**COMPENSATION REVIEW BOARD**

**CRB No. 11-094**

**CATHY CHAUPIS,**
**Claimant–Petitioner,**

**v.**

**GEORGE WASHINGTON UNIVERSITY and AVIZENT,**
**Employer/Carrier-Respondent**.

Appeal from a Compensation Order on Remand by
The Honorable Anand K. Verma
AHD No. 08-149C, OWC No. 642416

Matthew J. Peffer, Esquire for the Petitioner
Janeen M. Scaturro, Esquire for the Respondent

Before MELISSA LIN JONES, HENRY W. MCCOY, and JEFFREY P. RUSSELL,[1] *Administrative Appeals Judges*.

MELISSA LIN JONES for the Compensation Review Board; JEFFREY P. RUSSELL dissenting.

## DECISION AND REMAND ORDER

### JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board ("CRB") pursuant to §§32-1521.01 and 32-1522 of the District of Columbia Workers' Compensation Act of 1979, D.C. Code, as amended, §32-1501 *et seq*., ("Act"), 7 DCMR §250, *et seq*., and the Department of Employment Services Director's Administrative Policy Issuance 05-01 (February 5, 2005).

### FACTS OF RECORD AND PROCEDURAL HISTORY

On September 7, 2007, Ms. Cathy Chaupis injured her left shoulder while working for George Washington University ("GWU") as an access monitor. By January 2008, Ms. Chaupis had returned to work for GWU, but on June 30, 2009, Ms. Chaupis was terminated from her employment for reasons unrelated to her workers' compensation claim.

[1] Judge Russell has been appointed a temporary CRB member pursuant to the Department of Employment Services' Director's Administrative Policy Issuance No. 12-01 (June 20, 2012).

The parties proceeded to a formal hearing on the issue of Ms. Chaupis' entitlement to temporary total disability benefits from March 2, 2011 to the date of the formal hearing and continuing. In a Compensation Order dated August 11, 2011, an administrative law judge ("ALJ") granted Ms. Chaupis temporary total disability benefits from March 2, 2011 through April 5, 2011; the remainder of her claim was denied because Ms. Chaupis was capable of returning to her pre-injury position.

On appeal, Ms. Chaupis asserts her pre-injury position was not a light duty position within her work capacity because "she was physically incapable of keeping individuals out of the Employer's buildings because of her work injury."[2] Ms. Chaupis also asserts GWU's labor market survey ("LMS") was "insufficient evidence to demonstrate available jobs Ms. Chaupis could obtain."[3]

In opposition, GWU argues Ms. Chaupis' position at GWU was a light duty position within her limitations and restrictions, but she was ineligible to return to that employment because she had been terminated for cause. GWU also argues its LMS demonstrates suitable, available, alternative employment. Consequently, GWU requests we affirm the August 11, 2011 Compensation Order.

## ISSUE ON APPEAL

1. Is the August 11, 2011 Compensation Order supported by substantial evidence and in accordance with the law?

## ANALYSIS[4]

In his January 18, 2011 medical report, Ms. Chaupis' treating physician, Dr. Mustafa A. Haque, states Ms. Chaupis was unable to work at that time.[5] In his next report on March 22, 2011, Dr. Haque referred Ms. Chaupis for a FCE to determine the level of work Ms. Chaupis was capable of performing; in the meantime, Dr. Haque did not release Ms. Chaupis to return to work.

On February 22, 2011, Dr. Marc B. Danziger performed an independent medical examination at GWU's request. He opined Ms. Chaupis was capable of full duty work without restrictions.

Ms. Chaupis' FCE took place on April 5, 2011. She was capable of light duty with restricted lifting, stair climbing, bending, reaching, and frequent walking and squatting.

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[2] Ms. Chaupis' Memorandum of Points and Authorities in Support of Application for Review, unnumbered p. 4.

[3] Ms. Chaupis' Memorandum of Points and Authorities in Support of Application for Review, unnumbered p. 3.

[4] 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 Act. Consistent with this standard of review, the CRB is constrained to uphold a Compensation Order 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).

[5] Although the Compensation Order does reference the January 18, 2011 report, it omits any reference to this important piece of information.

The medical evidence of record is in conflict - Dr. Haque opined Ms. Chaupis was unable to work until at least April 5, 2011 at which point she was capable of light duty. On February 22, 2011 (prior to the start of the period for which Ms. Chaupis is claiming an entitlement to temporary total disability benefits), Dr. Danziger opined Ms. Chaupis was capable of returning to full duty work without restriction. The Compensation Order does not resolve this conflict.

A claimant is entitled to temporary total disability benefits when unable to work in her regular employment for a limited time because of a work-related injury.[6] Based upon the evidence in the record, Ms. Chaupis was not released to any work by any doctor until at least February 22, 2011 and was not released to any work by her treating physician until at least April 5, 2011. Given that this critical assessment differs from before the time period of the claim for relief to after the start of the time period of the claim for relief, it is incumbent upon the ALJ to make findings regarding Ms. Chaupis' work capacity throughout the entire time period of the claim for relief. The law requires we remand this matter for the ALJ to make those findings.[7]

Nonetheless, based upon the testimony of GWU's witness, Ms. Susanna Williams-Valentine, the ALJ determined Ms. Chaupis' pre-injury position was consistent with her light duty release:

> It has been demonstrated that the position of access monitor claimant held at the time of her September 7, 2007 injury was primarily a sedentary position which required sitting in one of the locations of the university. In that capacity, claimant would use a radio or telephone depending on the location, check identification of students as well as of visitors and notify the campus police officers, if warranted by an emergent situation. The job of access monitor was basically a light duty position which did not entail reaching, bending, squatting, heavy lifting/carrying of objects. (HT 73-74). The FCE of April 5, 2011 did find claimant capable of returning to light duty position [*sic*] with restrictions of stair climbing, prolonged walking, squatting, and bending/reaching at waist level. In other words, claimant was fit to return to her pre-injury position of access monitor, which she lost due to her own misconduct of sleeping, while at work. [Footnote omitted.] Hence, predicated on this record, it cannot be concluded claimant has made a *prima facie* showing that she could not return to her pre-injury employment as an access monitor after April 5, 2011. [Footnote omitted.] Absent the requisite showing, the burden does not shift to employer to offer evidence in rebuttal. As such, claimant cannot be found disabled under the Act. See *Washington Post v. District of Columbia Department of Employment Services*, 675 A.2d 37, 41 (D.C. 1996).[8]

Ms. Williams-Valentine's testimony constitutes substantial evidence sufficient to support this ruling, even if the record contains contrary evidence, namely Ms. Chaupis' testimony. Thus, whether Ms.

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[6] See *Savoy v. Evered Bardon*, Dir. Dkt. No. 96-59, H&AS No. 93-377, OWC No. unknown (April 24, 1997).

[7] Although there exists a preference for the opinions of a treating physician, our authority does not extend to an ability to apply it here to reach a conclusion regarding Ms. Chaupis' work capacity.

[8] *Chaupis v. George Washington University*, AHD No. 08-149C, OWC No. 642416 (August 11, 2011), pp. 5-6.

Chaupis was capable of returning to full duty work consistent Dr. Danziger's opinion or to light duty work consistent with the results of the functional capacity evaluation, as of April 5, 2011 the ALJ's denial of Ms. Chaupis' request for ongoing wage loss benefits is supported by substantial evidence.

The ALJ, however, rendered an alternate ruling:

> However, assuming *arguendo*, claimant did establish that her continued infirmity would interfere in the performance of light duty job as an access monitor, the burden then would obviously shift to employer to offer evidence in rebuttal by establishing the availability of suitable employment opportunities claimant could perform. The record herein demonstrates the June 14, 2011 LMS identified seven employment opportunities available to claimant consistent with her work experience and physical restrictions.
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> * * *
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> The requirements of the available positions were, for the most part, consistent with the FCE recommendations for claimant's ability to return to full-time light duty work with certain physical restrictions. (EE 2, p.7). However, claimant's testimony on cross examination that since March 2011, she has not searched for any employment, further affirms her inertia in returning to a productive life. (HT 66-67). Thus, employer has met its requisite burden under *Logan*, *supra*, by establishing that claimant is no longer incapacitated in performing the duties of available employment consistent with her physical restrictions.[9]

Given that the denial of temporary total disability benefits after April 5, 2011 is affirmed, any issues regarding the contents and application of the June 14, 2011 LMS are moot.

## CONCLUSION AND ORDER

The portion of the August 11, 2011 Compensation Order denying Ms. Chaupis' request for ongoing wage loss benefits as of April 5, 2011 is supported by the evidence, is in accordance with the law, and is AFFIRMED. The portion of the Compensation Order granting temporary total disability benefits from March 2, 2011 through April 5, 2011 is not in accordance with the law and is VACATED; this matter is REMANDED for proper findings of fact and conclusions of law regarding Ms. Chaupis' work

[9] *Chaupis v. George Washington University*, AHD No. 08-149C, OWC No. 642416 (August 11, 2011), p. 6.

capacity during that time period.

FOR THE COMPENSATION REVIEW BOARD:

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MELISSA LIN JONES
Administrative Appeals Judge

June 24, 2012
DATE

JEFFREY P. RUSSELL, *dissenting:*

Although I share the majority's concerns about lack of clarity in the Compensation Order, I believe that it attains a minimally sufficient factual finding and record reference supporting that finding to affirm the conclusion reached. I refer to this, from the "Analysis" section:

> Inasmuch as under Dr. Hacque's March 22, 2011 follow up report, claimant's release to light duty employment was clearly subjected to the FCE recommendation, claimant's capacity to return to light duty work with certain restrictions is clearly established from April 5, 2011, the date of her FCE. […] The job of access monitor was basically a light duty position which did not entail reaching, bending, squatting, heavy lifting/carrying of objects.

Compensation Order, page 5.

Reference to the disability slip of March 22, 2011 confirms that Dr. Hacque placed claimant in an off work status pending the outcome of the FCE. The quoted language provides adequate support for the conclusion that the ALJ accepted Dr. Hacque's total work restriction rather than Dr. Danziger's unrestricted return to work release of February 22, 2011 up through the date of the FCE. The fact that the ALJ granted the claim through the date of the FCE compels this result: had the ALJ not rejected Dr. Danziger's opinion, the claim would have been denied entirely. Accordingly, in light of the fact that an ALJ need not explain why an IME opinion is rejected, the award of temporary total disability through the date of the FCE is in accordance with the Act.

I would respectfully suggest that we can, on this basis, affirm.

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JEFFREY P. RUSSELL
Administrative Appeals Judge