

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 16-030

**JOHN WILSON,
Claimant-Respondent,**

v.

**SCHINDLER ELEVATOR and BROADSPIRE,
Employer and Carrier-Petitioner.**

Appeal from a January 29, 2016 Compensation Order by
Administrative Law Judge Nata K. Brown
AHD No. 06-054B, OWC Nos. 600100, 615610, 615611

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2016 JUL 13 AM 10 09

(Decided July 13, 2016)

David M. Schloss for Claimant
John P. Rufe for Employer

Before LINDA F. JORY, HEATHER C. LESLIE and JEFFREY P. RUSSELL, *Administrative Appeals Judges.*

LINDA F. JORY for the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

John Wilson (Claimant) worked for Schindler Elevator (Employer) as an elevator mechanic for more than twenty five years. While in the course of his employment, Claimant sustained injury to his right knee in 2003 and to his left knee and back in 2005. Claimant underwent arthroscopic surgery on both knees, once in 2004 and again in 2007. His left knee was replaced by Dr. Anthony Unger in 2009. Dr. Unger projected that Claimant will need a total knee replacement of the right knee.

On December 19, 2011, Dr. Unger opined that Claimant was totally disabled and did not need any further ongoing treatment for his back and left knee. Claimant was advised to return for another evaluation in six months. Claimant did not return to Dr. Unger until April 29, 2013, when he returned with complaints of continued left knee pain. Dr. Unger found the left knee replacement to be in good position and advised Claimant to return to see him on an as-needed

basis. Claimant returned to Dr. Unger again on May 6, 2013 with a complaint of pain in his right knee. Dr. Unger diagnosed Claimant with degenerative disease of the right knee which he related to a work injury. X-rays of Claimant's right knee on August 5, 2013 revealed advanced osteoarthritis. Dr. Unger thought Claimant would eventually need a right knee replacement.

In response to an October 9, 2013 inquiry from Crawford & Co., with regard to treatment of the right knee, Dr. Unger indicated Claimant's right knee was not at maximum medical improvement and that he expected after his knee replacement is performed he will then be able to be rated with a permanent partial disability (PPD) rating. On November 4, 2013, Dr. Unger opined that he did not expect Claimant will be able to return to work at any time in the future.

A dispute arose as to whether Claimant's temporary and total disability status should be converted to permanent and total disability status and a formal hearing was requested.

At the April 23, 2015 formal hearing, an off the record discussion was conducted by the Administrative Law Judge (ALJ) with respect to the Joint Pre-Hearing Statement (JPHS) and the issues which would be the subject of the hearing. Over objection by Claimant, the ALJ amended the JPHS to add the issue of whether Claimant voluntarily limited his income pursuant to District of Columbia Workers' Compensation Act (the Act), D.C. Code § 32-1508 to the nature and extent of Claimant's disability, the only issue listed by the parties in the Stipulation Form.

A Compensation Order (CO) issued on January 29, 2016, which granted Claimant's claim for permanent total disability (PTD) benefits as of December 19, 2011. The ALJ concluded, in addition, that Claimant did not voluntarily limit his income.

Employer filed Employer/Carrier's Application for Review and Supporting Memorandum of Points and Authorities in support of Application for Review (Employer's Brief) asserting the CO is not supported by substantial evidence. Claimant filed Claimant's Opposition to Employer's Application for Review (Claimant's Brief) arguing that the CO should be affirmed.

ISSUE ON APPEAL

Is the January 29, 2016 CO supported by substantial evidence and in accordance with the law?

ANALYSIS

The scope of review by the CRB as established by the District of Columbia Workers' Compensation Act and as contained in the governing regulations is limited to making a determination whether the factual findings of a Compensation Order on appeal are based upon substantial evidence in the record, and whether the legal conclusions flow rationally from those facts and are otherwise in accordance with applicable law. D.C. Code § 32-1521.01(d)(2)(A). "Substantial evidence" as defined by the District of Columbia Court of Appeals (DCCA), 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) (*Marriott*). Consistent with this scope of review, the CRB is 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 members of the CRB review panel considering the appeal might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

Initially, Employer's Brief states assertions that pertain to Claimant's cooperation with Employer's vocational rehabilitation services and its explanation for the termination of said services, i.e., Claimant's contemplated medical treatment. Upon review of the Hearing Transcript and the JPHS, we note the issue of whether Claimant unreasonably refused employer's vocational rehabilitation services was not raised at the hearing and although the ALJ listed this issue in the list of issues in the CO, she did not list it as an issue at the formal hearing and the JPHS does not include it as an issue. We further note that Employer had an opportunity to raise "failure to cooperate" as an issue and there was an off the record discussion specifically to discuss the issues. Nevertheless, after the off-the-record discussion, the Employer sought to raise instead the defense of "voluntary limitation of income". As noted above, Claimant objected to including this issue but the ALJ included it in the JPHS as a contested issue. HT at 7.

We, therefore, will not address Employer's contention with regard to Claimant's cooperation with vocational rehabilitation as we find the issue was neither presented to nor decided by the ALJ.

With regard to the error Employer asserts the ALJ made in finding Claimant to be permanently and totally disabled, Employer concentrates on Dr. Unger's October 11, 2013 report wherein, according to Employer, Dr. Unger stated Claimant has not reached maximum medical improvement and that he expected that after the right knee replacement Claimant would be rated with a PPD rating. Employer asserts that this statement does not equate to a finding of PTD and certainly not disability dating back to December 2011 as Claimant seeks. Employer's Brief unnumbered at 3.

Claimant asserts and we agree:

Employer argues that Claimant's total disability was not permanent by focusing on the medical opinions of Dr. Unger from December 19, 2011, which stated Claimant could not return to work "at this time" and that Claimant was totally disabled "at this point in time." Application at 2-3. Employer also argues that Claimant cannot be permanently totally disabled because Dr. Unger's October 11, 2013, opinion said that Claimant has not reached maximal medical improvement due to the unresolved degenerative arthritis in his right knee which would require a total knee replacement. Application at 3. By narrowly limiting its factual support to the specific language used in Dr. Unger's initial opinion of total disability and singling out only one of Claimant's multiple debilitating injuries, Employer's argument ignores the overall message of Dr. Unger's opinions, which is that Claimant was totally disabled and unable to return to work from December 19, 2011, forward due to a combination of his injuries, and ignores the legal definition of permanent disability, which is an economic concept predicated on Claimant's inability to return to work. A disability may become permanent; even if not initially adjudged so at the time, "if it has continued for a lengthy period, and it appears to be of lasting or indefinite duration." *Logan*, 805 A.2d at 241.

ALJ Brown's factual findings credited Dr. Unger's reports as providing substantial evidence that Claimant's injuries had rendered him totally disabled over a long period of time, and that his condition was of an indefinite duration without expected recovery, and those factual findings support the conclusion that Claimant was permanently totally disabled. CO at 6. Employer's argument that Dr. Unger's opinion rendered on a specific date, like the opinion of December 19, 2011, that Claimant "cannot return to work *at this time*," is "certainly not a statement of permanent total disability" misunderstands the law because otherwise it would acknowledge that Dr. Unger's later opinions from October 11 and November 3, 2013, support the conclusion that Claimant's continued total disability over a sufficient period of time make it permanent. Application at 3 (emphasis in original).

Claimant's Brief at 9, 10.

We agree with Claimant with regard to Employer's characterization of Claimant's evidence, specifically with the notion that because Dr. Unger said Claimant had not reached MMI with regard to her right knee, does not mean Claimant was not at MMI with regard to her left knee and back injuries.

With regard to the surgical procedure prescribed by Dr. Unger for the right knee we also agree with Claimant that the fact that there are additional surgery options for Claimant's right knee, does not preclude a determination of PTD. Moreover, a finding of PTD also does not preclude employer from attempting to locate employment for Claimant following such surgery. *Safeway Stores, Inc. v. DOES*, 806 A.2d 1214 (D.C. 2002).

We also agree with Claimant that pursuant to *Logan v. DOES*, 805 A.2d 237 (D.C. 2002) "A disability may become permanent; even if not initially adjudged so at the time, if it has continued for a lengthy period, and it appears to be of lasting or indefinite duration." *Logan, supra* at 241. As the CRB stated in *Damegreene v. American Red Cross*, CRB No. 13-050 (R) (August 6, 2014) (*Damegreene*):

Our analysis in this instance is similar to the analysis that we have adopted in cases involving claimants who have been determined to be permanently and totally disabled. Thus, we have held:

It must be understood that "permanent total disability" is a statutory construct, and in many senses, it is a term of art which has the meaning that the legislature and the D.C. Court of Appeals have ascribed to it; as such, the meaning may be somewhat at odds with the meaning the phrase would have if the words were understood in their vernacular sense. Thus, a person is permanently and totally disabled if (1) he or she has reached permanency in connection with the medical condition caused by the work injury, (2) he or she is unable to return to the pre-injury job because of the

effects of that medical condition, and (3) there is no suitable alternative employment available in the relevant labor market.

While a permanently and totally disabled person remains under an obligation to cooperate with an employer's efforts to return that person to the labor market and while that person's entitlement to ongoing permanent total disability benefits is contingent upon that cooperation, that person is nonetheless permanently and totally disabled until such time as that person is employable. Then, the person's condition may be said to have changed, rendering him or her either only partially disabled or not disabled at all, depending upon the level of wage earning capacity that has been recovered.

Id. at 4-5. (citations omitted)

We conclude substantial evidence supports the determination that Claimant has met his burden by a preponderance of the evidence that he is permanently and totally disabled and has not voluntarily limited his income.

CONCLUSION AND ORDER

For the reasons explained herein, we find the January 29, 2016 Compensation Order is supported by substantial evidence in the record and is in accordance with the law and is **AFFIRMED**.

So ordered.