

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 15-053

BROCK MACK,
Claimant-Petitioner,

v.

PREMIUM DISTRIBUTORS OF DC and
SEDGWICK CLAIMS MANAGEMENT,
Employer/Third-Party Administrator-Respondents.

Appeal from a March 10, 2015 Order By
Administrative Law Judge Douglas Seymour
AHD No. 14-591, OWC No. 712780

(Decided July 10, 2015)

Michael J. Kitzman for Claimant
Jonathan M. Marlin for Employer

Before HEATHER C. LESLIE and MELISSA LIN JONES, *Administrative Appeals Judges* and
LAWRENCE D. TARR, *Chief Administrative Appeals Judge*

HEATHER C. LESLIE for the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

Claimant was employed by the Employer as an order selector. On January 8, 2013, Claimant injured his low back and chest when the forklift which he was operating struck a rack.

Claimant sought treatment at Concentra Medical Center where he was diagnosed with a lumbar strain. Claimant was treated conservatively and released to light duty work. Claimant was released to full duty on February 25, 2014 and from medical care two days later.

Because of continued low back pain, Claimant sought additional treatment with his primary care physician, Dr. Shadi Soufi. Claimant was diagnosed with lumbar spinal stenosis and physical therapy was recommended. Claimant was referred to several other physicians who recommended the same treatment modalities. On August 26, 2014, Claimant underwent an epidural steroid injection by Dr. George H. Drakes.

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On July 7, 2014, Dr. Louis Levitt performed an independent medical evaluation (IME) of Claimant at the request of Employer. Dr. Levitt took a history of Claimant's injury and treatment to date, and performed a physical examination. After a normal physical examination, Dr. Levitt opined Claimant had recovered fully from the work injury and could return to work without restrictions.

In March 23, 2013, Claimant was terminated from Employer for cause. Claimant returned to work with a different company on November 19, 2014.

A full evidentiary hearing was held on February 12, 2015. Claimant sought an award of temporary total disability benefits from March 31, 2013 to November 18, 2014, causally related medical expenses, and interest. The issues to be adjudicated were the nature and extent of Claimant's disability and whether Claimant voluntarily limited his income. A Compensation Order (CO) was issued which concluded Claimant failed in presenting a *prima facie* case of total disability and denied Claimant's claim for relief in its entirety.

Claimant timely appealed to the Compensation Review Board (CRB). Claimant argues that the CO's conclusion on the nature and extent of Claimant's disability is in error. Employer opposes arguing the CO should be affirmed as it is supported by the substantial evidence in the record and in accordance with the law.

THE STANDARD OF REVIEW

The scope of review by the 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).

DISCUSSION AND ANALYSIS

Claimant's argument in total is the following:

Here, Mr. Mack contends that up through the date of his termination, he only worked in a limited duty capacity. His termination by the employer effectively made light duty no longer available to the Claimant.

While the employer may contend that the termination constituted a voluntary limitation of income, that issue was not addressed by the Compensation Order in this matter and this matter is not yet ripe for review.

Here, the evidence presented does not support the Compensation Order's findings on the nature and extent of disability.

Claimant's argument at 4.

A review of the CO shows the ALJ acknowledged the burden shifting scheme outlined in *Logan v. DOES*, 805 A.2d 237, 242-243 (D.C. 2002)(hereinafter *Logan*), noting that Claimant first bears the burden of establishing that the work injury prevents the Claimant from performing his

pre-injury job, thereby establishing a *prima facie* showing of total disability, before the burden shifts to Employer. The ALJ, after reviewing the medical reports submitted and the testimony, stated:

To meet his burden of establishing a *prima facie* case of total disability for the period of relief claimed, claimant relies on his testimony and on the reports of his treating physicians at Providence Hospital, Dr. Soufi, Dr. Vebangsi, and Dr. Yokel. Claimant testified that he returned to employer, after his accident, performing light duty work, which consisted of no heavy lifting, and limited walking and standing. Claimant testified that despite his full duty release by Concentra, he did not perform his pre-injury job duties after he returned to work for employer.

Claimant testified that he continues to experience low back pain, pain radiating down his right leg and pain in his right arm. Despite these complaints, Claimant applied for part-time dishwashing and housekeeping jobs. However, neither of these jobs, nor the job Claimant eventually secured at the Washington Hospital Center exchanging linens, are jobs consistent with the restrictions placed on claimant in Concentra's first two reports, which limited claimant's sitting, standing, lifting, pushing, pulling and bending, but did not limit claimant's hours. CE 4, HT 22-25, 32-35.

None of claimant's treating physicians at Providence Hospital addressed claimant's work status, or work capacity, in any of their reports, which covered the period March 11, 2013 through July 7, 2014. Finally, after his appointment on March 11, 2013, claimant received no medical treatment until December 31, 2013, a period of nine and a half months, despite his complaints of back and radicular pain. CE 1. HT 103.

Having observed claimant's demeanor at the hearing, and in view of his inconsistent and contradictory testimony concerning his subjective complaints, his job search efforts, the physical demands of his current job, and his nine and a half months without medical treatment, I did not find credible claimant's testimony concerning his ability to return to his pre-injury duties. In addition, given that Concentra released claimant to full duty work as of February 25, 2013, and there is no medical evidence keeping the claimant out of work after that date, I find claimant has not established that he is incapable of returning to his pre-injury duties after February 25, 2013. Thus, I find claimant failed to carry his burden of establishing a *prima facie* case of total disability after February 25, 2013.

CO at 4-5.

Notably, in footnote 3, the ALJ observed:

Claimant's counsel conceded during his closing argument that Dr. Soufi did not address claimant's work status in any of his reports.

CO at 5.

Claimant, in argument does not point this Panel to any instance where the ALJ was wrong in his assessment of the medical records and the lack of any comment on Claimant's work capacity by his physicians. Claimant also does not appeal the conclusion that Claimant's testimony was

inconsistent and contradictory and overall incredible. Based upon the lack of any physician addressing Claimant's work capacity, a fact conceded by Claimant's counsel at the Formal Hearing, and in light of Claimant's incredible testimony, the ALJ determined Claimant had failed in his initial burden as outlined in *Logan*. As Claimant failed to establish a *prima facie* case of total disability, thereby defeating his claim, the ALJ determined it was not necessary to determine the issue raised by Employer as a defense, that Claimant voluntarily limited his income. We affirm this conclusion.

CONCLUSION AND ORDER

The March 10, 2015 Compensation Order is supported by the substantial evidence in the record and in accordance with the law. It is **AFFIRMED**.

So Ordered.