Claimant retired and is receiving social security benefits, the Claimant was no longer entitled to wage loss benefits under the Act. The Employer relies upon *Bailes v. DOES*, 728 A.2d 661 (D.C. 1999) for the proposition that the Claimant's retirement and receipt of social security benefits bars the receipt of workers compensation benefits under the Act. However, as the Employer points out, the Claimant in *Bailes* was not under any physical restrictions when he retired unlike the Claimant in the case at bar. Moreover, the Claimant testified that she would still be working but for the problems with her knees. Hearing transcript at 33-34. Thus, the Claimant cannot be said to have voluntarily retired. The receipt of social security benefits does not bar a Claimant from receiving workers compensation benefits and the Employer cites no authority for this proposition. Indeed, the provision which did allow Employers any type of relief when an injured worker received other benefits, such as taking a setoff and reducing workers compensation benefits was repealed on April 15, 1999.[8]

Finally, we note that the ALJ awards authorization for the right knee treatment. However, a review of the hearing transcript reveals the Claimant, through counsel, requested "authorization for ongoing treatment" for the right knee. Hearing transcript at 7. The award of ongoing medical treatment lacks any specificity and we are uncertain what ongoing treatment the Claimant is seeking. Such a award is in error. As we have stated,

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[8] Prior to April 15, 1999 the original version of the D.C. Workers' Compensation Act and subsequent amendments contained a provision which allowed employers, pursuant to D.C. Code § 36-308(9), to take a setoff reducing an employee's workers' compensation benefits when he/she is receiving other income from certain specific other sources and where the aggregate exceeds 80% of the employee's average weekly wage. Specifically D.C. Code § 36-308(9) provided:

> In no event shall the total money allowance payable to an employee or his dependent survivor(s): (1) As compensation for an injury or death under this chapter: (2) as federal old age, and survivors insurance benefits; and (3) from employee benefit plans subject to the Employee Retirement Income Security Act of 1974 (26 U.S.C. § 401 et seq.) and such income maintenance plans solely funded by the employer (computed weekly) exceed in the aggregate the higher of 80% of the employee's average weekly wage or the total federal payments and employee benefit plans payments. In the event the total aggregate money allowance payable to an employee or his survivor(s) exceeds this limitation, the amounts otherwise payable as compensation ... under this chapter shall be reduced accordingly.

> Any such award must be limited in scope such that it does not constitute an overly broad order to provide a series of treatments indefinitely into the future. The entitlement to obtain medical care may only be premised upon the condition of a claimant at the present time, and any award of disputed medical care must be limited to address conditions as they currently exist.[9]

Thus, that portion of the award authorizing ongoing medical treatment is vacated. The Claimant may reapply for a Formal Hearing when, and if, additional future medical treatment or reasonable follow up care to the right knee is requested and denied.

CONCLUSION AND ORDER

The findings of fact and the conclusions of law in the March 28, 2012 Compensation Order are not supported by the substantial evidence in the record and are not in accordance with the law and therefore the Compensation Order is VACATED and REMANDED.

As the Employer failed to rebut the Claimant's *prima facie* showing of permanent total disability pursuant to the burden shifting scheme as outlined by *Logan*, upon remand the ALJ is directed to issue a Compensation Order awarding the Claimant permanent total disability benefits from August 30, 2010.

That portion of the Compensation Order awarding authorization for medical treatment is vacated.

FOR THE COMPENSATION REVIEW BOARD:

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HEATHER C. LESLIE
Administrative Appeals Judge

April 24, 2013
DATE

[9] *Lattimore v. CVS Pharmacy*, CRB No. 12-075, AHD No. 09-243D (September 10, 2012).