

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
Department of Employment Services

MURIEL BOWSER  
MAYOR



DEBORAH A. CARROLL  
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 15-162

MARY PROCTOR,  
Claimant-Respondent,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,  
Self-Insured Employer-Petitioner.

An Appeal from an August 31, 2015 Compensation Order by  
Administrative Law Judge Lilian Shepard  
AHD No. 14-268, OWC No. 625285

DEPT. OF EMPLOYMENT  
SERVICES  
COMPENSATION REVIEW  
BOARD  
2016 MAR 9 AM 9 06

(Decided March 9, 2016)

Frank R. Kearney for Claimant  
Mark H. Dho for Employer

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

HEATHER C. LESLIE, for the Compensation Review Board.

DECISION AND REMAND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

On February 8, 2006, the Claimant was working as a systems maintenance worker when she injured her neck and back when attempting to pick up a piece of equipment. Claimant was paid temporary total disability pursuant to a Compensation Order issued on August 9, 2007. *Mary Daniels v. WMATA*, AHD No. 06-335, OWC No. 625285 (August 9, 2007). Claimant's treating physician, Dr. Daniel Glor, opined Claimant was permanently 100% disabled on November 18, 2013.

Employer sent Claimant for an independent medical evaluation (IME) with Dr. Marc Danzinger on August 12, 2014. Dr. Danzinger took a history of Claimant's injury, treatment, and performed a physical exam. Based on his examination, and prior examinations of Claimant at other IMEs, Dr. Danzinger opined Claimant was at maximum medical improvement and could return to work without restrictions.

Claimant began vocational rehabilitation on April 16, 2010 with Ms. Camilla D. Mason. Claimant did not obtain employment. A labor market survey was completed in June of 2014 identifying appropriate jobs within a light physical demand level Claimant was qualified to do.

A full evidentiary hearing was held on December 10, 2014. At the hearing, the Claimant sought to modify a prior Compensation Order which awarded Claimant temporary total disability benefits and sought an award of permanent total disability benefits from November 15, 2013 to the present and continuing, as well as interest on accrued benefits. The Employer contested the nature and extent of the Claimant's disability. In a Compensation Order issued August 31, 2015, the Administrative Law Judge (ALJ) first determined Claimant had satisfied her preliminary burden under *Snipes v. DOES*, 542 A.2d 832 (D.C. 1988) and then that Claimant had sufficient evidence to show there is reason to believe that a change of conditions has occurred which could result in a modification of the prior award. The CO granted the Claimant's request for permanent total disability.

The Employer timely appealed. Employer argues the CO erred in not addressing Claimant's vocational capacity and did not properly apply the burden shifting scheme as enunciated by the District of Columbia Court of Appeals (DCCA) in *Logan v. DOES*, 805 A.2d 237 (D.C. 2002) (*Logan*).<sup>1</sup> The Claimant opposes, arguing that the substantial evidence in the record supports the ALJ's determination that the Claimant is permanently and totally disabled.

#### ANALYSIS<sup>2</sup>

We are mindful 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. DOES* 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 Lawson & Lex K. Lawson, *Larson's Workers' Compensation Law*, § 80.04, at 80-13 (Matthew Bender rev. ed.) ("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.").

["A] claimant suffers from *total* disability if his injuries prevent him from engaging in the only type of gainful employment for which he is qualified." *Washington Post v. DOES*, 675 A.2d 37, 41 (D.C. 1996) (emphasis added); see also *Washington Metro. Area Transit Auth. v. DOES*, 703 A.2d 1225, 1229 (D.C. 1997). "Total disability does not mean absolute helplessness, . . . and the claimant need not show that he is no longer able to do any work at all." *Washington Post*, 675 A.2d at 41. Instead, "an employee who is so injured that he can perform no services other than those which are so

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<sup>1</sup> Employer did not appeal the ALJ's conclusion that Claimant had satisfied her burden under *Snipes*, thus warranting a Formal Hearing.

<sup>2</sup> The scope of review by the CRB 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 and this review panel 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.

limited in quality, dependability or quantity that a reasonably stable market for them does not exist, may well be classified as totally disabled." *Id.* (quoting 4 LARSON, *supra* § 83.01, at 83-2). In other words, 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. *Logan, supra at 243.*

As enunciated by the District of Columbia Court of Appeals in the seminal case of *Logan v. DOES*, 805 A.2d 237 (D.C. 2002), a *prima facie* case of total disability is made when a claimant presents evidence that he or she cannot perform the duties of the job held at the time of the injury. The burden then shifts to the employer to refute that evidence, either by showing that the claimant can in fact perform the pre-injury job, that it offered suitable modified employment to the claimant which the claimant refused to accept, or that there exist jobs in the relevant labor market, considering the claimant's age, education, experience and physical capacity, for which the claimant could compete and for which if he applied he would likely obtain. Such a showing by the employer shifts the burden back to the claimant to overcome the employer's evidence by, for example, attacking the suitability of the proffered modified employment, the suitability of the identified alternate jobs, or by showing that the supposedly available other jobs are not actually available. This last showing could be by presenting labor market evidence contradicting that of the employer, or showing a diligent yet unsuccessful job search. *See Logan at 243.*

Turning to Employer's argument, Employer argues the ALJ erred when stating:

Employer has failed to present sufficient evidence that Claimant is physically capable of performing her pre-injury work duty. Employer presented no evidence that it offered Claimant or was able to obtain for Claimant a job that did not cause any disabling pain that Claimant testified precludes her from performing any duties. In the absence of such evidence, it is determined that Claimant has demonstrated, by a preponderance of the evidence, that the change in circumstances constitutes a change in the degree of Claimant's disability, from temporary total disability that was previously determined to the permanent total disability that she presented at the instant formal hearing. Accordingly, Claimant has met her burden of establishing a change in condition sufficient to support modification of the prior compensation order as Claimant has requested.

CO at 6.

The Employer further argues the ALJ "failed to consider or weigh all the relevant evidence in the record, including Claimant's own admissions as to her vocational capacity and job qualifications, the testimony of the vocational counselor, and the Labor Market Survey." Employer's argument at 7.<sup>3</sup> We agree.

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<sup>3</sup> For instance, Employer points to Claimant testimony indicating an interest in a teaching job or counseling job wherein Claimant testified:

In counseling? I said I can do a job like that. I mean, with my expertise, I can do a counseling job. And it also depends what it's counseling in.

Hearing transcript at 56.

As we have stated before,

As has been made clear by the DCCA<sup>3</sup> a physician's opinion as to whether a claimant can "work" is not controlling on the issue of whether a claimant is disabled under the Act; disability being a vocational matter, the physician's medical opinion as to a claimant's physical capacity can *inform* a disability determination, but it can not control it.

<sup>3</sup> See *Negussie v. DOES*, 915 A.2d 391 (D.C. 2007)

*Venable v. Safeway Inc.*, CRB No. 10-145 at 4. (February 28, 2012).

Moreover, as the Court in *Logan* points out,

As we have said, "The degree of disability in any case cannot be considered by physical condition alone, but there must [also] be taken into consideration the injured [person's] age, his industrial history, and the availability of the type of work which he can do." *Washington Post*, 675 A.2d at 40-41 (quoting *American Mut. Ins. Co. v. Jones*, 138 U.S. App. D.C. 269, 271, 426 F.2d 1263, 1265 (1970)); see also *Crum*, 238 U.S. App. D.C. at 85, 738 F.2d at 479 (in determining extent of disability, relevant factors include "the claimant's age, physical condition, work experience, and [the] availability of other work").

*Logan*, supra at 242.

Thus, it was incumbent upon the ALJ to consider not only the medical opinions but also the Claimant's age, her industrial history, and the availability of the type of work which she could do, and any other vocational factors as may be appropriate, pursuant to *Logan*. A review of the CO reveals the ALJ failed to address these factors. Indeed, the CO failed altogether to address or mention *Logan* in the analysis section. The ALJ failed to address in any fashion Employer's evidence, including testimony from the vocational counselor, Ms. Camilla Dion Mason, and the Labor Market Survey.

Upon remand, the ALJ is to make further findings of fact and conclusions of law, taking into account the burden shifting scheme in *Logan*, and addressing Claimant's vocational capacity when determining whether Claimant is permanently and totally disabled or rather, in denying Claimant's claim for relief, continuing payment of temporary total disability benefits pursuant to the prior order.

Without such findings of fact and conclusions of law, we cannot say the CO is supported by the substantial evidence in the record or in accordance with the law.

## CONCLUSION AND ORDER

The findings of fact and the conclusions of law in the August 31, 2015 Compensation Order are not supported by the substantial evidence in the record and are not in accordance with the law and therefore the Compensation Order is VACATED and REMANDED for further analysis consistent with the above discussion.

*So ordered.*