DISTRICT OF COLUMBIA COURT OF APPEALS

No. 15-AA-225

LEE M. BROWN, PETITIONER,

v.

DISTRICT OF COLUMBIA DEPARTMENT OF EMPLOYMENT SERVICES, RESPONDENT,

and

HOWARD UNIVERSITY, INTERVENOR.

Petition for Review of a Decision of the District of Columbia Department of Employment Services Compensation Review Board
(CRB 90-14)

(Submitted February 18, 2016 Decided April 27, 2017)

Before EASTERLY and MCLEESE*, *Associate Judges*, and PRYOR, *Senior Judge*.

MEMORANDUM OPINION AND JUDGMENT

PER CURIAM: Petitioner Lee Brown, a former philosophy professor at Howard University, sustained an injury to his left knee in 2002 arising out of and in the course of his employment. He sought a payment of temporary total disability benefits from April 2010 to the present and continuing. A Department of Employment Services Administrative Law Judge (ALJ) determined that he had met his burden to show that his injury prevented him from performing his pre-injury job and issued an order requiring compensation. Howard University appealed the ALJ's compensation order, and the Compensation Review Board (CRB) reversed, holding that the conclusion that Dr. Brown was unable to perform his job as a professor was "unsupported by substantial evidence." This appeal followed.

* Associate Judge McLeese concurs in the result.

Dr. Brown argues that the CRB's decision "was not supported by the facts of the case" and that the finding that the ALJ's decision was unsupported "was in error." The CRB's role with respect to a hearing examiner's decision is to "[r]eview the compensation order for legal sufficiency" and "affirm a compensation order that is based upon substantial evidence and is in accordance with . . . applicable law[]." D.C. Code § 32-1521.01 (d) (2013 Repl.). The CRB is bound by a decision that follows rationally from findings that are supported by substantial evidence on the record, even if the CRB "may have reached a contrary result based on an independent review of the record." *See, e.g.*, *Dell v. Dep't of Emp't Servs.*, 499 A.2d 102, 108 (D.C. 1985). When challenges are made to the CRB's assessment of the evidence, we ask whether "the CRB properly conduct[ed] its review." *Wash. Metro. Area Transit Auth. v. District of Columbia Dept. of Emp't Servs.*, 926 A.2d 140, 147 (D.C. 2007). We are "likewise . . . limited to determining whether the [CRB's] order is in accordance with law and supported by substantial evidence in the record." *King v. District of Columbia Dep't of Emp't Servs.*, 560 A.2d 1067, 1072 (D.C. 1989) (citing D.C. Code § 2-510 (a)(3)(A), (E) (1981)); *see also Wash. Metro. Area Transit Auth.*, 926 A.2d at 146–47. Although "we review the decision of the [CRB], not that of the ALJ[,] . . . we cannot ignore the compensation order which is the subject of the [CRB's] review." *Georgetown Univ. Hosp. v. District of Columbia Dep't of Emp't Servs.*, 916 A.2d 149, 151 (D.C. 2007) (citation omitted).

Here, the CRB applied the correct standard of review and looked to the ALJ's compensation order to determine whether her decision to award Dr. Brown benefits was supported by substantial evidence, i.e., "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion," *Young v. District of Columbia Dep't of Emp't Servs.*, 865 A.2d 535, 540 (D.C. 2005). The question before us is whether the CRB erred in determining that it was not.

The ALJ determined that Dr. Brown had met his burden of proving by a preponderance of the evidence[1] that he could not perform his pre-injury job and

[1] There is no presumption as to the nature and extent of a claimant's injury. *Logan v. District of Columbia Dep't of Emp't Servs.*, 805 A.2d 237, 242 (D.C. 2002); *see also Wash. Metro. Area Transit Auth. v. District of Columbia Dep't of Emp't Servs.*, 992 A.2d 1276, 1282 (D.C. 2010) ("[T]he ALJ erroneously stated that the [claimant's] burden was only to present substantial credible evidence that he has a disability entitling him to the requested level of benefits. In fact, the correct burden of proof is a preponderance of the evidence." (internal quotation marks omitted)).

that he had thereby shifted the burden to Howard to disprove his entitlement to benefits.[2] To reach this conclusion, the ALJ relied primarily on a September 2013 Independent Medical Examination (IME) report by Dr. Phillip Omohundro, which opined that Dr. Brown's "current physical limitations do not prevent him from returning to work," but "his major impediment to return to work is related to his pain medication." The ALJ also noted Dr. Brown's own testimony that "Howard would not permit [him] to work on narcotics," as well as an IME report from a different doctor, which stated that Dr. Brown "is not completely and totally disabled from the injury . . . . [but] would be required to do sedentary work with 10 minutes of standing every two hours." The ALJ concluded that "[w]ithout testimony from . . . the employer that [Dr. Brown] would be able to stand up every two hours for ten minutes and be able to continue taking the necessary narcotic medications, . . . employer ha[d] [not] met its burden of proof to overcome [Dr. Brown's] initial threshold showing."

In reversing the compensation order, the CRB concluded that the ALJ "demonstrate[d] a misunderstanding of the burdens in this case." Specifically, "[i]t is a claimant's burden to present evidence that the pre-injury job includes physical or other requirements that the work injury prevents the claimant from doing, not an employer's burden to demonstrate that any limitation a claimant has . . . is not part of the job." Noting that Dr. Brown did not present any evidence regarding the requirements of his job and finding that the evidence regarding his pain medication did not constitute substantial evidence to support the finding that "Dr. Brown was precluded from performing his pre-injury job," the CRB reversed the compensation order.

Based on our review of the record, we cannot say that the CRB erred in reversing the order as unsupported by substantial evidence. Regarding any impediment posed by his use of pain medication, it was Dr. Brown's burden to present sufficient evidence that he could not perform his pre-injury job while taking these medications. Dr. Omohundro's IME report is weak support for this claim. Although it stated that Dr. Brown's "major impediment . . . is related to his pain medication," it provided no detail about the severity of Dr. Brown's pain, the nature of Dr. Brown's medication, the frequency with which he required pain medication throughout the day, or the particular effects of the medication on Dr.

[2] We discussed this burden-shifting framework in *Logan*, 805 A.2d at 242 (explaining that the claimant must initially establish his "inability to perform his . . . usual job" and only then does the burden shift to the employer to demonstrate the availability of other jobs that the claimant can perform).

Brown that prevented him from working as a philosophy professor at Howard.[3] In fact, Dr. Brown testified that he *was* capable of teaching while using narcotics but that Howard would not allow him to do so. He did not provide any other evidence supporting the latter assertion, and when asked to clarify whether his narcotic usage was the reason he had not been reinstated, he was equivocal: "I don't know. It was never stipulated in that way." Dr. Brown's ambiguous testimony, combined with Dr. Omohundro's opaque and conclusory report do not amount to substantial evidence that Dr. Brown was unable to perform his pre-injury job due to his narcotics usage.[4] Thus, the CRB did not err in determining that the ALJ's conclusion that Dr. Brown carried his initial burden was unsupported by substantial evidence.

Similarly, we cannot say the CRB erred in concluding that Dr. Brown failed to show that he could not perform his pre-injury job because of his sitting and

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[3] It is reasonable to expect that, when petitioners assert that narcotics dependency renders them unable to perform their pre-injury jobs, they present evidence that particular effects of the medication have impeded their job performance. *See, e.g.*, *Gorham v. Marriott at Wardman Park*, CRB No. 12-010, 2012 WL 1352707, at *4 (Mar. 2, 2012) (finding that claimant's "medication caused her to become drowsy and sleepy after she reported to work"); *Oliver v. George Washington Univ.*, CRB No. 09-001, 2008 DC Wrk. Comp. LEXIS 398, at *4 (Nov. 17, 2008) (finding that claimant's "medication cause[d] [a] loss of concentration and extreme drowsiness which do[] not allow her to perform sedentary work").

[4] In fact, substantial evidence supports the opposite conclusion. *See Shaw Project Area Comm., Inc. v. District of Columbia Comm'n on Human Rights*, 500 A.2d 251, 255 (D.C. 1985) ("The substantiality of evidence must take into account whatever in the record fairly detracts from its weight."). Specifically, as the CRB noted, the most recent IME report from Dr. Marc Danziger stated that Dr. Brown "could return to his job as a professor" and Dr. Brown testified that he could perform his job despite taking the pain medication, *see supra* p. 4. The record also contained an IME report from August 2008, in which Dr. John O'Donnell opined that Dr. Brown was able to return to work if he limited the time he spent standing, and a 2007 IME report from Dr. Danziger, which stated that Dr. Brown "could work as a university professor, even at this point. The major impediment seems to be his lack of desire to return to teaching and his fear of returning to the classroom."

standing restrictions.[5] While his medical record includes statements that he requires "sedentary work with 10 minutes of standing every two hours" and "a scooter for transportation," Dr. Brown did not put on any evidence that his pre-injury job prevented him from adhering to these restrictions and, given the nature of his job, we cannot assume that it did. In contrast to other cases, where petitioners demonstrated that an injury precluded them from performing physically demanding employment,[6] Dr. Brown did not demonstrate that his job required him to be ambulatory or to stand while teaching. In the absence of any such demonstration, the CRB did not err in concluding that the limitations on Dr. Brown's ability to walk or stand did not constitute substantial evidence to support the ALJ's conclusion that Dr. Brown could not perform his pre-injury job.

Accordingly, the order of the Compensation Review Board is

Affirmed.

MCLEESE, *Associate Judge*, concurring in the result: It is unclear to me whether Dr. Brown's initial burden was to prove that he was unable to return to his

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[5] At the hearing before the ALJ, Dr. Brown testified that he needed a "smart room" in order to return to work, by which he seemed to mean a room that was equipped with a device that would allow him to type text that would appear either on a board that all the students could see or on their individual computers. His medical records do not mention the need for a smart room, however. More particularly, to the extent that Dr. Brown needed to avoid prolonged periods of sitting and standing, he did not explain why he could not do this without a smart room. Indeed, the same IME report that discusses the need for "10 minutes of standing every two hours" also states that "[t]eaching from behind a desk with occasional trips to the blackboard or computer would be well within [Dr. Brown's] . . . capability."

[6] *See Logan*, 805 A.2d at 244 (noting that it was "indisputably correct" that the petitioner, a delivery man, had met his initial burden where he showed that his pre-injury job "entailed, among other things, lifting and carrying packages of considerable weight"); *cf. George Washington Univ. Med. Ctr. v. District of Columbia Dep't of Emp't Servs.*, 704 A.2d 1194, 1195 (D.C. 1997) (noting that, where physician-imposed lifting and movement restrictions prevented petitioner, a clinical nurse, from performing her pre-injury job, the employer offered her a modified position).

particular position at Howard or whether instead Dr. Brown was required to show more generally that he was unable to perform the duties of a philosophy professor. If we needed to decide that question, I would be inclined to remand the matter to the CRB, which in my view did not clearly address the question. I am not inclined to reach that question, however, given that Mr. Brown's brief in this court does not adequately identify or brief the question. *See, e.g.*, *Kamit Inst. for Magnificent Achievers v. District of Columbia Pub. Charter Sch. Bd.*, 81 A.3d 1282, 1288–89 & n.25 (D.C. 2013) ("Issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived." (brackets and internal quotation marks omitted)). I further conclude that if Dr. Brown was required to show that he was unable to perform the duties of a philosophy professor, he failed to introduce substantial evidence to support such a conclusion. I therefore join in the judgment affirming the order of the CRB.

ENTERED BY DIRECTION OF THE COURT:

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Clerk of the Court

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