

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 15-154

**NEMEIKA JOHNSON,
Claimant-Respondent,**

v.

**HOWARD UNIVERSITY HOSPITAL and
SEDGWICK CMS,
Employer and Third-Party Administrator-Petitioner.**

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2016 FEB 17 AM 9 31

Appeal from an August 25, 2015 Compensation Order on Remand
by Administrative Law Judge Amelia G. Govan
AHD No. 14-315, OWC No. 712584

(Decided February 17, 2016)

William H. Schladt for Employer
David J. Kapson for Claimant¹

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

HEATHER C. LESLIE for the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

The facts and procedural history are set out in *Johnson v. Howard University Hospital*, CRB No. 15-002 (May 14, 2015) (DRO):

Since approximately 2000, Ms. Nemeika Johnson has worked as a laundry technician with Howard University Hospital (“HUH”). Ms. Johnson maneuvered

¹ Michael Kitzman represented Claimant at the formal hearing before the Administrative Hearings Division and in the prior appeal before the Compensation Review Board. Mr. Kapson filed the Claimant’s Opposition to Employer’s Application for Review in this appeal.

a laundry cart which requires bending, reaching, lifting, standing, walking, and carrying.

On October 26, 2013, a linen cart struck the back of Ms. Johnson's left leg. She reported to the nurse staffing office for an admission slip to HUH's emergency room where she was examined on November 2, 2013. Ms. Johnson was taken off of work and was referred to orthopedic specialist Dr. Shelton McKenzie.

On November 27, 2013, Dr. McKenzie placed Ms. Johnson on light duty with no heavy lifting or prolonged walking or standing; these restrictions were imposed until December 4, 2013. On December 19, 2013, Ms. Johnson was excused from work for a work-related medical condition; this excuse was imposed again on January 13, 2014. Ms. Johnson was released to full duty on February 13, 2014.

A dispute arose over Ms. Johnson's entitlement to workers' compensation benefits, and the parties proceeded to a formal hearing to resolve whether Ms. Johnson sustained an accidental injury to her left knee or back on October 26, 2013 which arose out of and in the course of employment, whether Ms. Johnson gave timely notice, and the nature and extent of Ms. Johnson's disability, if any. In a Compensation Order dated December 5, 2014, an administrative law judge ("ALJ") granted Ms. Johnson temporary total disability benefits from October 26, 2013 through March 25, 2014 with interest and payment of causally related medical expenses on the grounds that Ms. Johnson's left knee injury arose out of and the course of her employment and Ms. Johnson gave timely notice. *Johnson v. Howard University Hospital*, AHD No. 14-315, OWC No. 712584 (December 5, 2014).

Employer appealed the Compensation Order (CO), arguing the Administrative Law Judge (ALJ) erred in finding Claimant provided proper notice and in awarding temporary total disability benefits. Claimant opposed the appeal, arguing the CO was supported by the substantial evidence in the record and in accordance with the law.

In the DRO, the Compensation Review Board (CRB) determined the ALJ properly applied the law regarding notice in concluding Claimant provided timely notice. The CRB remanded the case however, because the findings of fact and conclusions of law were not clear regarding Claimant's work capacity during the period in contention. The CRB determined:

The ALJ properly applied the law regarding timely notice including the burden-shifting scheme of the presumption of timely notice, and the ruling that Ms. Johnson gave timely notice is **AFFIRMED**. Because the ALJ's findings of fact regarding the nature and extent of Ms. Johnson's work capacity are unclear, the CRB is unable to perform an appellate review of that issue; therefore, the portion of the December 5, 2014 Compensation Order discussing the nature and extent of Ms. Johnson's disability is **VACATED**, and this matter is **REMANDED** for clarification of the ALJ's findings of fact and conclusions of law regarding Ms. Johnson's work capacity from October 26, 2013 through March 25, 2014.

DRO at 7.

A Compensation Order on Remand (COR) was issued on August 25, 2015. After re-analyzing the evidence per the DRO, the ALJ concluded:

Based upon the record evidence, I conclude that Claimant was temporarily and totally disabled from her usual employment from October 26, 2013 through March 25, 2014. Claimant is not entitled to temporary total disability benefits for any days, during that period, on which she reported to work and earned wages.

COR at 6.

Employer appealed. Employer argues first, the conclusion that Claimant provided timely notice is in error. Second, Employer argues the ALJ's conclusion Claimant was temporarily totally disabled from October 26, 2013 through March 25, 2014 is not supported by the substantial evidence.

On October 5, 2015, Claimant opposed Employer's appeal, arguing proper notice was provided by Claimant and the COR's conclusion that Claimant was temporarily totally disabled from October 26, 2013 through March 25, 2014 is supported by the substantial evidence in the record and in accordance with the law.

On October 14, 2015, Employer replied to Claimant's opposition to its appeal.

ANALYSIS²

Employer first argues the ALJ's conclusion that Claimant provided timely notice pursuant to the Act is in error. We note that the same arguments were addressed by the CRB in the prior appeal. In the DRO, after a review of the evidence and testimony, the CRB concluded the CO's determination that notice was timely given was supported by the substantial evidence and in accordance with the law. We refer Employer to our DRO on these points. We need not reiterate them here.

Employer next argues the ALJ's determination that the Claimant was temporarily and totally disabled from October 26, 2013 through March 25, 2014 is in error and not supported by the substantial evidence. Employer specifically argues that there is no medical evidence to support a finding of disability between February 13, 2015 and March 24, 2014.

The ALJ stated:

² The scope of review by the CRB is limited to making a determination as to whether the factual findings of the appealed 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. Section 32-1521.01(d)(2)(A) of the District of Columbia Workers' Compensation Act of 1979, as amended, D.C. Code § 32-1501 *et seq.* ("Act"). Consistent with this standard of review, the CRB is constrained to uphold a compensation order that is supported by substantial evidence, even if there also is contained within the record under review substantial evidence to support a contrary conclusion and even if the CRB might have reached a contrary conclusion. *Marriott International v. DOES*, 834 A.2d 882, 885 (D.C. 2003).

The Board has asked for clarification regarding when Ms. Johnson was totally disabled, when Ms. Johnson was on light duty, when Ms. Johnson was capable of full duty, and when Ms. Johnson worked. Claimant sought temporary total disability benefits from October 26, 2013 through March 25, 2014. The Findings of Fact, above, detail all matters addressed in the available testimony and medical documents.

To further clarify the decision regarding nature and extent of disability, the following was considered. Claimant's usual work duties required heavy lifting, prolonged walking and standing. For the period from October 26, 2013 through November 26, 2013, Claimant continued to work. Per Dr. McKenzie, Claimant was totally restricted from performance of those physical activities; therefore, Claimant was temporarily and totally disabled from 11/27/2013 - 12/4/2013 and from 01/13/2014 - 2/13/14. Ms. Johnson was not capable of full duty work during those periods. On December 4, 2013 Claimant was excused from duty and referred for orthopedic evaluation, by Employer's Health Provider, for her work-related left leg pain. CX 5. Claimant's uncontradicted testimony indicates that Dr. McKenzie did not release her for return to full duty work at any time. HT 21, 27.

Dr. McKenzie's most recent report in the record (August 5, 2014) restricts her from heavy lifting, prolonged walking or standing. Claimant's usual work duties required that she lift heavy bags of laundry, as well as that she walk and stand while carrying heavy bags of soiled linens. Thus, her usual work required that Claimant perform the three physical activities she is unable to perform. There is no record evidentiary indication that light duty suitable to her left knee impairment was available to her at any time. Dr. Levitt's opinion that Claimant could return to full duty work by December of 2013 is rejected. Although Dr. McKenzie's August 2014 narrative report did not specifically address the periods from December 5, 2013 to January 12, 2014, from 2/13/14 until 3/25/14, it did address Claimant's physical restrictions, which preclude performance of her usual work duties.

Claimant's left knee impairment, following her work accident, prevented her from returning to her usual employment prior to March 25, 2014. Claimant's credible testimony that she could not perform her usual duties, combined with Dr. McKenzie's restrictions on the heavy lifting, prolonged walking and prolonged standing while carrying heavy loads required to perform those duties, supports her claim for temporary total disability benefits during that period. Dr. Levitt's IME does not address the period of wage loss at issue. There is no reason to credit his opinion, which indicates that Claimant could have returned to unrestricted work two months after the injury, over that of Claimant's treating physician. No alternative employment was offered to Claimant by Employer after her work injury. Employer has not met its burden of proving suitable work for which the Claimant is qualified was, in fact, available.

COR at 5-6.

The ALJ took into consideration the DRO's directive to clarify the dates of disability. The ALJ noted the dates the Claimant was in a total disability status per disability slips as well as when Employer excused Claimant from duty and referred her for orthopedic evaluation. The ALJ also found persuasive the Claimant's testimony that Dr. McKenzie never released her to return to work full duty; testimony supported by Dr. McKenzie's subsequent August 5, 2014 record wherein Claimant continued to be restricted from her usual duties at work.

Thus, the ALJ concluded from the evidence and testimony presented, Claimant was disabled for the period of time claimed, a conclusion supported by the substantial evidence in the record. What Employer is asking us to do is to reweigh the evidence in its favor, a task we decline to do. As stated above, the CRB is constrained to uphold a compensation order that is supported by substantial evidence, even if there also is contained within the record under review substantial evidence to support a contrary conclusion and even if the CRB might have reached a contrary conclusion. *Marriot, supra*.

CONCLUSION AND ORDER

The August 25, 2015 Compensation Order on Remand is supported by the substantial evidence in the record and in is in accordance with the law. It is **AFFIRMED**.

So ordered.