GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR

DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB 16-096

LARRY D. JONES,
Claimant–Respondent,

v.

TRAYLOR SKANSKA JAYDEE JOINT VENTURE
and ACE/ESIS,
Employer/Carrier-Petitioner.

Appeal from a June 27, 2016 Compensation Order on Remand
by Administrative Law Judge Nata K. Brown
AHD No. 13-235A, OWC No. 698422

(Decided November 21, 2016)

David M. Snyder for Claimant
Julie D. Murray for Employer

Before JEFFREY P. RUSSELL, LINDA F. JORY, and HEATHER C. LESLIE, *Administrative Appeals Judges.*

JEFFREY P. RUSSELL on behalf of the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

Larry D. Jones ("Claimant") worked for Traylor Skansa Jaydee Joint Venture ("Employer") as a welder. In this position, Claimant was required to lift welding torches, oxygen tanks and acetylene bottles which weighed more than 50 pounds. On November 15, 2012, Claimant lifted an oxygen bottle and felt a pop in his stomach. He fell to the ground and dropped the bottle. Claimant was taken by Employer to Concentra, where he was diagnosed with a right inguinal hernia. Claimant was held out of work until November 26, 2012, with restricted activity of no lifting over 10 pounds. Claimant was referred to Dr. Pedro Ceppa for hernia surgery; however Claimant instead made an appointment with Dr. Joel D. Fechter, orthopedic surgeon for November 21, 2012. He was diagnosed with a lumbosacral spine strain secondary to his injury at work on November 15, 2012.

Dr. Fechter referred Claimant to Dr. Craig Colliver for a surgical consultation with regard to his inguinal hernia. Dr. Colliver repaired the hernia on November 26, 2013. Claimant resumed light duty work on December 2, 2013 cleaning offices in the evenings. Dr. Colliver released Claimant to resume full duty work on January 7, 2014. Dr. Fechter recommended work hardening for Claimant on February 6, 2014.

On April 22, 2014, Claimant presented his claim for temporary partial disability ("TPD") benefits and ongoing medical treatment to an Administrative Law Judge ("ALJ") in the Administrative Hearings Division ("AHD") of the Department of Employment Services ("DOES"). On September 30, 2015, the ALJ issued a Compensation Order denying Claimant's claim for TPD and granting Claimant's request for work hardening and EMG nerve conduction studies.

Claimant filed a timely appeal, arguing that the ALJ's finding that Claimant has not demonstrated entitlement to TPD benefits is not supported by substantial evidence and not in accordance with the law.

Employer filed a timely opposition to the appeal, arguing that the ALJ's decision is supported by substantial evidence and is in accordance with prevailing law.

On April 4, 2016, the CRB issued a Decision and Remand Order ("DRO"), which concluded and ordered as follows:

> Notwithstanding Dr. Fechter's light duty restriction and Claimant's testimony that welding requires heavy lifting, the ALJ determined Claimant did not demonstrate an inability to perform his usual job and did not shift the burden to Employer to rebut Claimant's alleged inability or otherwise seek to rebut by establishing the availability of other jobs Claimant could perform.
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> We must agree with Claimant that with Claimant's testimony at the formal hearing which the ALJ described in the CO and the February 6, 2014 opinion of Dr. Fechter that Claimant required work hardening to maximize his functional abilities, which the ALJ found to be a reasonable and necessary expense, Claimant has demonstrated a *prima facie* case of total disability under the *Logan* test. As we conclude the ALJ did not properly apply the standard set forth in *Logan*, we conclude the determination that Claimant is not entitled to the requested TPD is not supported by substantial evidence and in accordance with the law. We must accordingly reverse this conclusion and remand the CO to the ALJ to determine, in accordance with *Logan,* if Employer can rebut a finding that Claimant remains unable to return to his pre-injury duties of a welder by presenting opposing medical evidence as to the extent of claimant's disability. *Ridley v. WMATA*, CRB No. 06-66 (November 2, 2006). Should employer meet this evidentiary burden, claimant, in order to sustain a disability finding, must successfully challenge the legitimacy of the employer's evidence. *Logan, supra* at 243.

CONCLUSION AND ORDER

> The ALJ's conclusion that Claimant has not demonstrated an inability to perform his usual job, and he is not entitled to TPD benefits from December 10, 2013 to the present and continuing is not in accordance with the law and is VACATED. The matter is REMANDED to AHD for the ALJ to determine if Employer has presented sufficient evidence to rebut Claimant's *prima facie* case of disability. If the employer does this, the burden shifts back to the claimant to demonstrate that employer's evidence is faulty or inadequate. The unopposed conclusion that the medical treatment sought by Claimant is reasonable and necessary is AFFIRMED.

On June 30, 2016, the ALJ issued a Compensation Order on Remand ("COR") in which the ALJ reconsidered the claim, and determined that Claimant is unable to return to work as a welder, and awarded Claimant the TPD sought.

On July 29, 2016, Employer filed Employer and Insurer's Application for Review ("AFR") and Employer/Insurer's Memorandum of Law in Support of Application for Review ("Employer's Brief") asserting "the legal conclusions are not supported by substantial evidence and are contrary to established law" (AFR at 1) and concluding the COR "is not in accordance with the applicable law nor is it supported by by the substantial evidence and, as a result, it should be reversed" (Employer's Brief at 9).
Because the facts found by the ALJ in the COR are supported by susbstantial evidence, the conclusions drawn flow rationally therefrom and are in accordance with the law, and because the ALJ fully and completely followed the mandate of the DRO, we affirm the COR.[1]

ANALYSIS

Employer raises two arguments under the general heading that "Judge Brown's June 27, 2016, Compensation Order on Remand Finding the Claimant was Entitled to Temporary Partial Disability Benefits Is Not Supported by Substantial Evidence and is Not in Accordance With Applicable Law". Before embarking on the specific arguments, Employer recites, correctly, that claimants are not entitled to any presumption regarding the nature and extent of disability, bearing the burden of establishing entitlement to the level of benefits sought by a preponderance of the evidence. Employer thereupon cites *Logan v. DOES,* 805 A.2d 237 (D.C. 2002), Dunston. *v. DOES*, 509 A.2d 109 (D.C. 1986), and *Joyner v. DOES*, 502 A.2d 1028 (D.C. 1986) in support of this legal principal, which no one in this appeal disputes. Employer then alludes to another legal concept involving "voluntary limitation of income", an issue not involved in this case, but then correctly states that "the burden falls on the Claimant to establish an inability to perform his usual job and, once he does this, a *prima facie* case of total disability is established and the Employer and Insurer must rebut this by showing evidence of other availabale jobs which the

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[1] While neither the original Compensation Order, the COR, or either party's brief explain, Claimant's claim is for TPD, not TTD, because Claimant has successfully returned to work in a second unrelated employment and is earning wages. This fact does not affect the outcome of this appeal.

Claimant would perform or by presenting opposing medical evidence as to the nature and extent of Claimant's disability. Logan, 805 A. [sic] at 240." Employer's Brief at 3. No reference to the facts of this case are contained in this prefatory material.

Employer proceeds with its first argument: "A. The Claimant cannot meet his burden and show an inability to perform his usual job." Employer's Brief at 3.

In support of this argument Employer embarks on a recitation of facts about the case, among them that: the physician who repaired Claimant's hernia on November 5, 2013 released Claimant to return to work in connection with that condition, first to light duty on December 10, 2013, then full duty on January 7, 2014; Claimant was laid off from his job on the date of the hernia repair; Employer's IME physican, Dr. Cohen, has opined that Claimant's back condition no longer precludes his performing work; and that Dr. Fechter had discharged Claimant from care on December 11, 2013. Employer summarizes that it is "undisputed that the medical evidence shows that Claimant could not show an inability to perform his usual job." *See* Employer's Brief at 5.

Claimant responds to this argument by pointing out that Claimant testified that his ongoing back complaints inhibit returning to the heavy work as a welder, and that Dr. Fechter imposed light duty retrictions (no lifting over 20 pounds) as of February 2014. Review of the COR demonstrates that the ALJ considered these evidentiary points to be relevant in determing whether Claimant had made the requisite *prima facie* showing (CO at 5) and when considering the record as a whole (CO at 6) after finding Employer had rebutted the showing by the evidence cited by Employer in its Brief (CO at 5). In her two concluding analytic paragraphs, the ALJ wrote:

> In assessing the weight of competing medical testimony in workers' compensation cases, attending physicians are ordinarily preferred as witnesses rather than those doctors who have been retained to examine injured workers' solely for purposes of litigation. *Stewart v. D.C. Department of Employment Services*, 606 A.2d 1350 (D.C. 1992).
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> Dr. Fechter opined that Claimant was not capable of returning to the pre-injury employment, and had put him on a light duty restriction since November 21, 2012. The greater weight is given to Dr. Fechter's assessment because he had the opportunity to evaluate Claimant's condition over 20 examinations in a 13-month period of time. Dr. Cohen evaluated Claimant one time, and Dr. Collier [sic] evaluated Claimant twice. Employer has failed to present persuasive medical evidence to support the conclusion that Claimant could go back to his regular job.

COR at 6.

This analysis demonstrates that the ALJ had a proper understanding of the law and applied it to the facts consistent therewith.

Employer includes reference to Claimant's being laid off, and argues that the lay-off severs the relationship between the work injury and the wage loss. Employer's Brief at 5.

Nothing in the first step of the *Logan* burden-shifting paradigm concerns itself with non-injury related factors. The question of whether an employer has rebutted that showing is a matter of its medical evidence, or its showing the availability of other jobs that a claimant could perform despite the work-related impairments. *See Upchurch v. DOES,* 783 A.2d 623, 627 (D.C. 2001). Employer's argument is rejected.

Employer's second argument is that "The Employer and Insurer can rebut any showing made by the Claimant of an inability to perform his usual job." Employer's Brief at 6. Employer thereupon proceeds to identify record evidence[2] that, if ultimately accepted, might support a denial of the claim. None of these arguments are sufficient to cause us to substitute our judgment for that of the ALJ, an exercise we are not empowered to undertake.

CONCLUSION AND ORDER

The findings of fact contained in the Compensation Order on Remand are supported by substantial evidence, the conclusions drawn therefrom are in accordance with the law, and the Compensation Order on Remand is AFFIRMED.

So ordered.

[2] This evidence is largely red herrings, first concerning the ALJ's failure to address Claimant's not seeking to renew his welder certification and resumption of work at a second job, and the fact that Claimant continues to perform his second job (irrelevant since Claimant is seeking only partial disability benefits), and second that a treating physician authorized a return to work (ignoring the fact that that physician's connection to the case is limited to Claimant's hernia, which Claimant does not assert is causing his disability).