

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA MARÍA MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 13-117

**MARIA CERRATO,
Claimant–Petitioner,**

v.

**REMINGTON HOLDINGS, LP and LIBERTY MUTUAL INSURANCE COMPANY,
Employer/Carrier–Respondents.**

Appeal from a August 30, 2013 Compensation Order By
Administrative Law Judge Anand K. Verma
AHD No.13-150A, OWC No. 693716

David M. Snyder, Esquire, for the Petitioner
Christopher R. Costible, Esquire, for the Respondent

Before HEATHER C. LESLIE, JEFFREY P. RUSSELL, and HENRY W. MCCOY, *Administrative Appeals Judges*.

HEATHER C. LESLIE, 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 August 30, 2013, Compensation Order (CO) issued by an Administrative Law Judge (ALJ) in the Hearings and Adjudication Section of the District of Columbia Department of Employment Services (DOES). In that CO, the ALJ denied the Claimant's request for disability benefits after February 4, 2013 but granted the Claimant's request for medical treatment. We VACATE and REMAND.

BACKGROUND AND FACTS OF RECORD

The Claimant is a housekeeper for the Employer. The Claimant's job duties are laborious in nature, requiring lifting, walking, and standing. On July 11, 2012, the Claimant injured her right ankle when it became entangled in a passing work cart. The Claimant felt pain and experienced swelling in her right ankle and sought medical treatment.

The Claimant came under the care and treatment of Dr. Ghazala Shah, M.D., who diagnosed the Claimant with an ankle sprain and a calcaneal spur. Dr. Shah recommended an ace wrap and medication. The Claimant then consulted a podiatrist, Dr. Marc Goldberg. Dr. Goldberg recommended a cam walker boot and medications.

On August 23, 2012, the Claimant underwent an MRI which revealed a partial tear of the tibialis tendon distal to the medial malleolus. Dr. Goldberg recommended a custom functional foot orthotic and recommended physical therapy. Dr. Goldberg also recommended the Claimant refrain from athletic activities, and that she rest, ice, elevate and compress the ankle with an ACE wrap.

On February 4, 2013, the Claimant was examined by Dr. Goldberg, after an MRI on January 31, 2013. Dr. Goldberg recommended a second opinion regarding the ankle and indicated that surgery was a potential course of treatment. Dr. Goldberg continued the Claimant on the same restrictions as before.

The Claimant, at the request of the Employer, underwent an independent medical evaluation (IME) with Dr. Ian Weiner on March 8, 2013. At that IME, Dr. Weiner took a history of the Claimant's injury, performed a physical examination, and reviewed medical records and MRI results. Dr. Weiner opined the Claimant suffered from a contusion of the right ankle and agreed that the treatment to date had been related to the injury and that her current complaints are casually related. Dr. Weiner further opined that the Claimant was at maximum medical improvement, no longer required any further treatment, and could return to work without restrictions. As a result of the IME, Employer terminated Claimant's ongoing benefits.

On June 26, 2013 a full evidentiary hearing was held at which the Claimant sought an award of temporary total disability from March 20, 2013 to the present and continuing along with interest and authorization for medical treatment. The issue presented for resolution was the nature and extent of the Claimant's disability, if any. A CO issued on August 30, 2013 which granted, in part, the Claimant's claim for relief. The CO granted the Claimant's authorization for medical treatment¹ and granted disability benefits until February 4, 2013. Thereafter, benefits were denied.

The Claimant timely appealed. The Claimant argues the CO is not supported by the substantial evidence and that the ALJ erred in not granting temporary total disability benefits from March 20, 2013 to the present and continuing because she was unable to return to her pre-injury employment. Furthermore, the Claimant argues the CO is in error as the ALJ ignored the

¹ The Employer did not appeal the grant of authorization for medical treatment.

physical therapy notes and the testimony of the Claimant and a witness, Ms. Maria Hernandez Santos.

The Employer opposes the application for review arguing the CO is supported by the substantial evidence in the record and is in accordance with the law.

STANDARD OF REVIEW

The scope of review by the CRB, as established by the Act and as contained in the governing regulations, is generally 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. *See*, D.C. Workers' Compensation Act of 1979, as amended, D.C. Code § 32-1501, *et seq.*, (the Act) at § 32-1521.01 (d)(2)(A), and *Marriott International v. DOES*, 834 A.2d 882 (D.C. 2003). Consistent with this standard of review, the CRB must affirm 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 this panel might have reached a contrary conclusion. *Id.*, at 885.

DISCUSSION AND ANALYSIS

The Claimant argues that the CO's findings that the Claimant is not entitled to disability after February 4, 2013 is not supported by substantial evidence and is not in accordance with the law as outlined in *Logan v. DOES*, 805 A.2d 237 (D.C. 2002). We agree.

Turning to the CO, the ALJ correctly noted that there is no presumption regarding the nature and extent of disability and the Claimant must prove, by a preponderance of the evidence, entitlement to the requested benefits. The ALJ further found,

On July 8, 2013, Dr. Goldberg opined that Claimant had not reached maximum medical improvement (MMI) with respect to her continued right foot and ankle infirmities and she was unable to resume her normal daily routine. Dr. Goldberg, however, did not state unambiguously that Claimant could not perform her pre-employment duties after February 4, 2013. He restricted Claimant's activities to include bending, crouching, lifting heavy objects and prolonged standing. And because Claimant's conservative treatment failed to ameliorate her symptoms, Dr. Goldberg contemplated surgical management as the next treatment. (CE 1, p.2).

CO at 5.

As shown in the above passage, after finding that Dr. Goldberg did not unambiguously state the Claimant could not go back to work, the ALJ then acknowledged that the doctor restricted the Claimant's activities including bending, crouching, lifting heavy objects and prolonged standing. However, after acknowledging these restrictions by the treating physician, whose reports he gave more preference after rejecting the IME, the ALJ fails to determine whether, in light of these restrictions, the Claimant established a *prima facie* case of total disability pursuant to the burden shifting scheme outlined by the District of Columbia Court of Appeals in *Logan, supra*. *Logan* established,

In order to be found disabled, the claimant must establish an inability to return to his usual employment. Once claimant has made [this] showing, the burden shifts to the employer to establish suitable alternate employment opportunities available to claimant considering his age, education and work experience.

Logan, 805 A.2d at 242 (quoting *Crum v. General Adjustment Bureau*, 738 F.2d 474, 479 (D.C. 1984)).

Thus, the Court explained:

[O]nce 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. Absent either showing by the claimant, he is entitled only to a finding of partial disability.

Logan, *supra* (citations omitted).

The ALJ seems to skip the *Logan* analysis all together. This is in error. Upon remand, the ALJ, bearing in mind the opinion of the IME has been discredited, must determine whether or not the restrictions outlined by the treating physician renders the Claimant unable to return to her usual occupation. If so, then the Claimant has established a *prima facie* case of total disability and the burden shifts to the Employer, as outlined above. If it is found that Claimant has met her burden, the ALJ is to make specific findings whether or not the Employer presented evidence of suitable job availability, taking into consideration all the documentary evidence as well as the testimony of the Claimant and the witness, Ms. Santos. Without these findings, we cannot say the CO is supported by the substantial evidence in the record or is in accordance with the law.

We also must point out another issue in an effort to avoid further remands. The claim for relief presented to the ALJ was the nature and extent of the Claimant's disability from March 20, 2013 to the present and continuing. Any time prior to March 20, 2013 was not sought or contested.² Inexplicably, the ALJ denies any disability after February 4, 2013, a period of time not at issue in front of the ALJ. This is in error. Upon remand, the ALJ is instructed to consider the claim for relief presented to him, that of temporary total disability benefits from March 20, 2013 to the present and continuing, or to explain why an award commencing prior to the claim for relief was entered.

²It is well settled in this jurisdiction that, in order to conform to the requirements of the D.C. Administrative Procedures Act, D.C. Code § 2-501 *et seq.* (2006), for each administrative decision in a contested case, (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 (emphasis added). *Perkins v. DOES*, 482 A.2d 401, 402 (D.C. 1984); D.C. Code § 2-509.

CONCLUSION AND ORDER

The August 30, 2013 Compensation Order is not supported by the substantial evidence in the record and is not in accordance with the law. It is VACATED and REMANDED, for further consideration consistent with the foregoing discussion. Upon remand, the ALJ is to analyze whether or not the Claimant is disabled pursuant to the burden shifting scheme outlined by the District of Columbia Court of Appeals in *Logan v. DOES*.

FOR THE COMPENSATION REVIEW BOARD:

HEATHER C. LESLIE
Administrative Appeals Judge

November 19, 2013
DATE