GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR

ODIE DONALD II
ACTING DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 17-008

KELLIE BUTLER,
Claimant–Respondent,

v.

HOWARD UNIVERSITY HOSPITAL and
SEDGWICK CLAIMS MANAGEMENT SERVICES,
Employer/Third-Party Administrator-Petitioners.

Appeal of a December 21, 2016 Compensation Order
by Administrative Law Judge Amelia G. Govan
AHD No. 16-480, OWC No. 745427

(Issued April 24, 2017)

David J. Kapson for Claimant
William H. Schladt for Employer

Before HEATHER C. LESLIE, LINDA F. JORY, and GENNET PURCELL, *Administrative Appeals Judges.*

HEATHER C. LESLIE for the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

The following facts are not in dispute:

> On March 25, 2016, Claimant experienced a respiratory event following exposure to irritants in the air in the Howard University Hospital basement, where she worked. The medical report of Shehran Islam, M.D. and Rabia Cherquoui, M.D. indicates she was admitted in "full code" status as a result of intractable coughing which began that morning. The medical diagnosis was acute asthma exacerbation; shortness of breath set off by the acute triggers of chemicals in the hospital basement. CX 1.
>
> Due to the severity of her breathing difficulties, Claimant was admitted to the

hospital. During her three-day stay, her breathing difficulties were exacerbated by chemicals used to strip the floor in the room next to her room. She was discharged from the hospital with an inhaler, prescribed steroids, and was told to take the following two weeks off and to follow-up with a pulmonary specialist. CX 1, p. 16, CX 2-6.

Claimant began treating with pulmonary specialist Vishnu Poddar, M.D. on April 5, 2016. Dr. Poddar noted that the flooding and chemical exposure in March had triggered Claimant's asthma attack and advised her to avoid the triggers for asthma. RX 6, p. 39, 42. On May 17, 2016 he recommended that Claimant switch to a different work environment. RX 6, p. 54. Dr. Poddar indicated that smoke, strong odors, molds, other chemical agents precipitated Claimant's severe asthma attack. RX 6, p. 58.

The most recent disability slip from Dr. Poddar excuses Claimant from work from March 25, 2016 to May 23, 2016. A handwritten, signed notation on the face of Dr. Poddar's May 17, 2016 disability slip reads as follows:

> *patient can return to work. However based on the previous episode of severe resp. problem, we recommend her to be switched to a different area if possible. CX 3, p. 20.

On April 8, 2016 Claimant was cleared for return to work by employee health. When she entered her work area, there were no physical barriers between the basement areas damaged by the flood and Claimant's assigned work area. The contractor reported on April 5, 2016 that the work was completed with no unacceptable moisture levels or notable malodors. RX 3. On the same date, Employer obtained official approval to resume patient care services in some areas of the basement. RX 4, p. 28. However, the actual area where Claimant worked, and became ill on March 25, 2016, had not been remediated in any way. HT 44.

On arrival, Claimant began coughing uncontrollably and experiencing serious breathing problems. Again, she was rushed to the emergency room where she was given oxygen and underwent other emergency protocols. Again, she was admitted to the hospital; this time she was intubated and placed on a ventilator in the ICU. Her admission diagnosis was shortness of breath/asthma exacerbation. CX 17, p. 100-164. Prior to the April 8, 2016 incident, Claimant had never been intubated for asthma exacerbation. CX 17, p. 158.

Butler v. Howard University Hospital, AHD No. 16-480, OWC No. 745427 (December 21, 2016)("CO").

Employer sent Claimant for an independent medical evaluation ("IME") with Dr. Ross Myerson. Dr. Myerson took a history of Claimant's injury, treatment to date, as well as Claimant's prior medical history and performed a physical examination. Dr. Myerson opined that while Claimant does have apparent respiratory problems, these problems pre-date the injury and are unrelated to the

work injury at question. Dr. Myerson also cautioned that when Claimant was able to return to work, she "needs to take care to avoid exposure to respiratory irritants." Employer exhibit 5 at 38.

A full evidentiary hearing occurred on November 9, 2016. Claimant sought an award of temporary total disability from March 25, 2016 to the present and continuing, with a credit to Employer for any unemployment benefits received. The issues presented to be adjudicated were the medical causal relationship of Claimant's respiratory symptoms and the nature and extent of Claimant's disability. Employer, at the hearing, conceded that Claimant was temporarily and totally disabled because of the March 25, 2016 injury through May 23, 2016. A CO was issued on December 21, 2016 which awarded Claimant her requested claim for relief.

Employer appealed. As Employer states:

> The Employer's position in this matter is that Ms. Butler had completely recovered from her symptoms as of May 24, 2016. Thereafter, the Claimant had no respiratory symptoms that were preventing her from returning to work. The only thing that was preventing the Claimant from returning to work was her unsubstantiated fear that returning to work would expose her to additional irritants.

Employer's brief at 3.

Claimant opposes the appeal, arguing the CO is supported by the substantial evidence in the record and in accordance with the law.

ANALYSIS[1]

Prior to addressing Employer's arguments, we note, as did the ALJ, that under *Logan v. DOES*, 805A.2d 237 (D.C. 2002)("*Logan*"), Claimant must establish an inability to return to her pre-injury employment. Once the claimant makes this showing, she establishes a *prima facie* case of total disability and the burden shifts to Employer to present sufficient evidence of suitable alternative employment to overcome a finding of total disability. If Employer meets this evidentiary burden, Claimant may refute the employer's evidence - - thereby sustaining a finding of total disability - - either by challenging the legitimacy of Employer's evidence of available employment or by demonstrating diligence, but a lack of success, in obtaining other employment.

[1] The scope of review by the CRB 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 and this review panel 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.

As to the first step, the ALJ noted:

> Claimant's evidence shows that she is unable to return to her usual employment because of its location. Employer contends that the absence of a disability slip for the period ending May 23, 2016 means Claimant is no longer disabled. This contention does not take into account the full content of Dr. Poddar's last disability slip, which approves return to work in a different area of the hospital. CX 3, p. 20. This recommendation was ignored by Employer, which only offered alternative work -- 5 months later -- in the same location that sickened Claimant.

CO at 7.

First, it is apparent from the above passage that the ALJ concluded Claimant sustained her initial burden, that of establishing a prima facie case of total disability, through not only her credible testimony,[2] but also through the disability slip of Dr. Poddar who opined Claimant should not return to the basement location due to her extreme reactions of March 25, 2016 and April 8, 2015. We affirm this conclusion.

With Claimant satisfying her initial burden, Employer was tasked with presenting sufficient evidence of suitable alternative employment to overcome a finding of total disability. Regarding the second step, the ALJ noted:

> Employer's argument that Claimant is able to return to her usual employment is rejected, in that Claimant's work location is toxic to her. That environment caused two life-threatening respiratory crisis situations which required emergency measures and hospitalization. She has been medically cautioned about encountering those chemicals or other triggers which put her in danger of a respiratory crisis. The fact that the basement may be tolerable for persons without a pre-existing respiratory condition does not mean that Claimant is able to be in that environment. It was not reasonable for Employer to offer Claimant the same job in the same location that triggered her respiratory crisis. The option of suitable alternative employment was not been presented to her; instead, she was offered unsuitable work and then she was laid off.

CO at 7.

Employer's argument is that after May 24, 2016, Claimant could return to her pre-injury employment. In so arguing, Employer relies upon the submitted evidence that the basement where Claimant suffered her injury had been sufficiently cleaned, and that as remediation had occurred, Claimant could return to her usual employment per Dr. Poddar's May 17, 2016 disability slip. Thus, Employer argues, Claimant's disability ceased and Employer was no longer responsible for temporary total disability benefits after May 24, 2016. Employer further argues the ALJ failed to address this evidence and as such, the CO is not supported by the substantial evidence in the record nor is it in accordance with the law.

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[2] Employer has not appealed the ALJ's conclusion Claimant was credible.

In so arguing the above, Employer also states:

> Employer does not challenge that the Claimant was entitled to recover for the exacerbation of her respiratory condition that occurred on March 25, 2016 and again on April 8, 2016. The Employer also does not challenge the fact that the Employer is responsible for the exacerbation of the Claimant's respiratory problems, even though the Claimant had respiratory problems prior to the flooding.

Employer's brief at 5.

Employer also relies heavily on exhibits 1-4, "to show that the remedial work had been done and approved by the appropriate agencies for the District [sic] Columbia to allow the hospital to use the facilities for medical purposes in the basement area in which flooding occurred."

We must reject Employer's arguments. In reviewing the referred to exhibits, we note that the exhibits are dated March 24, 2016[3], April 4, 2016[4], April 5, 2016[5] and April 8, 2016[6]. As Employer concedes that Claimant suffered an exacerbation when attempting to return to work on April 8, 2016, it is noteworthy that three of the relied upon exhibits pre-date April 8, 2016, with one exhibit written on the same day referencing a survey performed the prior month.

Furthermore, Employer also concedes that Claimant was temporarily and totally disabled until May 17, 2016. Thus, in light of Employer's concession that Claimant did suffer an exacerbation when she returned to work due to the conditions at work on April 8, 2016, and that Claimant's disability lasted until May 17, 2016, the exhibits relied upon do not shed any light on the conditions of the basement after her exacerbation on April 8, 2016 as they *pre-date* the accepted exacerbation. Based on the April 8, 2016 exacerbation, we cannot agree with Employer's assertion that these exhibits show that the "irritants have been removed by the remedial action of the hospital". Employer's brief at 8.

Thus, the evidence Employer relies upon does not show any suitable alternative employment. Claimant attempted to return to work after remediation and suffered the same reaction. As the ALJ stated, Claimant was offered unsuitable work in the same location where she suffered respiratory distress and then she was laid off. As Employer does point out, "Claimant credibly testified that she did not want to go back to any place where she might have the same type of respiratory problem." Employer's brief at 7.

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[3] Exhibit 1 is a letter dated March 24, 2016 describing the immediate need remove asbestos from several areas impacted by the broken pipe on March 21, 2016.

[4] Exhibit 2 in a report regarding the results of fungal air testing which occurred on April 4, 2016.

[5] Exhibit 3 is a post-flood moisture intrusion report dated April 5, 2016 outlining results of an investigation which occurred on April 4, 2016.

[6] Attached to the April 8, 2016 letter in exhibit 4 is a summary of an asbestos survey of the basement performed on March 22-25 and March 31, 2016.

Employer also argues that an award of disability is not warranted because Claimant could work at another hospital as a medical supply technician. In so arguing, Employer does not point to any evidence to support this assertion. Employer failed to show sufficient evidence of suitable alternative employment to overcome a finding of total disability. Employer failed at the second step of the *Logan* analysis.

Finally, we note that much of what Employer argues also amounts to a reweighing of the evidence in its favor, a task we are prohibited from doing. As stated above, the CRB and this review panel 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. *Marriott,* 834 A.2d at 885.

CONCLUSION AND ORDER

The December 21, 2016 Compensation Order is supported by the substantial evidence in the record and is in accordance with the law. It is AFFIRMED.

So Ordered.