

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 15-AA-474

PHYLLIS F. SINCLAIR, PETITIONER,

v.

DISTRICT OF COLUMBIA DEPARTMENT OF EMPLOYMENT SERVICES, RESPONDENT,

and

HOWARD UNIVERSITY HOSPITAL, INTERVENOR.

Petition for Review of an Order of the Compensation Review Board
of the District of Columbia Department of Employment Services
(CRB-24-13)

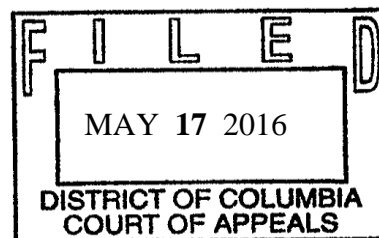
(Argued March 24, 2016

Decided May 17, 2016)

Before FISHER and BLACKBURNE-RIGSBY, *Associate Judges*, and KING,
Senior Judge.

MEMORANDUM OPINION AND JUDGMENT

PER CURIAM: This petition for review stems from a claim for workers' compensation benefits filed by Phyllis Sinclair. After a full evidentiary hearing on November 10, 2011, Administrative Law Judge Anand K. Verma denied Sinclair's claim for temporary total disability benefits. The Compensation Review Board ("CRB") affirmed. Although Sinclair makes several arguments, we remand solely on the ground that the CRB's decision was not supported by substantial evidence.



I. Background

In a Compensation Order issued May 10, 2010, an Administrative Law Judge (“ALJ”) found Sinclair’s back condition to be causally related to an accidental workplace injury that occurred on January 8, 2004. Then, in August 2010, Sinclair fell, injuring her right wrist and hand. She believed that the work-related back injury caused the fall, as her legs gave way after she felt a shooting pain from her back down her legs.

It is unclear when Sinclair’s injuries rendered her unable to continue working as a nurse at Howard University Hospital (“HUH”), but HUH referred Sinclair to vocational rehabilitation services commencing on July 25, 2010, and paid her disability benefits until April 21, 2011. On April 13, 2011, Sinclair’s treating physician, Dr. Segun T. Dawodu, released her to return to light duty work for four hours a day, gradually increasing to eight hours a day. HUH terminated the vocational rehabilitation services on April 23, 2011, when a dispute arose over Sinclair’s entitlement to continued disability payments.

II. Procedural History

On November 10, 2011, Sinclair appeared before ALJ Verma, seeking temporary total disability (“TTD”) benefits from April 21, 2011, to the present and continuing, and interest on accrued benefits.¹ Counsel for HUH argued that Sinclair was not eligible for benefits because she had voluntarily limited her income in April 2011 by declining a job in the office of Dr. Elizabeth Nolte – a doctor at the Employee Health Department at HUH.² HUH also submitted a labor market survey (“LMS”), which listed twelve nursing positions that purportedly “were within Ms. Sinclair’s physical capacities” and for which “Ms. Sinclair would qualify given her educational and employment backgrounds.” HUH relied on various exhibits, but did not present any witnesses.

¹ Sinclair also sought, and was granted, payment of medical expenses related to her right wrist (which required surgery) and her right knee. On April 23, 2013, the CRB vacated the award for the right knee. HUH no longer challenges the award of medical expenses related to her right wrist.

² Initially, HUH also contended that Sinclair had failed to cooperate with the vocational rehabilitation services but it withdrew that claim before closing arguments.

Sinclair denied that she had declined a job with Dr. Nolte and testified that she had followed up on all job leads provided through the vocational rehabilitation services, with the exception of those more physically demanding jobs that required bedside nursing.

In an opinion dated February 21, 2012, ALJ Verma denied the claim for TTD benefits on two grounds: (1) Sinclair voluntarily limited her income by declining the job offered by Dr. Nolte; and (2) there was “no clear indication in the record of whether [Sinclair] diligently pursued” the suitable, alternative, and available opportunities presented in the LMS. On November 21, 2012, the CRB affirmed.

The CRB concluded that the job with Dr. Nolte was available and Sinclair declined it for reasons that were, “[a]s the ALJ put it, . . . ‘purely personal in nature.’” However, it also noted that, because the job with Dr. Nolte was “only a temporary position[,]” ALJ Verma’s “determination that Ms. Sinclair had voluntarily limited her income [] by declining the position . . . might not withstand substantial evidence review” had HUH not also presented the LMS evidence. The CRB then deferred to ALJ Verma’s determination with respect to the LMS because “the fact finder is in the best position to assess the quality, character and weight to be assigned the evidence.” Thus, in affirming ALJ Verma’s denial of benefits, the CRB relied on the combination of Sinclair declining the temporary job offered by Dr. Nolte and the lack of evidence that she diligently pursued the jobs described in the LMS. On April 23, 2013, following a remand on other issues, the CRB reaffirmed its decision denying temporary total disability benefits.

Sinclair petitioned for review by this court. While the petition was pending, she filed a motion to remand for a new hearing, alleging that ALJ Verma was not licensed to practice law as required under applicable regulations. This court remanded for the CRB to determine “how to proceed in light of petitioner’s challenge to ALJ Verma’s qualifications.”

On remand, the CRB did not revisit its TTD analysis. Rather, it adopted a rule that, if it were established that ALJ Verma had been unqualified, then some of his decisions must be reheard – those involving “credibility determinations or contested factual determinations” to which CRB deferred on appeal. However, decisions based on “pure legal questions[,]” which could be reviewed “independently of ALJ Verma’s analysis[,]” would not require rehearing.

Applying this standard, the CRB found that Sinclair was not entitled to a new hearing.

Sinclair again petitioned this court for review, seeking a new formal hearing before a qualified ALJ and renewing her challenge to the CRB's denial of the TTD benefits. While Sinclair's first claim implicates the CRB's decision on remand, the latter requires us to look back to the CRB's November 2012 decision, which we have not previously reviewed.

III. Standard of Review

In a workers' compensation case, our review of CRB decisions is "deferential" but "it is by no means 'toothless.'" *Georgetown Univ. Hosp. v. District of Columbia Dep't of Emp't Servs.*, 916 A.2d 149, 151 (D.C. 2007). "To pass muster, an administrative agency decision must state findings of fact on each material, contested factual issue; those findings must be supported by substantial evidence in the agency record; and the agency's conclusions of law must follow rationally from its findings." *Murchison v. District of Columbia Dep't of Pub. Works*, 813 A.2d 203, 205 (D.C. 2002) (citation omitted). "Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Georgetown Univ. Hosp.*, 916 A.2d at 151 (internal quotation marks omitted).

IV. Analysis

Sinclair argues that the CRB erred in determining that she was not entitled to a new formal hearing and in denying her TTD benefits. Because we agree that the bases on which the CRB's denial of benefits rests (voluntary limitation of income and availability of suitable employment) were not supported by substantial evidence in the record, we decide the case on that ground.³

³ Sinclair and HUH debate whether the *de facto* officer doctrine precludes rehearing of ALJ Verma's decisions. We need not address the impact of this doctrine, however. Even in its most robust form, the *de facto* officer doctrine does not shield from scrutiny the actions or decisions of judicial officers that would be
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A. Voluntary Limitation of Income

D.C. Code § 32-1508 codifies a defense to the payment of TTD benefits. It states:

If the employee voluntarily limits his income or fails to accept employment commensurate with his abilities, then his wages after the employee had the disability shall be deemed to be the amount he would earn if he did not voluntarily limit his income or did accept employment commensurate with his abilities.

D.C. Code § 32-1508 (5) (2012 Repl.).

This defense requires HUH to prove that Sinclair voluntarily limited her income or did not accept employment commensurate with her abilities. In affirming ALJ Verma's finding that Sinclair had voluntarily limited her income, the CRB stated that the "undisputed" evidence showed that Sinclair "was offered but declined to accept the job in Dr. Nolte's office." This finding fails to acknowledge the evidence in the record.

First, Sinclair testified that she did not decline a job with Dr. Nolte. Rather, she said that Dr. Nolte was "to call me and let me know . . . whether . . . and when she wanted me to come in" to start the position. The employer's counsel questioned Sinclair's credibility on this issue and, in closing argument, stated that Sinclair "knew" the job offered by Dr. Nolte would be available to her upon her return from vacation but that Sinclair failed to call Dr. Nolte, as, counsel said, was her obligation.

HUH failed to present testimony from Dr. Nolte (or any other witness) to support this assertion. Additionally, one of the exhibits that HUH entered into

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subject to reversal under normal standards of review. We may assume for the sake of argument that ALJ Verma was fully qualified to hold office, but his factual findings are not supported by substantial evidence. The *de facto* officer doctrine thus does not preclude our review.

evidence, a vocational progress report for the period from March 24, 2011, to April 23, 2011, seems to corroborate Sinclair's testimony. According to this report, Sinclair initially interviewed for a temporary position with Dr. Nolte on April 15, 2011, but Dr. Nolte "felt that [Sinclair] was not a good candidate for the position, given all of her medical issues." Dr. Nolte then (1) gave Sinclair an application for an Employee Health assistant position; (2) stated that "[i]n the event that [her] nurse assistant goes on leave in May," Sinclair *might* be able to do some "light clinical work"; and (3) offered Sinclair a job doing "some clerical work" from April 18, 2011, until April 27, 2011 – which Sinclair turned down due to pre-existing vacation plans.

At minimum, this evidence shows that whether Sinclair voluntarily limited her income or failed to accept employment commensurate with her abilities was a material and *contested* issue to which the ALJ and the CRB did not give "full and reasoned consideration." *Georgetown Univ. Hosp.*, 916 A.2d at 151. Moreover, without additional evidence or legal authority, this court is not convinced that turning down less than two weeks of undefined clerical work due to pre-existing plans would constitute voluntary limitation of income disqualifying petitioner from receiving any further benefits for temporary total disability.

B. Suitable, Alternative Employment

As discussed above, the CRB also relied in large part on the LMS. This court uses a burden-shifting framework to evaluate the extent of a claimant's disability. *Logan v. District of Columbia Dep't of Emp't Servs.*, 805 A.2d 237, 242 (D.C. 2002). In order to establish a *prima facie* case of total disability, a claimant must demonstrate "an inability to return to his usual employment." *Id.* (citation omitted). The burden then shifts to the employer, who may "seek to rebut by establishing the availability of other jobs which the claimant could perform." *Id.*

In order to show "suitability," the employer must consider what the claimant can "physically and mentally do following his injury." *Id.* at 243 (citation omitted). The employer must also show that such jobs are "reasonably available in the community for which the claimant is able to compete" and that "there exists a reasonable likelihood, given the claimant's age, education, and vocational background that he would be hired if he diligently sought the job." *Id.* (citation omitted). "If the employer meets that evidentiary burden, the claimant may refute the employer's presentation" either by "challenging the legitimacy of the

employer's evidence of available employment or by demonstrating diligence, but a lack of success, in obtaining other employment." *Id.*

In upholding ALJ Verma's denial of TTD benefits, the CRB acknowledged that, under the first prong of *Logan*, "[t]here does not appear to be any dispute in this appeal that Ms. Sinclair's injury renders her unable to return to her pre-injury job." The CRB then concluded that HUH had satisfied its evidentiary burden under the second prong, stating that "[t]he LMS established that there were numerous positions available . . . in employment categories that are suitable for Ms. Sinclair." However, the CRB's suitability determination rested on ALJ Verma's factual findings that the jobs listed were "consistent with Claimant's physical restrictions."

Notably, however, neither ALJ Verma, in his compensation orders, nor the CRB reconciled Dr. Dawodu's restriction of Sinclair to four hours of work a day with the fact that "[a]ll identified positions [in the LMS] are full time positions." Without such a finding (and evidence to support it), this court cannot say that the CRB's conclusion that the LMS presented jobs "suitable" for Sinclair is supported by substantial evidence.

ALJ Verma prematurely shifted the burden to Sinclair to demonstrate a "good faith effort in following up on the [LMS] job leads." Similarly, the CRB faulted Sinclair for failing to (1) establish that "she had diligently applied for the positions identified in the LMS[.]" (2) "offer any counter labor market evidence," or (3) "attack the suitability of the identified positions [in the LMS]." However, because the record does not demonstrate that HUH satisfied its burden of proving that suitable, alternative employment was available, Sinclair was not yet obliged to refute the LMS evidence.

Apart from this error of law, we question whether the evidence supports the criticisms of Sinclair by ALJ Verma and the CRB. First, Sinclair did present evidence of her efforts to find a job, testifying that she conducted an independent search and applied to the job leads provided by her vocational rehabilitation case manager. Even ALJ Verma found that, "in some cases [Sinclair] did make serious efforts by applying and interviewing for the available positions without success[.]" and he thus refused to find a pattern of non-cooperation with HUH's vocational efforts. Second, it is not clear if the job leads provided to Sinclair by her case manager were the same as those in the LMS, or that Sinclair ever received a copy of the LMS before the November 10, 2011, hearing.

V. Conclusion

In light of the lack of substantial evidence to support the CRB's (and ALJ's) findings, we reverse the CRB's order and remand this case for further proceedings to determine whether petitioner is entitled to temporary total disability benefits. We leave it to the newly assigned ALJ and the parties to determine whether to reopen the existing record or to start the proceedings anew.⁴

It is so ordered.

ENTERED BY DIRECTION OF THE COURT:



JULIO A. CASTILLO
Clerk of the Court

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⁴ In light of our disposition, we express no views on the rule adopted by the CRB for dealing with decisions issued by former ALJ Verma.