

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA MARÍA MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 11-142

**RUTH E. PROCTOR,
Claimant-Petitioner,**

v.

**CB RICHARD ELLIS and ZURICH INSURANCE CO.,
Employer/Insurer-Respondent.**

Appeal from a November 15, 2011 Compensation Order By
Administrative Law Judge Leslie A. Meek
AHD No. 11-122, OWC No. 673456

Jason Zappasodi, Esquire for the Petitioner
Mark W. Bertram, Esquire for the Respondent

Before MELISSA LIN JONES, HENRY W. MCCOY, and HEATHER C. LESLIE, *Administrative Appeals Judges*.

MELISSA LIN JONES for the Compensation Review Board.

DECISION AND REMAND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

In July 2010, Ms. Ruth E. Proctor was employed by CB Richard Ellis (“Ellis”) as a real estate coordinator. On July 28, 2010, she fell when exiting an elevator.

Ms. Proctor was off of work from September 8, 2010 to October 31, 2010. After November 18, 2010, she returned to work on light duty, but her employment was terminated by January 1, 2011.

At a formal hearing, Ms. Proctor requested temporary total disability benefits from January 1, 2011 to the date of the formal hearing and continuing plus causally-related medical expenses. In a Compensation Order dated November 15, 2011, an administrative law judge (“ALJ”) denied

Ms. Proctor's claim for indemnity benefits; the ALJ awarded Ms. Proctor ongoing medical benefits.¹

On appeal, Ms. Proctor contends the ALJ erred in ruling that her ability to work light duty precluded her from receiving temporary total disability benefits. Ms. Proctor asserts her inability to return to her pre-injury employment with Ellis shifted the burden to Ellis to prove suitable, alternative employment was available. For these reasons, Ms. Proctor requests the CRB reverse the November 15, 2011 Compensation Order.

Ellis asserts the November 15, 2011 Compensation Order is supported by fact and law. Ellis requests the CRB affirm the Compensation Order.

ISSUE ON APPEAL

1. Is the November 15, 2011 Compensation Order supported by substantial evidence and in accordance with the law?

ANALYSIS²

The only issue for resolution at the formal hearing was the nature and extent of Ms. Proctor's disability. When considering Ms. Proctor's claim for ongoing temporary total disability benefits as of January 1, 2011, the ALJ determined

Claimant's evidence shows she was disabled from work for the period of September 8, 2010 to October 31, 2010 and returned to work on a restricted basis sometime after. Claimant was released to light duty on November 18, 2010. Claimant was terminated from her employment in January, 2011. By March 9, 2011 Claimant was still deemed to be capable of light duty.^[3]

Based upon these findings, the ALJ denied Ms. Proctor's request for wage-loss benefits:

Claimant has requested TTD benefits from January 1, 2011 to the present and continuing, however Claimant's evidence shows that as of November 18, 2011 she was not totally disabled as she was capable of working light duty.^[4]

¹ *Proctor v. CB Richard Ellis*, AHD No. 11-122, OWC No. 673456 (November 15, 2011).

² The scope of review by the Compensation Review Board ("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, as amended, D.C. Code §32-1501 to 32-1545, ("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).

³ *Proctor, supra*, at p. 4.

⁴ *Id.*

The ALJ's conclusion does not flow rationally from the findings.

In *Logan v. DOES*,⁵ the D.C. Court of Appeals adopted a burden-shifting procedure for determining the nature and extent of an injured worker's disability:

Deciding the extent of disability in any case has both a procedural and a substantive component. In *Crum [v. General Adjustment Bureau]*, 238 U.S. App. D.C. 80, 86, 738 F.2d 474, 480 (1984), the District of Columbia Circuit pointed out that "the [Department of Labor's Benefits Review] Board and the courts have utilized [a] burden-shifting device . . . as an aid to the evaluation of such evidence," namely:

In order to be found disabled, claimant must establish an inability to return to his usual employment. Once claimant has made [this] showing, the burden shifts to the employer to establish suitable alternate employment opportunities available to claimant considering his age, education and work experience.

238 U.S. App. D.C. at 85, 738 F.2d at 479 (quoting the Board). [Footnote omitted.] Thus, "once the claimant demonstrates inability to perform his or 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." *Id.* This scheme is consistent with this court's holding that "the burden is on the employer to prove that work for which the claimant was qualified was in fact available." *Washington Post*, 675 A.2d at 41 (quoting *Joyner v. District of Columbia Dep't of Employment Servs.*, 502 A.2d 1027, 1031 n.4 (D.C. 1986)).^[6]

In this case, based upon Ms. Proctor's "affirmative duty to present substantial credible evidence of the level of benefits sought,"⁷ the ALJ ruled Ms. Proctor was not capable of returning to her pre-injury work as she was "capable of working light duty,"⁸ but the ALJ failed to assess the availability of suitable, alternative employment. Consequently, the law requires we remand this matter for further analysis.

CONCLUSION AND ORDER

Because the ALJ failed to fully apply the *Logan* burden-shifting protocol, the November 15, 2011 Compensation Order is not supported by substantial evidence, is not in accordance with the

⁵ 805 A.2d 237 (D.C. 2002).

⁶ *Id.* at 242-243.

⁷ *Proctor, supra*, at p. 3. The correct burden is a preponderance of the evidence. *Golding-Alleyne v. DOES*, 980 A.2d at 1216 (D.C. 2009) (The claimant had the burden of proof when presenting her case to the ALJ, and she must prove her case by a preponderance of the evidence. Merely presenting substantial evidence to support a claim is not necessarily enough to carry the burden of persuading the finder of fact.)

⁸ *Proctor, supra*, at p. 4.

law, and is VACATED IN PART. The award of ongoing medical benefits has not been appealed and remains in effect; the denial of temporary total disability benefits is VACATED and this matter is REMANDED for further analysis consistent with this Decision and Remand Order.

FOR THE COMPENSATION REVIEW BOARD:

MELISSA LIN JONES
Administrative Appeals Judge

June 4, 2013

DATE