GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR

LISA MARÍA MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 13-018

CURTIS GIBSON,
Claimant-Respondent,

v.

ARAMARK CORPORATION and SPECIALTY RISK SERVICES/SEDGWICK CMS,
Self-Insured Employer/TPA-Petitioner.

Appeal from a January 29, 2013 Compensation Order By
Administrative Law Judge Amelia G. Govan
AHD No. 07-293A, OWC No. 635657

Curtis B. Hane, Esquire for the Petitioner
David J. Kapson, Esquire for the Respondent

Before MELISSA LIN JONES and Heather C. Leslie, *Administrative Appeals Judges* and Lawrence D. Tarr, *Chief Administrative Appeals Judge*.

MELISSA LIN JONES for the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

On January 23, 2007, Mr. Curtis Gibson, an executive chef, injured his back lifting a large pot of soup at work. In a Compensation Order dated September 27, 2007, Mr. Gibson was awarded temporary total disability benefits from January 27, 2007 to the present and continuing.[1]

At a formal hearing held on October 24, 2012, Mr. Gibson requested permanent total disability benefits from December 5, 2008 to the date of the formal hearing and continuing. In a Compensation Order dated January 29, 2013, an administrative law judge ("ALJ") granted Mr. Gibson's claim for relief because Mr. Gibson has reached maximum medical improvement and Aramark Corporation ("Aramark") has not provided Mr. Gibson with suitable, alternative employment.[2]

[1] *Gibson v. Aramark Corporation*, AHD No. 07-293, OWC No. 635657 (September 27, 2007).

[2] *Gibson v. Aramark Corporation*, AHD No. 07-293A, OWC No. 635657 (January 29, 2013).

Aramark appeals the ruling that it has not provided Mr. Gibson suitable, alternative employment through a position with AllFacilities, Inc. because Mr. Gibson physically is capable of performing the duties of that position and because he is not under any mental or emotional restrictions related to his compensable injury. Consequently, Aramark asserts Mr. Gibson is not entitled to permanent total disability benefits and the Compensation Review Board ("CRB") should reverse the Compensation Order.

In opposition, Mr. Gibson contends his physical restrictions, pain, use of medication, and transferrable skills make his position with AllFacilities, Inc. not suitable. Mr. Gibson requests the CRB affirm the Compensation Order because it is supported by substantial evidence.

ISSUE ON APPEAL

Does Mr. Gibson's position with AllFacilities, Inc. qualify as suitable, alternative employment thereby proving Mr. Gibson is not entitled to permanent total disability benefits?

ANALYSIS[3]

In order to demonstrate entitlement to permanent total disability benefits, a claimant must prove (1) his condition has reached maximum medical improvement, and (2) he is unable to return to either his usual or any other employment as a result of his injury.[4] A "claimant suffers from total disability if his injury prevents him from engaging in the only type of gainful employment for which he is qualified."[5] In assessing the degree of disability, physical condition alone is not determinative; the ALJ also must consider the claimant's age, industrial history, and the availability of other work[6] as well as the claimant's background, experience, and intellectual capabilities."[7]

There is no dispute that Mr. Gibson has reached maximum medical improvement or that he cannot return to his pre-injury usual employment. The issue in this case is whether Ms. Gibson's position with AllFacilities, Inc. qualifies as a *bona fide* position within Mr. Gibson's abilities; the ALJ found that it did not.

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[3] 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).

[4] See *Logan v. DOES,* 805 A.2d 237, 241 (D.C. 2002).

[5] *Washington Post v. DOES,* 675 A.2d 37, 41 (D.C. 1996).

[6] *Logan, supra.*

[7] See *Joyner v. DOES*, 502 A.2d 1027 (D.C. 1986).

In reaching her conclusion, the ALJ found

> Claimant currently has problems with low back pain and pain radiating down into his lower extremities, as well as numbness which occurs with prolonged standing or sitting. It is necessary for him to use a cane frequently, to ambulate and to assist with getting up out of chairs. He cannot lift more than fifteen pounds. The prescribed medication he takes on a daily basis makes him drowsy and affects his cognitive abilities, including writing and conversing. Claimant experiences increased back pain with prolonged sitting, standing, walking, and/or driving as well as with ascending and descending stairs. Because of his medications, he cannot operate machinery or drive. His back and lower extremity symptoms impact Claimant's ability to perform activities of daily living. His gait is altered; he cannot stand or walk for more than a few minutes, and he is especially challenged by the low back pain which occurs with prolonged time spent in any position.[8]

The ALJ also found

> The following is clear from review and consideration of Claimant's testimony; the reports and testimony of Ms. Wallace and Ms. Koslow; and the record medical and psychiatric evidence. During the period of vocational rehabilitation, Claimant did not have one interview. Claimant is not able to return to his former work duties. He has no transferable skills that would assist him in locating suitable alternative sedentary physical demand level type employment. Claimant has not been trained for any computer, or other, programs. Although Claimant can read, write and answer a telephone, he has problems with short term memory, concentration and focusing. He does not communicate verbally in a persuasive or engaging manner. His pain medication causes drowsiness and lethargy, while failing to alleviate his head and lower body pain. In 2009, Claimant's treating orthopedic specialist recommended that he be seen by a psychologist to address symptoms of depression.
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> Claimant's inability to successfully perform the cold-calling activities required by Catalyst/AF was neither willful nor unreasonable. Not only were said activities incompatible with his actual physical, mental and emotional functional deficits, but also the very structure of the job/training "opportunity" precludes productive, sustainable performance of the training activities.[9]

Based upon these findings, the ALJ concluded the work with AllFacilities, Inc. does not constitute suitable alternative employment and Mr. Gibson is entitled to permanent total disability benefits: "At this juncture, Claimant's work-related medical limitations, physical restrictions, and other barriers to employment bring him within the category of permanent total disability pursuant to the Act."[10]

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[8] *Gibson v. Aramark Corporation*, AHD No. 07-293A, OWC No. 635657 (January 29, 2013), p. 4.

[9] *Id.* at p. 6.

[10] *Id.* at p. 8.

Although Aramark disagrees with the conclusion the ALJ reached, the foundational facts are based upon substantial evidence and the conclusion rationally follows from those facts. As a result, the CRB lacks authority to reweigh the facts or to change the conclusion.[11]

Aramark expresses particular distain over the ALJ's ruling that the position with AllFacilities, Inc. is bogus employment:

> Employer's evidentiary submissions do not demonstrate the availability of suitable alternative employment. The artificially created opportunity presented through Employer's subsidized payee Catalyst/AF is not one that Claimant is reasonably capable of performing. Claimant has demonstrated the requisite medical evidence regarding his physical, mental, emotional, and vocational limitations, over a sufficient period of time (four years), to support the determination that he is unemployable.
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> In effect, Employer, rather than actually providing suitable alternative employment within Claimant's medical restrictions, is funding an entity (Catalyst) and paying an intermediary to stand in its place to provide bogus employment. The "job" involves forced performance of a meaningless, frustrating activity at which, in the view of the undersigned, the injured worker is intended to fail, when failure results in diminishing the wage loss benefits for which an employer is liable. The entire process entailed in the "employment opportunity" with Catalyst/AF, as described by the credible witnesses and reflected in the record documents, is repugnant and unfair to injured workers. The requirement that someone make thousands of telephone cold calls, with a pre-determined quotient of "successful" contacts, in order to continue receiving the full amount of wage loss benefits to which they are entitled is a travesty. Employer is in effect, contrary to the humanitarian purposes of the Act, imposing an inhumane hurdle on a sick and suffering injured worker.[12]

The ALJ, however, does not base her ultimate determination upon the legitimacy of the position with AllFacilities, Inc. but upon Mr. Gibson's qualifications, restrictions, and abilities as applied to that position.

CONCLUSION AND ORDER

Mr. Gibson's position with AllFacilities, Inc. does not qualify as suitable, alternative employment so as to defeat Mr. Gibson's entitlement to permanent total disability benefits. The

[11] *Marriott*, *supra*.

[12] *Gibson v. Aramark Corporation*, AHD No. 07-293A, OWC No. 635657 (January 29, 2013), p. 8.

January 29, 2013 Compensation Order is supported by substantial evidence in the record, is in accordance with applicable law, and is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

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MELISSA LIN JONES
Administrative Appeals Judge

August 5, 2013
DATE