

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

Department of Employment Services

VINCENT C. GRAY  
MAYOR



LISA MARÍA MALLORY  
DIRECTOR

COMPENSATION REVIEW BOARD

**CRB No. 13-013**

**WANDA M. FRANCIS,  
Claimant-Petitioner,**

**v.**

**HOWARD UNIVERSITY and SEDGWICK CMS,  
Employer/Insurer-Respondent.**

Appeal from a January 16, 2013 Compensation Order By  
Administrative Law Judge Linda F. Jory  
AHD No. 06-040E, OWC Nos. 603915 and 606928

Benjamin T. Boscolo, Esquire for Petitioner  
William H. Schladt, Esquire for Respondent

Before MELISSA LIN JONES and HENRY W. MCCOY, *Administrative Appeals Judges* and  
LAWRENCE D. TARR, *Chief Administrative Appeals Judge*.

MELISSA LIN JONES for the Compensation Review Board.

**DECISION AND REMAND ORDER**

FACTS OF RECORD AND PROCEDURAL HISTORY

On August 30, 2004, Ms. Wanda M. Francis was working security at Howard University Hospital (Howard).<sup>1</sup> On that day, she injured her cervical spine and right shoulder while struggling with a patient.

Ms. Francis was receiving temporary total disability benefits, medical benefits, and vocational rehabilitation services, but as of August 30, 2004, Ms. Francis asserted she was entitled to permanent total disability benefits. Howard refused to pay permanent total disability benefits, and the parties proceeded to a formal hearing before an administrative law judge (ALJ).

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<sup>1</sup> Although the caption of the Compensation Order lists Ms. Francis' employer as Howard University, it is clear from the evidence in the record that Ms. Francis' employer is Howard University Hospital.

In a Compensation Order dated January 16, 2013, the ALJ ruled Ms. Francis had not met her burden to prove she is entitled to permanent total disability benefits.<sup>2</sup> This appeal ensued.

After an extensive recitation of the facts in a light most favorable to her position, Ms. Francis argues that an award of “permanent total disability does not require presentation of evidence that the injured worker has attained maximum medical improvement.”<sup>3</sup> Ms. Francis also argues that her disability is permanent under *Logan*<sup>4</sup> because it has continued for a lengthy period of time and it appears to be of lasting or indefinite duration. Because the ALJ purportedly did not properly apply *Logan* to her situation, Ms. Francis requests the Compensation Review Board (CRB) reverse the Compensation Order and remand this matter “with instructions that a Compensation Order e [sic] entered find [sic] that Ms. Francis is permanently and totally disabled.”<sup>5</sup>

In opposition, Howard contends there are jobs in the D.C. metropolitan area that Ms. Francis is capable of performing and which she could secure with diligent effort. In Howard’s opinion, because the evidence and law support the conclusion in the Compensation Order that Ms. Francis’ disability is not permanent, Howard requests the CRB affirm that Compensation Order.

#### ISSUE ON APPEAL

1. Did the ALJ properly apply the burden-shifting analysis required by *Logan* to determine Ms. Francis’ entitlement to permanent total disability benefits?

#### ANALYSIS<sup>6</sup>

In order to be entitled to permanent partial disability benefits, a claimant’s disability must be both permanent and total.

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<sup>2</sup> *Francis v. Howard University*, AHD No. 06-040E, OWC Nos. 603915 and 606928 (January 16, 2013).

<sup>3</sup> Memorandum of Points and Authorities in Support of Application for Review, unnumbered p. 5.

<sup>4</sup> *Logan v. DOES*, 805 A.2d 237 (D.C. 2002).

<sup>5</sup> Memorandum of Points and Authorities in Support of Application for Review, unnumbered p. 1.

<sup>6</sup> 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, (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).

To prove a disability is permanent, the claimant can prove (1) maximum medical improvement has been achieved or (2) the disability has continued for a sufficient period of time that it is of lasting or indefinite duration:

Relying on prior DOES decisions, the hearing examiner interpreted this definition as requiring a claimant to show (1) that his condition has reached maximum medical improvement and (2) that he is unable to return to his usual, or to any other, employment as a result of the injury. [Footnote omitted.] With one small adjustment, these proof elements are consistent with this court's understanding of the statute. Thus, we have said 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. District of Columbia Dep't of Employment Servs.*, 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 LAW § 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.").<sup>7</sup>

Howard does not dispute the ALJ's ruling that Ms. Francis has reached maximum medical improvement, and although the Compensation Order at times is muddled on the issue of maximum medical improvement, in the end, the ALJ did not deny Ms. Francis' claim for relief on the grounds that Ms. Francis failed to prove her disability has reached maximum medical improvement.

To prove a disability is total, the claimant must prove an inability to return to usual employment as a result of the work-related injury.<sup>8</sup> There is no dispute Ms. Francis is unable to perform her pre-injury job.

Because there is no dispute Ms. Francis is unable to perform her pre-injury job, the burden shifted to Howard to prove suitable, alternative employment is available to Ms. Francis:

To summarize, 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. If the employer meets that evidentiary burden, the claimant may refute the employer's presentation -- thereby sustaining a finding of total disability -- either by challenging the legitimacy of the employer's evidence of available employment or by demonstrating diligence, but a lack of success, in obtaining other employment. [Footnote omitted.] Absent either showing by the claimant, he is entitled only to a

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<sup>7</sup> *Logan, supra*, at 241.

<sup>8</sup> *Logan, supra*.

finding of partial disability. See *Palombo*, 937 F.2d at 73; *Director, Office of Workers' Comp. Programs v. Berkstresser*, 287 U.S. App. D.C. 266, 272, 921 F.2d 306, 312 (1991).<sup>[9]</sup>

In this case, the ALJ has not ruled that Howard satisfied its burden of proving suitable, alternative employment. Only if Howard satisfies that burden does the burden shift back to Ms. Francis to demonstrate diligence but lack of success in obtaining other employment. The ALJ prematurely placed the burden on Ms. Francis throughout the analysis of this case.

In order to conform to the requirements of the D.C. Administrative Procedures Act (APA),<sup>10</sup> (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.<sup>11</sup> Thus, when an ALJ fails to make factual findings on each materially contested issue, an appellate court is not permitted to make its own finding on the issue; it must remand the case for the proper factual finding.<sup>12</sup>

The CRB is no less constrained in its review of Compensation Orders.<sup>13</sup> Moreover, the determination of whether an ALJ's decision complies with the APA requirements is a determination that is limited in scope to the four corners of the Compensation Order under review. Thus, when, as here, an ALJ fails to make express findings on all contested issues of material fact, the CRB can no more "fill the gap" by making its own findings from the record than can the Court of Appeals but must remand the case to permit the ALJ to make the necessary findings.<sup>14</sup> For this reason, the law requires we remand this matter.

#### CONCLUSION AND ORDER

The ALJ did not properly apply the burden-shifting analysis required by *Logan* to determine Ms. Francis' entitlement to permanent total disability benefits; the ALJ prematurely shifted the burden to Ms. Francis without reaching a conclusion as to whether Howard had proven the availability of suitable, alternative employment. The January 16, 2013 Compensation Order is

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<sup>9</sup> *Logan, supra*.

<sup>10</sup> D.C. Code §2-501 *et seq.* as amended.

<sup>11</sup> *Perkins v. DOES*, 482 A.2d 401, 402 (D.C. 1984).

<sup>12</sup> *King v. DOES*, 742 A.2d. 460, 465 (Basic findings of fact on all material issues are required; only then can the appellate court "determine upon review whether the agency's findings are supported by substantial evidence and whether those findings lead rationally to its conclusions of law.")

<sup>13</sup> See *Washington Metropolitan Area Transit Authority v. DOES*, 926 A.2d 140 (D.C. 2007).

<sup>14</sup> See *Mack v. DOES*, 651 A.2d 804, 806 (D.C. 1994).

not supported by substantial evidence and is not in accordance with the law. The Compensation Order is VACATED, and this matter is remanded for further consideration consistent with this Decision and Remand Order.

FOR THE COMPENSATION REVIEW BOARD:

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MELISSA LIN JONES  
Administrative Appeals Judge

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September 26, 2013  
DATE