GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services
Labor Standards Bureau

Office of Hearings and Adjudication
COMPENSATION REVIEW BOARD

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CRB No. 04-056

JOHN FOREHAND,

Claimant – Petitioner,

v.

THE WEXLER GROUP AND TRAVELERS INSURANCE COMPANY,

Employer/Carrier – Respondent.

Appeal from a Compensation Order of
Administrative Law Judge Karen R. Calmiese
OHA No. 02-519, OWC No. 518801

Benjamin T. Boscolo, Esquire for the Petitioner

Roger S. Mackey, Esquire for the Petitioner

Before LINDA F. JORY, FLOYD LEWIS, *Administrative Appeals Judges* and E. COOPER BROWN, *Chief Administrative Appeals Judge.*

LINDA F. JORY, *Administrative Appeals Judge*, on behalf of the Review Panel

DECISION AND ORDER

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board pursuant to D.C. Official Code § 32-1521.01 and 32-1522 (2004), 7 DCMR § 230, and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005).[1]

[1] Pursuant to Administrative Policy Issuance No. 05-01, dated February 5, 2005, the Director of the Department of Employment Services realigned the Office of Hearings and Adjudication to include, *inter alia*, establishment of the Compensation Review Board (CRB) in implementation of the District of Columbia Fiscal Year 2005 Budget Support Act of 20024, Title J, the Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, sec. 1102 (Oct. 1, 1994) *codified at* D. C. Code Ann. §§ 32-1521.01, 32-1522 (2005). In accordance with the Director's Policy Issuance, the CRB replaces the Office of the Director in providing administrative appellate review and disposition of workers' and disability compensation claims arising under the D.C. Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §§ 32-1501 to 32-1545 (2005) and the D.C. Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Official Code §§ 1-623.1 to 1.643.7 (2005), including responsibility for administrative appeals filed prior to October 1, 2004, the effective date of the D.C.

BACKGROUND

This appeal follows the issuance of a Compensation Order from the Administrative Hearings Division (AHD) of the Office of Hearings and Adjudication (OHA) in the District of Columbia Department of Employment Services (DOES). In that Compensation Order, which was filed on May 12, 2004, the Administrative Law Judge (ALJ), concluded Claimant-Petitioner's (Petitioner) injury of June 4, 1997 arose out of and in the course of his employment; his subsequent disability was medically causally related to that injury; Petitioner gave employer timely notice of his injury; and Petitioner's average weekly wage is $2,307.69. The ALJ further found Petitioner was temporarily total disabled from his regular work duties from November 16, 1998 through March 1999; however he had not shown entitlement to wage loss benefits for which he could be compensated under the Act. The ALJ further found Petitioner was entitled to an award of permanent partial disability benefits for 25% impairment to the right lower extremity and 20% permanent partial impairment of the left lower extremity attributable to the June 4, 1997 injury.

The Petition for Review alleges as grounds for its appeal that the ALJ's finding that claimant failed to prove an entitlement to wage loss benefits is not supported by substantial evidence; Petitioner is entitled to 36% permanent partial disability rating to the lower right extremity and 30% permanent partial disability rating to the lower left extremity; and therefore, the Compensation Order must be reversed. Employer-Respondent (Respondent) has filed a response asserting the record supports the ALJ's finding Petitioner failed to sustain his burden of showing that he was required to quit his job as Deputy General Manager for Respondent due to the work-related injury.

ANALYSIS

As an initial matter, the scope of review by the Compensation Review Board (CRB) and this Review Panel (hereafter, the Panel) as established by the Act 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. D.C. Official Code § 32-1521.01(d)(2)(A). "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. District of Columbia Department of Employment Services* 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.

Turning to the case under review herein, Petitioner, properly citing *Logan v. Department of Employment Services*, 805 A.2d 237, 240 (D.C. 2002) (hereafter, *Logan*), asserts that there is substantial evidence in the record to support a finding that claimant could not return to the full duties of his pre-injury employment from January 1, 1998 to February 26, 2002 as well as

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Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004.

establish that employer did not offer him employment consistent with the restrictions imposed by his treating physicians.

For reasons set forth below, the Panel finds the Compensation Order is not in accordance with the law and the matter must be remained to AHD for further findings of fact. At the outset, although not raised by either party, the panel must conclude the ALJ lacked jurisdiction to decide the issues of causal relationship, and average weekly wage as the parties stipulated to both issues at the conclusion of the second hearing held by the ALJ in this matter. *See* Hearing Transcript of March 6, 2003 Formal Hearing at 108.

The ALJ does not specifically cite to the Court of Appeals decision in *Logan,* although the ALJ begins to set forth a similar standard set forth in the *Washington Post v. District of Columbia Department of Employment Services*, 675 A.2d 37, 40 (D.C. 1996) (*Muhktar*). The difference between the two is that pursuant to *Logan*, once the claimant demonstrates an inability to perform his/her usual job, a *prima facie* case of total disability is established, which the employer may then seek to rebut by establishing the availability of other jobs which the claimant could perform. *See Logan, id* at 240, citing the District of Columbia Circuit Court in *Crum v. General Adjustment Bureau*, 238 U.S. App. D.C. 80, 738 F.2d 474 (1984). As Petitioner correctly posits, per *Logan,* the injured worker is not under any burden to demonstrate that work for which he was qualified was available.

The ALJ determined that Petitioner did not suffer any disability from June 1997 through December 1997 as he suffered no wage loss, citing D.C. Code, as amended, §32-1501(8). The Panel finds this finding is supported by substantial evidence in the record. Although Petitioner testified that his back pain progressively got worse, the record does not reveal he missed any time from work during this time.

The ALJ found that for the period of relief claimed from January 1, 1998 through November 6, 1998, Petitioner had not presented sufficient evidence to demonstrate that his loss of wages was due to his work injury as opposed to what the ALJ described as "a business decision to return to private consulting in January 1998". The ALJ relied on a statement she asserts Petitioner made that he felt he was not suited for the position. The ALJ quoted Petitioner in the Compensation Order, particularly the passage wherein Petitioner stated "I wasn't well suited towards it. Maybe I was older and more set in my ways likewise…" HT at 91; CO as 10.

The Panel notes however that the ALJ has not included the full text of Petitioner's testimony in the quote as Petitioner went on to say . . .

> . . . and the new business development, that was you know. I had also started experiencing the pain in my back. I was doing everything I could. It was just more than I could carry.

HT at 91. The ALJ acknowledged that the record contains voluminous medical records documenting Petitioner's treatment for pain and his testimony regarding his complaint of low back pain and bilateral leg discomfort but found "no contemporaneous medical reports were presented that expressed the opinion that, as a result of the 1997 low back injury, [petitioner] was

unable to perform the primarily sedentary work duties of his regular employment from January 1998 through November 1998". CO at 11. The Panel agrees Petitioner has not submitted any evidence, such as described by the ALJ, and further notes the record does not contain any evidence which states Petitioner *was able* to perform his pre-injury duties from January 1998 through November 1998.

Instead the record reveals when asked by his counsel if he was "physically capable of performing the duties of the job as Deputy General Manager at the Wexler Group?", Petitioner answered "no" and gave the following explanation:

> Because the job at the Wexler Group requires periods of extended sitting and extended standing. It doesn't required a lot of stair climbing, albeit you could use their elevator, but it is a rather old elevator and it moves pretty slowly is my recollection on it. And getting in and out of cabs is an exercise for me that consumes energy. I can't keep up the hours that it takes, and it is an intense day at a very fast pace. And with the breaks that I need to take so that I can continue to do the job, I wouldn't be able to keep up that fast pace and deliver on what they are expecting.

Contrary to Petitioner's contention, the ALJ did not "find" that Petitioner was not able to maintain the number of hours and level of work he put into lobbying that he did before because of his painful back condition, the ALJ stated that "[Petitioner] ***claimed*** he was not able to maintain the number of hours and level of work he put into lobbying that he did before because of his painful back. CO at 9. The ALJ based her decision to deny Petitioner's request for wage loss benefits from January 1998 to November 1998 on what she called Petitioner's "business decision" and relied on the *John T. White v. American Elevator Services Inc*., Dir. Dkt. No. 89-140, OHA No. 88-431 (March 1995) as well as the Court of Appeals decision in *Heidi Burge v. District of Columbia Department of Employment Services*, 842 A.2d 661 (D.C. 2004).

The Panel must conclude that neither *White* nor *Burge* support the ALJ's decision to find claimant able to return to his pre-injury duties in the instant matter. In *White*, claimant had been laid off twice and the Director upheld a decision by AHD that *White's* inability to retain employment was due to economic conditions and beyond the scope of the Act. In *Burge*, The Court of Appeals affirmed a determination by an ALJ that based upon *Burge's* own declarations she was able to return to her pre-injury duties as a basketball player and her own decision to pursue other career goals, she was not entitled to further wage loss benefits. The Panel finds that neither case supports or negates the possibility that Petitioner's own testimony that he could not physically handle his pre-injury duties may establish a *prima facie* case of temporary total disability under *Logan* which the Respondent has the burden to rebut.[2]

With regard to the credibility of Petitioner's testimony, the Panel notes the ALJ has made no such finding with regard to the period of relief claimed. The ALJ's determination that

[2] *See Jesse Marable v. Ceco Corporation*, Dir. Dkt. No 87-8, OWC No. 078520, OHA No. 86-103 (Remand Order February 12, 1998). In *Marable, supra*, it was decided that a finding of disability may be predicated solely on the credible, subjective complaints of claimant.

Respondent's evidence of a video presentation of Petitioner performing automobile maintenance in 2002, after the Formal Hearing, "belies his testimony that he is limited in his ability to perform bending, lifting, or twisting activity over extended periods of time" is not relevant to the activities and or limitations Petitioner claimed after the injury and before his back surgery.

The Panel declines to affirm the ALJ's conclusion that the Petitioner failed to prove entitlement to wage loss benefits since the Compensation Order does not include any findings of facts related to the credibility of Petitioner's testimony that he was unable to work at the pre-injury duties due to his back pain. Accordingly, the ALJ's denial of wage loss benefits must be reversed and the matter remanded for further proceedings, findings of fact and conclusions of law based upon the standard enunciated in *Logan* by the Court of Appeals.[3] *See also, Daniel Reynolds v. D.H. Stevens Corporation*, Dir. Dkt. No. 98-17, OHA No. 97-243, OWC No. 179865 (August 1998).

Petitioner also asserts that he is entitled to 36% permanent partial impairment disability benefits to the lower right extremity and 30% permanent partial disability benefits to the lower left extremity. Petitioner cites no error on the ALJ's part in her according more weight to Respondent's IME rating over Petitioner's IME rating, other than her reliance on Respondent's video surveillance and awarding Petitioner 25% permanent partial impairment disability benefits to the lower right extremity and 20% permanent partial disability benefits to the lower left extremity. Petitioner has essentially asserted no other reason why the ALJ might have ruled differently even if the ALJ accepted Petitioner's views as to the weight to be accorded the ratings presented. We may not substitute our judgment for that of the ALJ whose conclusion with regard to the permanent partial impairment is supported by substantial evidence including but not limited to the surveillance video, and must be affirmed.

Lastly, the Panel must affirm the ALJ's finding that Petitioner was temporarily and totally disabled from November 16, 1998 through March 1999 as a result of his recovery from invasive surgery to his back, however, the Panel does not agree that Petitioner has any burden to establish entitlement to wage loss benefits for which he can be compensated under the Act in the event he is found, on remand, to be unable to return to his pre-injury duties.

CONCLUSION

The ALJ's conclusion that Petitioner's loss of income as an independent congressional lobbyist following his January 1, 1998 resignation was due to his decision not to continue as the Deputy General Manager for Respondent and not caused by the injury of June 4, 1997 is not supported by substantial evidence and the Compensation Order not in accordance with the Law. The matter must accordingly be remanded to the ALJ to apply *Logan* and consider the credibility of Petitioner's testimony with regard to his ability to work as a Deputy General Manger after his work injury. The ALJ's conclusion that and that Petitioner was temporarily and totally disabled from November 6, 1998 through March 1999 and that the work injury has resulted in 25%

[3] After further review of Petitioner's testimony, in the event the ALJ concludes Petitioner was unable to return to his pre-injury duties and entitled to temporary partial wage loss benefits, Petitioner would be afforded wage loss benefits for the reasonable recovery period following his November 1998 surgery and would not retain any burden to establish his wage loss as his total wage loss benefits would be based upon his pre-injury average weekly wages under §32-1511 with a credit for any wages earned during this period in his field as a lobbyist.

permanent partial impairment disability to the lower right extremity and 20% permanent partial disability to the lower left extremity is supported by substantial evidence and in accordance with the law.

ORDER

The Compensation Order of May 12, 2004 is AFFIRMED in part, REVERSED in part, and the matter REMANDED for further proceedings, findings of fact and conclusions of law based upon the standard enunciated in *Logan* by the Court of Appeals.

FOR THE COMPENSATION REVIEW BOARD:

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LINDA F. JORY
Administrative Appeals Judge

February 24, 2006
Date