

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 15-064

**JACQUELINE O. LLEWELLYN,
Claimant–Petitioner,**

v.

**DENIS O’LEARY and TRAVELLER’S INSURANCE Co.,
Employer/Carrier–Respondent.**

Appeal from a March 25, 2015 Compensation Order by
Administrative Law Judge Joan E. Knight
AHD No. 14-387, OWC No. 705229

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2015 AUG 19 PM 1 38

(Decided August 19, 2015)

Benjamin T. Boscolo for Claimant
Scott E. Snyder for Employer

Before LINDA F. JORY and MELISSA LIN JONES, *Administrative Appeals Judges* and LAWRENCE D. TARR, *Chief Administrative Appeals Judge*.

LINDA F. JORY for the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

Claimant was employed as a dental assistant for Employer. Claimant suffered a cumulative work related exposure which manifested on November 3, 2006 in the form of rashes on the backs of her hands and forearms. From 2006 through 2013, Claimant had mild to severe allergic reactions in the form of skin rashes and treated with numerous physicians including a board certified allergist.

On February 19, 2013, Claimant was seen by Dr. Alan Moshell, dermatologist, for significant skin lesions on the back of her hands. Dr. Moshell administered a diagnostic immune test and allergy patch test on February 22, 2013. Dr. Moshell advised Claimant that she is strongly allergic to paraphenylenediamine (PPD) compounds used in hair dye, food preservatives and cosmetics; thiuram (an accelerant used in rubber gloves) ethylenediaminetetraacetic acid (EDTA) a widely used ubiquitous chemical substance used in clinical laboratories, soaps,

cleansers and a bactericidal agent in Cetylcide-II, which she was exposed to in her job at the dental office. On November 11, 2014, in an addendum report, Dr. Moshell opined that Claimant's skin condition of allergic contact dermatitis began in 2006, from allergic exposure to latex gloves and the chemicals of the cleaning agent which she was exposed to working as a dental assistant for Employer. Claimant notified her employer of the test results. Claimant did not miss any time from work.

On April 4, 2013, Claimant's employment was terminated by Employer.

As arranged by employer, Claimant was evaluated by Dr. Ross Myerson on May 23, 2014.

A full evidentiary hearing occurred on November 20, 2014. An administrative law judge (ALJ) in the Department of Employment Services Administrative Hearings Division (AHD) issued a compensation order (CO) on March 25, 2015. The ALJ concluded Claimant sustained a cumulative work exposure aggravation of a pre-existing condition on November 3, 2006 which arose out of and in the course of her employment. The ALJ found Claimant did not provide timely written notice under the Act but Employer was not prejudiced by the failure to receive timely written notice as Employer had actual notice of the conditions and Employer made modifications to address the exposure. The ALJ further concluded Claimant has not shown her inability to perform her pre-injury duties stems from her work injury or a related disability. Claimant's claim for causally related medical expenses was granted and her claim for temporary total disability was denied.

Claimant timely appealed. Claimant asserts there is substantial evidence in the record that demonstrates Claimant's temporary total disability arose, in part, due to her occupational disease.

Employer has responded asserting Claimant's Application for Review should be denied as Employer asserts "substantial evidence in the record supported the findings that the alleged disability of the Claimant did not render her unable to perform her duties as a dental assistant". Employer's Brief at 2.

ISSUE ON APPEAL

Is the March 26, 2015 Compensation Order supported by substantial evidence and in accordance with the law?

ANALYSIS¹

The ALJ properly advanced that in order to sustain a disability finding a Claimant has the burden of proving by a preponderance of the evidence that he or she is entitled to the relief requested, citing *Dunston v. DOES*, 509 A2d 109 (D.C. 1986) and *Logan v. DOES*, 805 A.2d 237, 242-243 (D.C. 2002) (*Logan*). In *Logan*, the District of Columbia Court of Appeals explained in detail the system employed under the Act for determining the extent of disability. A claimant must establish in the first instance that the work injury prevents the performance of the claimant's pre-injury job. If the claimant establishes this, a *prima facie* showing of total disability is established, shifting to the employer the burden of rebutting that showing, either by demonstrating that the claimant can in fact return to the pre-injury job, or showing that the employer has offered a modified position to the claimant which is within the claimant's physical capacity. The ALJ correctly added that Employer may rebut a Claimant's case by presenting opposing medical evidence as to the extent of Claimant's disability.

The ALJ concluded Claimant did not demonstrate an inability to perform her usual job as a dental assistant as a result of her work injury, thus, Claimant did not establish a *prima facie* case of temporary total disability. We conclude the ALJ correctly did not shift the burden to Employer without a *prima facie* case of disability and the analysis with respect to the nature and extent of Claimant's disability properly ended. Claimant asserts that:

[T]he Compensation Order did not review the evidence that Ms. Llewellyn was terminated as a result of needing medical treatment for the work accident, and thus made a *prima facie* case that she was temporarily and totally disabled from April 23, 22013 to February 1, 2014...

* * *

Because Ms. Llewellyn was terminated in part of her longstanding occupational disease and its results, she made a *prima facie* case that her disability was caused in part by the inability to perform her usual job.

Claimant's Brief at 5.

¹ The scope of review by the Compensation Review Board (CRB) and this Review Panel, as established by, D.C. Code §§ 32-1501, *et seq.*, (the Act) at § 32-1521.01(d)(2)(A) 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. "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 Int'l. v. DOES* 834 A.2d 882 (D.C. 2003). Consistent with this scope of review, the CRB and this panel are bound 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

We disagree and affirm the ALJ's decision not to describe hearsay evidence that was admitted at the unemployment hearing. Dr. O'Leary testified at the formal hearing and was not asked about the reason for Claimant's termination. Instead the ALJ found:

The reason Claimant was unable to work as a dental assist[ant] was for reasons other than her work exposure injury or a disability stemming from her work injury, but as result of termination.

CO at 3, 4.

While we acknowledge that Claimant testified at her unemployment hearing that after she asked for the following day off to see her doctor about her hands, and according to Claimant, Dr. O'Leary advised her if she took off "not to come back", CE 14 at 56, Claimant's testimony was contradicted by Dr. O'Leary and the Office Manager Jennifer O'Leary.² We also note that Claimant did not proffer evidence that she in fact sought treatment the following day or at any time in April 2013. After Claimant saw Dr. Moshell on March 6, 2013, her next visit, according to the medical evidence, was on May 31, 2013. Dr. Moshell's May 31, 2013 report does not indicate that claimant was unable to perform her duties as a dental assistant at that time.

The CRB's role is limited to determining whether the CO is supported by the substantial evidence in the record and in accordance with the law. *Marriott*, supra. 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.

We conclude that the :ALJ's conclusion that Claimant did not meet her burden of establishing a *prima facie* case that she was unable to perform her pre-injury duties of a dental assistant is supported by substantial evidence and is in accordance with the law.

² According to the hearing transcript of the June 21, 2013, unemployment hearing before the Office of Administrative Hearings,(OAH) Jennifer O'Leary testified that on April 2, 2013, Ms. O'Leary advised Claimant that two days earlier Claimant's behavior with another co-worker was unprofessional and that the conversation began to get heated to the extent that Claimant stated "Why don't you fire me?". According to the transcript the incident two days earlier involved a birthday cake for a birthday that was to take place on Friday April 5, 2013 which claimant said she would not eat because she was allergic to nickel. Dr. O'Leary testified that he had a conversation with Claimant after Ms. O'Leary's heated conversation with Claimant:

I asked Jackie what's really going on? I know that she did not want to be at work on Friday because of the birthday that was happening there, that she said she was not going to be participating with . She mentioned - she said the reason why she wasn't coming into work the next day was because her hands hurt. And that's when I said, 'Okay what's really going on ? And then we opened up a dialogue during which she explained to me how unhappy she was at work She used - - she told me the dental assistants were abused.

Dr. O'Leary testified that the reason Claimant was terminated was repeated volatile behavior. CE 14 at 38.

CONCLUSION AND ORDER

The ALJ's conclusions of law are supported by substantial evidence in the record. The March 25, 2015 Compensation Order is in accordance with the law and is **AFFIRMED**.

So ordered.