

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

**Department of Employment Services**

VINCENT C. GRAY  
MAYOR



F. THOMAS LUPARELLO  
ACTING DIRECTOR

**COMPENSATION REVIEW BOARD**

**CRB No. 14-069**

**BRENDA GARRETT,  
Claimant-Respondent,**

**v.**

**CARECO, INC.  
and PMA MANAGEMENT CORP**

**Employer/Carrier-Petitioners.**

Appeal from a April 25, 2014 Compensation Order By  
Administrative Law Judge Karen Calmeise  
AHD No. 11-184B, OWC No. 672418

DEPT. OF EMPLOYMENT  
SERVICES  
COMPENSATION REVIEW  
BOARD  
2014 OCT 6 AM 11 13

John Rufe for the Petitioner  
Eric May for the Respondent

Before HEATHER C. LESLIE, MELISSA LIN JONES, and JEFFREY P. RUSSELL, *Administrative Appeals Judges.*

HEATHER C. LESLIE for the Compensation Review Board.

**DECISION AND ORDER**

**OVERVIEW**

This case is before the Compensation Review Board (CRB) on the request for review filed by the Employer - Petitioner (Employer) of the April 25, 2014, Compensation Order (CO) issued by an Administrative Law Judge (ALJ) in the Hearings and Adjudication Section of the District of Columbia Department of Employment Services (DOES). In that CO, the ALJ granted Claimant's request for permanent total disability benefits from July 19, 2011 to the present and continuing as well as payment for medical treatment. We AFFIRM.

## **BACKGROUND AND FACTS OF RECORD**

Claimant was a home health aide for the Employer. Claimant's duties included assisting clients with daily activities including bathing, house cleaning, laundry, and food preparation.

On July 22, 2010, the Claimant was injured when she was ejected from a van that was struck by another vehicle that was involved in a high-speed police chase. Claimant suffered multiple injuries, including fractures of the ribs and pelvis, and spinal injuries. Claimant was hospitalized for a period of time and underwent several surgeries. Upon discharge from the hospital, Claimant entered a nursing home for further care before returning home. Claimant underwent treatment for various conditions related to her work injury, including orthopedic care, post traumatic care, treatment for depression and chronic pain.

After a full evidentiary hearing, a CO was issued on January 31, 2012 wherein it was concluded that the Claimant suffered a 41% permanent partial disability to her right lower extremity as a result of the work injury.<sup>1</sup>

Claimant began vocational rehabilitation in 2012. Vocational rehabilitation was temporarily placed on hold at the end of 2012 and then reinstituted on February 15, 2013.

On September 11, 2012, Claimant, at the request of the Employer, underwent an independent medical evaluation (IME) with Dr. Louis Levitt. Dr. Levitt took a history of the Claimant's injury, performed a physical examination, and reviewed objective testing. Dr. Levitt opined Claimant was at maximum medical improvement. Dr. Levitt further opined that because of the significant injuries to her pelvis and back, Claimant was restricted in what tasks she could perform. Specifically,

I do believe she has the capacity to work but only in a light duty status. I can't imagine she could do extended walking, ladder climbing, lifting or bending. I would limit her lifting not to exceed 35 lbs. Even if she sits for any period of time, she will require a 10 minute period out of each hour to stretch. It is a significant injury.

Employer's exhibit 1.

On March 21, 2013, an ALJ held a Formal Hearing on Claimant's request for permanent total disability benefits from July 22, 2010 to the present and continuing and payment for medical treatment. The sole issue to be adjudicated was the nature and extent of Claimant's disability. A CO issued on April 25, 2014 awarding Claimant permanent total disability benefits from July 19, 2011 to the present and continuing, based on injuries to her lumbar spine and pelvis.<sup>2</sup>

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<sup>1</sup> *Garrett v. CARECO*, AHD No. 11-184A, OWC No. 662398 (January 31, 2012).

<sup>2</sup> Claimant did not appeal the finding that she was entitled to permanent total disability benefits from July 19, 2011 rather than from July 22, 2010 as requested.

Employer has timely appealed. Employer argues the CO erred in awarding permanent total disability benefits as Claimant is currently undergoing vocational rehabilitation services. Employer also argues Claimant's condition has improved and that any determination on Claimant's disability is premature.

Concurrently with the Application for Review, Employer filed a Motion to Remand the case to submit to the ALJ additional evidence. Employer states in the Motion,

While it may not necessarily be probative insofar as consideration of the record below in determining whether the Compensation Order is supported by substantial evidence, it is indicative of the point of a rush to judgment and prematurity of determining permanent total disability.

Employer's argument, unnumbered, at 36.

Claimant opposes Employer's Application for Review. Claimant argues the CO is supported by substantial evidence and is in accordance with the law. Claimant further argues Employer did not demonstrate that there were available jobs Claimant could perform and that much of Employer's argument is based upon conjecture.

#### **STANDARD OF REVIEW**

The scope of review by the CRB, as established by the Act and as contained in the governing regulations, is generally limited to making a determination as to whether the factual findings of the 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. *See* D.C. Workers' Compensation Act of 1979, as amended, D.C. Code § 32-1501, *et seq.*, (the Act) at § 32-1521.01 (d)(2)(A), and *Marriott International v. DOES*, 834 A.2d 882 (D.C. 2003). Consistent with this standard of review, the CRB must affirm a Compensation Order that is supported by substantial evidence, even if there is also contained within the record under review substantial evidence to support a contrary conclusion, and even where this panel might have reached a contrary conclusion. *Id.*, at 885.

#### **DISCUSSION AND ANALYSIS**

Preliminarily we address Employer Motion to Remand. Employer's motion is based upon an alleged job offer presented to Claimant on January 7, 2014. Employer argues the letter is material to the issues presented at the Formal Hearing and also supports Employer's argument that the claim for, permanent total disability benefits, is premature.

7 DCMR § 264, Submission of Additional Evidence, states:

264.1 Where a party requests leave to adduce additional evidence the party must establish:

(a) that the additional evidence is material, and

(b) that there existed reasonable grounds for the failure to present the evidence while the case was before the Administrative Hearings Division or the Office of Workers' Compensation (depending on which authority issued the compensation order from which appeal was taken).

264.2 Where a party satisfies the requirements of subsections 264.1(a) and (b), the Review Panel to which the appeal is assigned, at its sole discretion, may remand the case to Administrative Hearings Division or the Office of Workers' Compensation for such further proceedings as the presiding Administrative Law Judge or claims examiner deems necessary.

The mere fact that new evidence becomes available after the close of the record does not mandate reopening the record for its consideration. The CRB and the District of Columbia . Court of Appeals (DCCA) have both required a showing that due to some unusual circumstances "the relevant, non-duplicative substance of the evidence could not been obtained prior to the formal hearing with reasonable diligence on the part of offering counsel." *Grant v. National Associates*, CRB No. 08-139, AHD No. 05-254A, OWC No. 606489 and 607735 (June 26, 2008); *see also*, *Young v. DOES*, 681 A.2d 451, 456 (D.C. 1996).

While the Claimant may have been offered a job, such job was offered well after the Formal Hearing. As we have stated, "we are of the opinion that it was not contemplated under the Act that the hearing record should be available to be reopened at any time until the issuance of a decision for the consideration of that new evidence." *Winkler v. Washington Hilton Hotel*, CRB No. CRB No. 10-093, AHD No. 05-502D (December 23, 2011). The additional evidence Employer wishes the ALJ to address on Remand has only become available with the passage of time and at this juncture would be more appropriately presented and, as the Act specifically provides, in a request for a modification. *Id.* We conclude such is the case here. Employer's motion is denied.

Turning to the Employer's argument, we first note the ALJ began her analysis quoting the Act and *Logan v. DOES*, 805 A.2d 237 (D.C. 2002). In *Logan*, the DCCA stated:

"A disability is *permanent* if it 'has continued for a lengthy period, and it appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period.'" *Smith v. District of Columbia Dep't of Employment Servs.*, 548 A.2d 95, 98 n.7 (D.C. 1988) (emphasis added) (citing *Crum v. General Adjustment Bureau*, 238 U.S. App. D.C. 80, 86, 738 F.2d 474, 480 (1984)); *see also* 4 ARTHUR LARSON, LARSON'S WORKERS' COMPENSATION LAW § 80.04, at 80-13 (Matthew Bender ed. 2002) ("Permanent means lasting the rest of claimant's life. A condition that, according to available medical opinion, will not improve during the claimant's lifetime is deemed to be a permanent one."). Similarly, "[a] claimant suffers from *total* disability if his injuries prevent him from engaging in the only type of gainful

employment for which he is qualified." *Washington Post v. District of Columbia Dep't of Employment Servs.*, 675 A.2d 37, 41 (D.C. 1996) (emphasis added); see also *Washington Metro. Area Transit Auth. v. District of Columbia Dep't of Employment Servs.*, 703 A.2d 1225, 1229 (D.C. 1997). "Total disability does not mean absolute helplessness, . . . and the claimant need not show that he is no longer able to do any work at all." *Washington Post*, 675 A.2d at 41 (internal citations omitted). Instead, "an employee who is so injured that he can perform no services other than those which are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist, may well be classified as totally disabled." *Id.* (quoting 4 LARSON, *supra*, § 83.01, at 83-2); see also *Lee v. Minneapolis St. Ry. Co.*, 230 Minn. 315, 41 N.W.2d 433, 436 (Minn. 1950).

It is uncontested in the case before us that Claimant cannot return to her pre-injury job because of the severity of her injuries. Thus, Employer has the burden to show the availability of a job Claimant can perform, incorporating the following questions as outlined in *Logan*:

- (1) Considering claimant's age, background, etc., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do? (2) Within this category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he could realistically and likely secure? This second question in effect requires a determination of whether 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.

The employer's showing must address these questions and may be challenged by the claimant as to either answer. Moreover, even if the employer has shown "a reasonable likelihood . . . that [the claimant] would be hired if he diligently sought [a] job," *Joyner*, 502 A.2d at 1031 n.4, a substantial body of law holds that "the claimant may still establish disability by showing that he has diligently sought appropriate employment but has been unable to secure it." *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 542 (4th Cir. 1988) (citing *Trans-State Dredging v. Benefits Review Bd.*, 731 F.2d 199, 200 (4th Cir. 1984)).<sup>3</sup> *Accord*, e.g., *DM & IR Ry. Co. v. Director, Office of Workers' Comp. Programs*, 151 F.3d 1120, 1123 (8th Cir. 1998); *Edwards v. Director, Office of Workers' Comp. Programs*, 999 F.2d 1374, 1376 n.2 (9th Cir. 1993); *CNA Ins. Co. v. Legrow*, 935 F.2d 430, 434 (1st Cir. 1991); *Palombo v. Director, Office of Workers' Comp. Programs*, 937 F.2d 70, 73 (2d Cir. 1991). That principle too is consistent with our decisions, and we adopt it.

*Logan*, *supra* at 243.

The ALJ held:

Claimant testified that prior to the work injury; she was performing her work duties as a home health care aide for mentally and physically disabled persons. Claimant fully participated in and social and family related activities and her pre-existing depressive condition was fully controlled by medication. (HT 28, 32) In support of her claim that she has been permanently totally disabled from July 22, 2010, Claimant further testified that, in addition to the pain, discomfort, and diminished mobility she has as a result of the medical and surgical treatment for her pelvic, rib, and lumbar injuries, she has memory loss, needs help with keeping appointments, taking her medications, and she gets easily frustrated by her physical and mental condition. (HT 44, 45)

Bolstering her testimony, Claimant presents the Vocational Assessment report of Kathleen Sampeck, Vocational Rehabilitation Case Manager, (hereinafter, Sampeck) wherein she opined, after interviewing the Claimant and review of the medical records, that, her cognitive and psychological problems combined with a her physical limitations precludes all work and that she has incurred a 100% loss in employment and earning capacity. Sampeck noted that the Claimant's work history and that her training was limited to home health care for which she is no longer licensed. Sampeck also noted that the Claimant did not possess computer or keyboarding skills and cognitive and memory impairments affect her ability to retain, recall information, and retrain. (CE 6, pg. 47)

CO at 5.

In arguing the CO is not supported by the substantial evidence in the record or in accordance with the law, Employer points to evidence that Claimant was, at the time of the Formal Hearing, participating in vocational rehabilitation. It is settled that there is no prohibition on an employer continuing vocational rehabilitation efforts after Claimant has been deemed permanent, totally disabled. *Brown v. DOES*, 83 A.3d 739 (D.C. 2014). Nonetheless, the ALJ took into consideration Claimant's testimony, the vocational assessment, and concluded that the Employer had not submitted "sufficient evidence that employment was available to Claimant that constituted wage earning potential." CO at 5.

Moreover, after discussing and reviewing the deposition testimony from the vocational counselor hired by Employer, Ms. Mary Dorsey Webster, the ALJ concluded:

I find, after review of Employer's evidence that the possibility of Claimant obtaining employment with her current skills and physical capabilities is poor and the jobs would be of limited quality or dependability. One proposed job would require her to sit with a patient in the hospital to stay with patients and get a nurse when that person needs help. (EE 5, pg. 18) I further find that Claimant's poor memory skills and cognitive ability caused by the traumatic work injury, makes her a poor prospect for training in updated vocational skills. For the above stated

reasons, I do not give great credit to the opinions presented the Employer's vocational rehabilitation specialist.

CO at 6.

What Employer is asking this Panel to do is to reweigh the evidence in Employer's favor. This is a task we cannot do. We affirm the ALJ's conclusion above.

Employer also relies on several medical reports that show Claimant has "consistently improved" over the years to such an extent that her lifting restrictions have increased from a 20 lb. restriction as enunciated by Dr. Whittenberg in January 2012 to a 35 lb. lifting restriction pursuant to Dr. Levitt's September 2012 opinion. Indeed, Employer states,

It is without question that Claimant is medically capable of performing meaningful employment. The bulk of Claimant's submitted evidence seeking to establish the contrary is one to two years stale. Claimant has had substantial treatment since then, and her medical condition has consistently improved.

Employer's argument, unnumbered at 9.

However, at the Formal Hearing, Employer conceded upon questioning that Claimant was at maximum medical improvement, or stated another way Claimant's condition would not improve significantly with further treatment. Hearing transcript at 21. The ALJ took into consideration Claimant's testimony, Employer's evidence, and Employer's contention that Claimant's physical condition showed improvement and rejected this evidence. As the ALJ noted, Ms. Webster, Employer's vocational counselor conceded that because of Claimant's vocational history and injuries, it would be difficult to find a suitable position. CO at 6. Thus, we cannot agree it is "without question" Claimant is capable of performing meaningful employment. We reject Employer's argument.

We conclude the ALJ took into consideration all the evidence and testimony, including evidence pointed out to us by Employer, when concluding Claimant was permanently and totally disabled. As we stated, our role is limited to determining whether the CO is supported by the substantial evidence in the record and in accordance with the law. We cannot reweigh the evidence as Employer would wish us to do. The CRB must affirm a Compensation Order that is supported by substantial evidence, even if there is also contained within the record under review substantial evidence to support a contrary conclusion, and even where this panel might have reached a contrary conclusion. *Marriot*, supra.

**CONCLUSION AND ORDER**

The April 25, 2014 Compensation Order is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

A handwritten signature in black ink, appearing to read 'H. Leslie', written over a horizontal line.

HEATHER C. LESLIE

*Administrative Appeals Judge*

October 6, 2014

DATE