

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA M. MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 11-087

JOSEPHINE KORANG,
Claimant-Respondent,

v.

SIBLEY MEMORIAL HOSPITAL
Self Insured Employer -Petitioner.

Appeal from a Compensation Order of
Administrative Law Judge Nata Brown
AHD No. 10-572, OWC No. 643691

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2011 OCT 18 AM 8 42

Robert D. Anderson, Esquire, for the Employer
Charles Krikawa, Esquire, for the Claimant

Before HEATHER C. LESLIE¹, LAWRENCE TARR, and JEFFREY RUSSELL², *Administrative Appeals Judges.*

HEATHER C. LESLIE, *Administrative Appeals Judge*, for the Compensation Review Board.

DECISION AND REMAND ORDER

OVERVIEW

This case is before the Compensation Review Board (CRB) on the request for review filed by the Sibley Memorial Hospital (Employer) of the July 28, 2011, 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 awarded Josephine Korang (Claimant) temporary total disability from October 14, 2007 to the present and continuing. We VACATE AND REMAND.

¹ Judge Leslie has been appointed by the Director of the DOES as a Interim CRB Member pursuant to DOES Administrative Policy Issuance No. 11-02 (June 13, 2011).

² Judge Russell has been appointed by the Director of the DOES as a Interim CRB Member pursuant to DOES Administrative Policy Issuance No. 11-02 (June 13, 2011).

BACKGROUND AND FACTS OF RECORD

The Claimant was a certified nursing assistant (CNA) for the Employer when the stipulated injury of October 14, 2007 occurred. The Claimant injured her back while attempting to assist an overweight patient.

The Claimant was treated by several physicians, including Dr. Vincent Desidario and Dr. Joshua Ammerman. The Claimant underwent objective testing including MRIs and conservative treatment. Dr. Ammerman opined that the Claimant would be unable to return to her job as a CNA and imposed lifting restrictions which would become permanent absent improvement. The Claimant did return for a time to work in a light duty capacity with the Employer. That job position ceased and no other light duty work was offered to the Claimant. The Claimant subsequently found part time work within her restrictions with another Employer.

The Claimant was sent by the Employer for an Independent Medical Evaluation (IME) with Dr. Louis Levitt on two occasions (May 25, 2010 and March 7, 2011) and Dr. Mark Scheer on one occasion (August 4, 2008). Dr. Levitt opined on March 14, 2011 that the Claimant had recovered from any injury suffered on October 14, 2007 and was at maximum medical improvement. Dr. Levitt further opined the Claimant was able to return to her pre-injury job without restrictions.

A Formal Hearing was held on March 17, 2011. The Claimant sought temporary partial disability benefits from October 14, 2007 to the present and continuing with a credit to the Employer for overpayment of benefits.³ The issues presented were the nature and extent of the Claimant's disability, if any, and whether or not the Claimant had voluntarily limited her income. A Compensation Order issued on July 28, 2011 which granted the Claimant's request for disability benefits. The Employer timely appealed.

On appeal, the Employer argues that the CO "failed to adequately address or otherwise explain the basis for the award of temporary partial disability such that the award is erroneous." Employer's Argument at 1. The Employer argues that the opinion of Dr. Levitt adequately rebutted the Claimant's claim for temporary partial disability.

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 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 District of Columbia Workers' Compensation Act of 1979, D.C. Code, as amended, §32-1501 *et seq.*, at §32-1521.01(d) (2) (A) of the ("Act") and *Marriott International v. DOES*, 834 A.2d 882 (D.C. 2003).

³ We will note that listed under the claim for relief is temporary total disability. The ALJ, on page 5, also states the "Claimant asserts that she is temporarily totally disabled as a result of her work injury." *Korang v. Sibley Memorial Hospital*, AHD No. 10-572, OWC No. 643691 (July 28, 2011) It is clear based upon the transcript and in the conclusion of the Compensation Order the Claimant was seeking temporary partial disability. Any reference to temporary total disability will be treated as an administrative error.

Consistent with this standard of review, the CRB must uphold a Compensation Order that is supported by substantial evidence, even if there is substantial evidence in the record to support a contrary conclusion, and even where the CRB might have reached a contrary conclusion. *Id.* at 885.

DISCUSSION AND ANALYSIS

There appears to be some ambiguity over what was stipulated to by the parties. The ALJ, while reciting the stipulations and issues at the Formal Hearing, indicated that “causal relationship” was stipulated to without further explanation. HT at 7. In the CO, the ALJ does list, as stipulated between the parties, the “Claimant suffered an accidental injury on October 14, 2007, which arose out of and in the course of her employment” but fails to mention whether or not medical causal relationship is a stipulated issue. We will assume for purposes of this appeal that both legal and medical causal relationship was stipulated, as when the ALJ recited the issues to be adjudicated only voluntary limitation of income and nature and extent were mentioned. The parties agreed and the Employer does not raise this issue on appeal.

The CO first addressed the issue of nature and extent. In the CO, the Claimant’s legal burden was described as being to produce “substantial, credible evidence of the disability entitling him to the level of benefits he is seeking.” This is error. As the District of Columbia Court of Appeals (DCCA) wrote in *Washington Metropolitan Area Transit Authority v. DOES and Juni Browne, Intervenor*, 926 A.2d 140 (D.C. 2007) (*Browne*):

On the question of the nature and extent of Mr. Browne's disability, the ALJ properly acknowledged that the claimant is not entitled to any presumptions. [citation omitted]; *Dunston v. District of Columbia Dep't of Employment Servs.*, 509 A.2d 109 (D.C. 1986). The worker's compensation act defines disability as a "physical or mental incapacity, because of injury which results in the loss of wages." D.C. Code § 32-1501 (8) [footnote omitted]. Despite the statement by the ALJ in this, and many other cases, that the claimant's burden of proving the extent of a disability is "substantial credible evidence," the correct burden of proof is a preponderance of the evidence [footnote omitted]. *Burge v. District of Columbia Dep't of Employment Servs.*, 842 A.2d 661, 666 (D.C. 2004); *Upchurch v. District of Columbia Dep't of Employment Servs.*, 783 A.2d 623, 628 (D.C. 2001).

Browne, supra, at 149.

Because the ALJ applied the wrong standard in analyzing the evidence, we must vacate the award and remand this matter for further consideration under the proper standard, that of a preponderance of the evidence.

We also note that in the CO the ALJ held that Dr. Levitt’s opinion was insufficient to rebut the Claimant’s evidence. While the ALJ is free to consider and thereafter reject the opinion of Dr. Levitt, the ALJ incorrectly wrote “Employer has not presented exhibits or testimonial evidence to establish the Claimant is able to return to her previous job, nor has Employer established that there are any other available jobs that Claimant is able to perform”. To the contrary, Employer has produced the opinion of Dr. Levitt to precisely that effect, and it is set forth explicitly in EE

2, where he writes “She has the capacity to return to work immediately as a nursing assistant and I would not limit or modify her work activity.”

The DCCA established a “burden shifting” scheme in which a claimant has the initial burden of demonstrating an injury-related inability to perform the duties of the pre-injury job, which demonstration shifts the burden to the employer to either rebut that showing (i.e., demonstrate through medical evidence or otherwise that the claimant is capable of performing that job), or to demonstrate the availability of suitable alternative employment (either through an offer of modified employment with the employer, or the availability of other jobs in the marketplace for which the claimant could compete and likely obtain). Upon making such a showing, the burden reverts to the claimant to rebut employer’s evidence of job availability, which can be done by demonstrating that despite diligence in searching for work, that search has not met with success. *Logan v. DOES*, 805 A.2d 237 (D.C. 2002).

In this case, the Claimant has established, by her testimony and the opinion of Dr. Ammerman, that she is suffering a wage loss, which she claims is the result of limitations from her injury. This established a prima facie case of partial disability, under *Logan*. In opposition to this evidence, the Employer produced the opinion of Dr. Levitt who opines that the Claimant is in fact capable of returning to full duty work. The ALJ is obligated, under *Logan*, to consider this evidence, and determine whether it rebuts the Claimant’s. This entails weighing the opinions of Dr. Levitt and the treating physician.

We are cognizant that the ALJ did ultimately reject the opinion of Dr. Levitt in favor of the treating physician, in line with the established preference for the treating physician in the District of Columbia. However, rejecting Dr. Levitt’s opinion because it does not rebut the Claimant’s claim of temporary partial disability is in error. As stated above, the evidence submitted established that Dr. Levitt opines in both his reports his belief that the Claimant can return to work full duty. This does not mean the ALJ’s rejection of Dr. Levitt’s opinion is ultimately in error. Upon remand the ALJ shall weigh the record evidence as a whole and consider the claim under the preponderance of the evidence standard. If upon weighing the evidence the ALJ determines that Dr. Levitt’s opinion is to be rejected, the Claimant prevails, because the Employer has failed in its burden, under *Logan*. If the ALJ accepts Dr. Levitt’s opinion that the Claimant can return to work, the burden will then shift back to the claimant to show by a preponderance of the evidence that she cannot, in fact perform the job that Dr. Levitt said she is capable of performing.

The Employer’s other assignment of error, that the Claimant is voluntarily limiting her income, is premised on the argument that the Claimant could work more hours than she presently does, even if she is physically limited as she claims. We reject this argument. The Employer has presented no *evidence* of any such work availability. *Logan, supra*. See also *Joyner v. DOES*, 502 A.2d 1027 (D.C. 1986).

As discussed above, we must remand the case back to the ALJ to apply the proper standard of proof as we cannot say the evidence is so one-sided that it would have compelled a finding one way or another. See *Washington Metropolitan Area Transit Auth. v. DOES*, 992 A.2d 1276, 1282 (D.C. 2010).

CONCLUSION AND ORDER

The July 28, 2011 Compensation Order is not supported by the substantial evidence in the record and is not in accordance with the law. The Compensation Order is VACATED and REMANDED for further findings and analysis consistent with the above discussion.

FOR THE COMPENSATION REVIEW BOARD:

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

Heather C. Leslie
Administrative Appeals Judge

October 18, 2011
DATE