

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 15-118

PATRICIA BRASWELL,
Claimant-Respondent,

v.

GREYHOUND LINES, INC. and
SRS-ITT SPECIALTY RISK SERVICES, INC.,
Employer/Third-Party Administrator-Petitioner.

Appeal from a June 29, 2015 Compensation Order on Remand
by Administrative Law Judge Joan E. Knight
AHD No. 09-519A, OWC No. 603794

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2016 JAN 12 PM 9 39

(Decided January 12, 2016)

David M. Snyder for Claimant¹
Naureen R. Weissman for Employer²

Before JEFFREY P. RUSSELL, LINDA F. JORY, *Administrative Appeals Judges*, and LAWRENCE D. TARR, *Chief Administrative Appeals Judge*.

JEFFREY P. RUSSELL for the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

The following procedural and factual matters are set forth in the 2012 Decision and Remand Order, the issuance of which lead to the issuance of the Compensation Order now under review:

On September 4, 2004, Ms. Patricia E. Braswell injured her left ankle at work. She underwent multiple surgeries to address her symptoms.

Ms. Braswell could not return to her usual duties as a bus driver. Consequently, her employer, Greyhound Lines, Inc. ("Greyhound"), provided vocational rehabilitation services.

¹ Michael Kitzman represented Ms. Braswell at the formal hearing.

² Shawn M. Nolen represented Greyhound Lines at the formal hearing.

On December 17, 2009 at a formal hearing, Ms. Braswell requested permanent total disability benefits from January 1, 2008 to the date of the hearing and continuing as well as medical benefits. A Compensation Order issued on January 29, 2010; Ms. Braswell's requests were denied in part. An administrative law judge ("ALJ") concluded "[Ms. Braswell] is disabled from performance of her usual work duties and is entitled to ongoing temporary total benefits as well as vocational rehabilitation services. She is not entitled to permanent total disability benefits for the period subsequent to January 1, 2008." *Braswell v. Greyhound Lines, Inc.*, AHD No. 09-519, OWC No. 629144 (January 29, 2010), p. 5. ("*Braswell I*")

Almost one year later, another formal hearing was held. The claim for relief was exactly the same as the one requested at the 2009 formal hearing. The result, also, was the same as previously; the claim for permanent total disability benefits was denied in a Compensation Order dated February 24, 2011.

Ms. Braswell appealed the February 24, 2011 Compensation Order to the CRB. In a Decision and Remand Order dated May 11, 2011, the CRB remanded the matter for specific issues to be addressed.

On July 5, 2012, the ALJ addressed those issues in a Compensation Order on Remand. Ms. Braswell's claim for relief was denied.

On appeal this time, Ms. Braswell contends there is no evidence there is employment available within her physical restrictions and her other capabilities. Ms. Braswell requests we reverse the Compensation Order on Remand.

In response, Greyhound asserts the July 5, 2012 Compensation Order on Remand is supported by substantial evidence and is in accordance with the law. Greyhound requests the CRB affirm the Compensation Order on Remand.

Braswell v Greyhound Lines, Inc., CRB No. 12-120, AHD No. AHD No. 09-519A, OWC No. 603794, (November 13, 2012) (DRO) at 1-2.

ISSUE ON APPEAL

1. Did the ALJ properly apply the *Logan* test to Ms. Braswell's request for permanent total disability benefits?

In the Analysis portion of that DRO, the Compensation Review Board (CRB) noted:

Neither party has raised [any] *Snipes* issue on appeal. Our focus, therefore, is limited to whether the ALJ answered the *Logan* questions posed in the prior Decision and Remand Order:

1. Is Ms. Braswell unable to return to her usual employment? 2. If yes, has Greyhound proven suitable, alternative employment is available to Ms. Braswell? 3. If yes, has Ms. Braswell disproven the legitimacy of Greyhound's evidence of such employment or has she demonstrated diligence but lack of success in obtaining other employment?

DRO p. 3.

After a review of the arguments of the parties and the findings and conclusions in the DRO, the CRB wrote as follows:

In the May 11, 2011 Decision and Remand Order, the ALJ was instructed to make a specific finding as to whether Greyhound had met its burden of demonstrating the availability of suitable, alternative employment. In response to that mandate, the ALJ determined Greyhound had met that burden by showing that work was available in the Baltimore/DC labor market and that the vocational rehabilitation counselor was working with Ms. Braswell to improve her skills and experience thereby making her competitive:

In the instant proceeding, Employer has met its evidentiary burden to show available employment through the testimony of Mr. James Allen and the Vocational Rehabilitation reports. Mr. Allen testified that, as of the date of the Formal Hearing, there was work available in the Baltimore/D.C. labor market and that he was working with her on developing her skills and work experience to become competitive with the labor market. (HT 40) Mr. Allen testified that the Claimant is actively engaged in vocational rehabilitation efforts and showing progress in her work skills. (HT 50-51) Employer has demonstrated the availability of suitable alternative employment. Furthermore, Employer continues to be willing to assist Claimant with her job search efforts and she has not suffered any loss of disability benefits.

That criterion, however, is not the *Logan/Joyner* standard. The question under *Logan* concerns a claimant as the claimant and the market as the market [sic] exists.

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.

DRO, at 5 (footnotes omitted).

Then, in the Conclusion and Order, the CRB wrote:

CONCLUSION AND ORDER

The July 5, 2012 Compensation Order on Remand is VACATED, and this matter is REMANDED for further consider of whether Greyhound has demonstrated there exists in the labor market positions that are within Ms. Braswell's current physical and vocational capacity in light of the factors described in *Logan* and *Joyner*.

DRO, at 6.

Following the remand to the Administrative Hearings Division (AHD), the Administrative Law Judge (ALJ) who had issued the Compensation Order on Remand left the Department of Employment Services (DOES) without issuing a new Compensation Order on Remand.

Prior to further proceedings in AHD, Claimant through counsel requested, in light of the departure of the ALJ who had heard the evidence at the formal hearing having left the agency without issuing the required compensation order in response to the CRB's remand, that the matter be reassigned to a new ALJ and that a new hearing be conducted. In a letter dated February 27, 2015, the Chief ALJ of AHD responded, writing in part:

In order to address and answer the instruction given by the CRB, a determination of claimant's credibility is not necessitated, even in part. Accordingly, [the newly assigned ALJ] Judge [Joan E.] Knight will proceed with the issuance of a compensation order on remand in accordance with the CRB's instruction.

Exhibit 1 of Claimant's Opposition to the Application for Review.³

Thereafter, on June 29, 2015, ALJ Knight issued the COR, granting Claimant's claim for an award of permanent total disability benefits commencing January 1, 2008.

Employer filed an Application for Review and memorandum of points and authorities in support thereof (Employer's Brief) with the CRB, seeking to have the CRB vacate the COR and remand the matter for a new formal hearing, arguing that the circumstances required a new hearing. Employer argued further that the findings made by the ALJ to the effect that Claimant had failed to cooperate

³ Although not a part of the evidentiary record, the Chief ALJ's letter is a part of the Agency file, of which we take administrative notice.

with vocational rehabilitation requires that her benefits be suspended, and that the ALJ impermissibly placed the burden of proof as to Claimant's employability upon Employer when it properly should have been Claimant's burden to demonstrate a change in conditions warranting a modification of the first compensation order denying the temporary total disability claim, and asserting that a *Snipes* proceeding should have been held on that question.

Claimant filed Claimant's Opposition to the Application for Review and memorandum of points and authorities in support thereof (Claimant's Brief), arguing that the COR is supported by substantial evidence, that Employer had waived any error that may have occurred when the ALJ failed to conduct a *Snipes* proceeding by not appealing that failure in the prior appeals, and that Employer improperly raises a new issue on appeal not presented at the formal hearing, to wit, that Claimant's alleged non-cooperation with vocational rehabilitation should result in suspension of benefits.

Despite the fact that Claimant had requested the new formal hearing, Claimant did not address in this appeal Employer's argument that a new formal hearing should have been held.

Because Employer did not request a new formal hearing and the record contains no indication that Employer objected to the decision not to conduct a new formal hearing, and because the COR is supported by substantial evidence, we affirm.

ANALYSIS

The scope of review by the CRB is limited to making a determination as to whether the factual findings of the appealed Compensation Order on Remand 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. Code § 32-1521.01(d)(2)(A) of the District of Columbia Workers' Compensation Act, 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 on Remand 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).

Regarding Employer's argument that a new hearing was required, we note that the Supreme Court has admonished generally that "[the] one who decides must hear." *Morgan v. United States*, 298 U.S. 468, 481, 80 L. Ed. 1288, 56 S. Ct. 906 (1936). It has been recognized that when opportunity on the part of an administrative board to hear the witnesses and "observe their demeanor in the act of testifying" is lacking, and "weight and credibility of witnesses" is involved, due process is also lacking. *Feldman v. Board of Pharmacy of District of Columbia, D.C.Mun.App.*, 160 A.2d 100, 103 (1960). See *Shawley v. Industrial Commission*, 16 Wis. 2d 535, 114 N.W.2d 872, 875-76 (1962).

While as a general rule we accept that the adjudicator who heard the case ought to be the one who decides it, in the three cases of which we are aware where this principle has been applied under the Act, inherent in the decisions was the underlying assumption that credibility issues were present. See *Segovia v. Able Service Contractors*, Dir. Dkt. 96-72, H&AS No. 94-199, OWC No. Unknown (January 22, 1997); *Jones v. District of Columbia Sports and Entertainment*, CRB No. 10-019(R), DCCA No. 10-AA-628, AHD No. PBL 09-012, DCP No. 761002000012003-0001 (April 28, 2010);

and *Swanson v. District of Columbia Department of Corrections*, CRB No. 12-011, AHD No. PBL 11-024, DCP No. 761032-0001-20000-005 (May 3, 2012). In this case, the ALJ's decision is based not upon any credibility determinations relating to Claimant, but rather upon taking the words of the counselor at face value, and finding that even assuming them to be true, Employer has failed in its burden under the second prong of *Logan*. Thus, we can see no prejudicial error in failing to conduct a new formal hearing.

Further, Employer did not request that a new formal hearing be conducted, and did not file any objection that we have seen to the decision by the Chief ALJ in AHD to deny Claimant's request for such a new hearing. Accordingly, Employer has no standing to raise the lack of a new formal hearing as grounds for appeal.

Finally, the remand instructions were quite specific and clear: the mandate was to determine whether Employer's evidence was sufficient to overcome the *prima facie* showing by Claimant of permanent total disability under *Logan*. The ALJ reviewed the testimony of the vocational rehabilitation counselor and rationally concluded that his response to the inquiry as to whether Claimant is currently employable was not in the affirmative, but suggestive that at some time in the future employability might be possible.

This interpretation of the counselor's testimony is a fair reading of his testimony and is consistent with his overall description of the vocational rehabilitation program in which Claimant was engaged. We see no reason to substitute our judgment on this question.⁴

There were no other instructions on remand to AHD, and therefore we need not address Employer's remaining concerns about non-cooperation.

CONCLUSION AND ORDER

The Compensation Order on Remand is supported by substantial evidence and is in accordance with the law, and therefore is affirmed.

So ordered.

⁴ We would be remiss if we did not note that the COR handles this analysis in a somewhat confusing and convoluted way, and the COR evinces some confusion on the ALJ's part as to the burdens of proof at different stages of the consideration of the evidence. However, the fundamental finding that the counselor did not testify that Claimant has the capacity to return to gainful employment as of the date of the formal hearing is unequivocally supported by substantial evidence, which renders any other analytic or procedural errors harmless.