

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA MARÍA MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 12-056

CHERYL BOWSER,
Claimant–Respondent,

v.

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

Appeal from an March 16, 2012 Compensation Order by
Belva D. Newsome, Administrative Law Judge
AHD Nos. 12-003, 12-004 and 12-026, OWC Nos. 664831, 667179, 671573

Sarah O. Rollman, Esquire for the Petitioner
Matthew Pepper, Esquire for the Respondent

Before MELISSA LIN JONES, JEFFREY P. RUSSELL,¹ *Administrative Appeals Judges* and LAWRENCE D. TARR, *Chief Administrative Appeals Judge*.

MELISSA LIN JONES, *Administrative Appeals Judge*, for the Compensation Review Board.

DECISION AND REMAND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

While working as a bus driver for the Washington Metropolitan Area Transit Authority (“WMATA”), Ms. Cheryl Bowser has been involved in several work-related accidents. A formal hearing was requested to adjudicate Ms. Bowser’s entitlement to temporary total disability benefits from May 7, 2011 to the date of the formal hearing and continuing.

An administrative law judge (“ALJ”) issued a Compensation Order on March 16, 2012. In that Compensation Order, the ALJ granted Ms. Bowser temporary total disability benefits from May 7, 2011 to September 6, 2011.² WMATA appeals that Compensation Order contending the ALJ made certain findings of fact that are not supported by the record. In addition, WMATA asserts the ALJ

¹ Judge Russell has been appointed by the Director of the Department of Employment Services (“DOES”) as a temporary Compensation Review Board (“CRB”) member pursuant to DOES Administrative Policy Issuance No. 12-01 (June 20, 2012).

² *Bowser v. Washington Metropolitan Area Transit Authority*, AHD Nos. 12-003 and 12-026, OWC Nos. 664831, 667179, and 671573 (March 16, 2012).

applied the wrong standard of proof to the issue of the nature and extent of Ms. Bowser's disability by ruling WMATA had failed to rebut Ms. Bowser's *prima facie* evidence of temporary total disability. For these reasons, WMATA requests the CRB reverse the Compensation Order.

In response, Ms. Bowser argues WMATA has improperly requested the CRB re-weigh the evidence in its favor: "specifically, the finding that Dr. Reiderman's IME and Dr. [Donald] Saltzman's IME were not sufficient to demonstrate Ms. Pauls-Anderson [*sic*] could not return to work."³ Ms. Bowser claims that because WMATA "did not demonstrate there was any job available for which Ms. Pauls-Anderson [*sic*] could compete and secure,"⁴ Ms. Bowser was temporarily, totally disabled from May 7, 2011 to September 6, 2011, and the Compensation Order must be affirmed.

ISSUE ON APPEAL

Is the March 16, 2012 Compensation Order supported by substantial evidence and in accordance with the law?

ANALYSIS⁵

In order to conform to the requirements of the D.C. Administrative Procedures Act,⁶ (1) the agency's decision must state findings of fact on each material, contested factual issue; (2) those findings must be based on substantial evidence; and (3) the conclusions of law must follow rationally from the findings.⁷ WMATA raises three specific instances of findings of fact purportedly not based upon substantial evidence.

First, WMATA asserts the ALJ erred in finding Dr. Haroun did not release Ms. Bowser to return to work as of July 14, 2011. The record establishes that on May 17, 2011, Dr. Haroun certified Ms. Bowser as unable to work from May 10, 2011 to June 28, 2011; at her next appointment on July 14, 2011, Dr. Haroun did not offer any opinion regarding Ms. Bowser's work capacity. Thus, while it is true Dr. Haroun did not release Ms. Bowser to return to work as of July 14, 2011, he did not keep her out of work either.

³ Claimant's Opposition to the Application for Review, p. 4.

⁴ *Id.* at p. 6.

⁵ The scope of review by the CRB is limited to making a determination as to whether the factual findings of the appealed 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. Section 32-1521.01(d)(2)(A) of the District of Columbia Workers' Compensation Act, as amended, D.C. Code §32-1501 to 32-1545, (the "Act"). Consistent with this standard of review, the CRB is constrained to uphold a Compensation Order on Remand that is supported by substantial evidence, even if there also is contained within the record under review substantial evidence to support a contrary conclusion and even if the CRB might have reached a contrary conclusion. *Marriott International v. DOES*, 834 A.2d 882, 885 (D.C. 2003).

⁶ D.C. Code §2-501 *et seq.*, as amended.

⁷ *Perkins v. DOES*, 482 A.2d 401, 402 (D.C. 1984).

Because a claimant's testimony alone may suffice as the basis for a finding of entitlement to wage loss benefits, we cannot rule out the possibility that there is a factual basis for the ALJ's award of wage loss benefits after July 14, 2011, but as written, we cannot ascertain the basis for the ALJ's finding in this regard. The law, therefore, requires we remand this matter for the ALJ to explain the evidentiary basis for his ruling on this issue.

Next, WMATA asserts the ALJ erred in finding WMATA did not issue a return to work slip or a commercial driver's license until September 6, 2011 because WMATA is not responsible for issuing driver's licenses. The ALJ found

On May 6, 2010, Ms. Fleming issued a return-to-duty form with Bowser based upon Dr. Reiderman's IME. Bowser did not return to work and did not file a recurrence form concerning a reoccurrence of any her [*sic*] work-related injuries after she was issued a return-to-duty form. HT at 65-69.^[8]

WMATA is correct that the ALJ incorrectly held it had issued a return to work slip on September 6, 2011; it issued a return to work slip on May 6, 2010. In addition, the ALJ found

Bowser underwent the medical process and commercial driver's license procedure and was returned to duty and issued a commercial driver's license on September 6, 2011. WMATA Ex. 5.^[9]

Because we are unable to ascertain whether the ALJ considered the May 6, 2010 return-to-duty slip when rendering her decision, the law, again, requires we remand this matter for further explanation.

The ALJ, however, did not find that WMATA is responsible for issuing driver's licenses.

Finally, WMATA asserts the ALJ erred in rejecting Dr. Reiderman's opinion on the grounds that Dr. Reiderman did not review Ms. Bowser's medical records from her June 22, 2010 accident before rendering his opinion. Although Dr. Reiderman's March 9, 2011 independent medical examination report references Dr. Haroun and states

Ms. Bowser provided films of the following MRI scans, which were reviewed along with radiology report. [*sic*] MRI of the cervical spine obtained on June 30, 2010 revealed multilevel degenerative disease with multilevel disc desiccation with multilevel osteophytes disc complexes.^[10]

the ALJ determined

⁸ *Bowser, supra*, at p. 4.

⁹ *Id.*

¹⁰ Employer's Exhibit 2.

[t]he IME of Dr. Reiderman did not refer to Bowser's work related injury of June 22, 2010 in determining that Bowser could return to her position as a bus driver. (FF 14)^[11]

Because Dr. Haroun started treating Ms. Bowser after her June 2010 accident, by referencing Dr. Haroun, Dr. Reiderman very well may have been aware of Ms. Bowser's June 22, 2010 injury and treatment. Thus, the ALJ's premise that Dr. Reiderman did not refer to Ms. Bower's June 22, 2010 injury is problematic and requires additional explanation.

At best, the findings in the Compensation Order are muddled, but they are not the only incongruous portions of the Compensation Order:

- The ALJ finds Ms. Bowser's disability is causally related to injuries sustained on October 24, 2009 and on June 22, 2010 but does not explain how any specific injury or injuries cause any specific disability warranting an award of temporary total disability benefits.
- The ALJ makes no findings regarding Ms. Bowser's work capacity from May 2011 through September 2011.
- After determining the presumption of compensability had been invoked, the ALJ states Dr. Haroun diagnosed Ms. Bowser with several conditions causally related to the June 22, 2010 exacerbation of her October 24, 2009 work-related injury, and without any analysis as to whether the presumption of compensability has been rebutted, the ALJ finds that based upon the "presumption of compensability, Bowser's current condition is medially causally related to her June 22, 2010 exacerbation of her October 24, 2009 work related injury."¹²
- As to the nature and extent of Ms. Bowser's disability, the ALJ states the holding of *Logan*¹³ rules Ms. "Bowser has demonstrated by a preponderance of the evidence that she could not perform her pre-injury position as a bus driver for the period of May 7, 2011 through September 6, 2011,"¹⁴ and concludes WMATA's evidence fails to rebut Ms. Bowser's *prima facie* evidence of temporary total disability.

There is no single interpretation that flows from the various factual findings, and just how the ALJ applies the facts to the law (which at times also is at odds) without reasonable explanation prevents us from performing our appellate role and requires we remand this matter.

¹¹ *Bowser, supra*, at pp. 6-7.

¹² *Id.* at p. 5.

¹³ *Logan v. DOES*, 805 A.2d 237 (D.C. 2002).

¹⁴ *Bowser, supra*, at p. 6.

CONCLUSION AND ORDER

Because it fails to provide a clear explanation of Ms. Bowser's work capacity from May 7, 2011 to the date of the formal hearing and continuing, the law requires we remand this matter for a thorough review of the evidence consistent with this Decision and Remand Order. The March 16, 2012 Compensation Order is not supported by substantial evidence, is not in accordance with the law, and is VACATED. Any remaining issues are moot at this time.

FOR THE COMPENSATION REVIEW BOARD:

MELISSA LIN JONES
Administrative Appeals Judge

February 13, 2013
DATE