

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



GERREN PRICE
INTERIM DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 14-090

LEE M. BROWN,
Claimant-Respondent,

v.

HOWARD UNIVERSITY,
Self-Insured Employer-Petitioner.

Appeal from a June 19, 2014 Compensation Order of
Administrative Law Karen R. Calmeise
AHD No. 04-323D, OWC No. 597092

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2015 JAN 27 PM 1 06

William H. Schladt for the Employer
Reginald L. Holt for the Claimant

Before JEFFREY P. RUSSELL, HEATHER C. LESLIE, *Administrative Appeals Judges*, and LAWRENCE D. TARR, *Chief Administrative Appeals Judge*.

JEFFREY P. RUSSELL, for the Compensation Review Board; LAWRENCE D. TARR, *concurring in part, dissenting in part.*

DECISION AND REMAND ORDER

BACKGROUND¹

On April 19, 2002, Claimant, a college professor of philosophy at Employer's university, fell at work and injured his left knee. He was unable to work due to this injury, underwent a course of medical care including surgery, physical therapy and administration of pain medication.

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.

a period of time.² He was subsequently terminated from his position. Employer also terminated Claimant's temporary total disability benefits. Claimant makes no claim that the termination was retaliatory in connection with this claim.

On November 7, 2013, a formal hearing was held before an Administrative Law Judge (ALJ) in the Administrative Hearings Division of the Department of Employment Services. At the formal hearing, Claimant sought an award of 59% permanent partial disability under the schedule to his left knee, and temporary total disability from April 27, 2010 to the date of the hearing and continuing.

Following that hearing, on June 19, 2014, the ALJ issued a Compensation Order in which she granted the claim in part and denied it in part. The part that was granted was for the claimed period of temporary total disability.

Employer filed a timely appeal of the Compensation Order with the Compensation Review Board, arguing that the ALJ misapplied the law in placing the burden of demonstrating job availability upon Employer where Claimant had failed to demonstrate that his purported physical limitations precluded his performing his pre-injury duties.

Claimant filed an opposition to the appeal, arguing that the Compensation Order is supported by substantial evidence and is in accordance with the law. Claimant did not file a cross appeal or otherwise contest or argue any error for the failure to make the claimed schedule award.

We vacate the award of temporary total disability benefits contained in the Compensation Order and remand the matter to AHD with the instruction that a supplemental order denying the claim be entered.

ANALYSIS

There does not appear to be any issue regarding whether Claimant's leg condition has reached maximum medical improvement or attained permanency: it has. The ALJ decided that, since Employer has not demonstrated Claimant is capable of returning to his pre-injury job, he remains entitled to temporary total disability benefits, and in so concluding, she relies upon *Washington Post v. DOES and Abdil Muhktar, Intervenor*, 675 A.2d 37 (D.C. 1996) (*Muhktar*), and *Logan v. DOES*, 805 A.2d 237 (D.C. 2002).

Logan stands for the proposition that where disability compensation is based upon actual wages earned or not earned, the disability is *prima facie* total where a claimant remains unable to return to the pre-injury job, and is either eliminated upon attainment of the ability to return to the pre-

² The dates and amounts of these payments are not part of the record and are not otherwise said to been in dispute, either at the formal hearing or in this appeal.

injury job or some other job that pays the same or more, or becomes partial where the claimant can return to a lower paying suitable alternative job.

In this Compensation Order, the ALJ quotes from Employer's IME report from Dr. Omohundro, which states that "his current physical limitations do not prevent him from returning to work as professor of philosophy. ... His major impediment to return to work is related to his pain medication and not his physical limitations." Compensation Order, p. 8.

The ALJ then immediately proceeds to note that "Claimant testified that he would be able to work if he would be provided reasonable accommodations as to the amount of time he could stand and sit was limited [sic]. HT at 68. Claimant testified that he was currently attempting to get back to work for employer as it was his opinion that he could teach from a wheelchair. HT at 86." She then makes the statement that "With regards to the medications he was taking, claimant testified that he required significant amounts of pain medication to control his pain and since employer would not permit him to work while on narcotics he tried physical therapy to get off the medications. HT at 64. Claimant also testified that he was taking the same amount and same kind of medication for his pain since 2008 and that he has to take it every day. Claimant's narcotic medications include Oxycodone, Duragesic patch and Dilaudid HT at 69."

In the ensuing paragraph the ALJ accepted this testimony as sufficient to establish Claimant's inability to return to his pre-injury job, writing "Inasmuch as habitual use of narcotic medication has been found in certain situations to be the basis of disability in this jurisdiction, Dr. Omohundro's candid opinion with regard to claimant's pain medication easily meets claimant's initial evidentiary burden of establishing that he is unable to return to his job as a professor and the burden shifts to employer to demonstrate that claimant can return to his pre-injury duties while on narcotic medication [case citations omitted]." Compensation Order, p. 8.

Resort to the hearing transcript presents a somewhat less clear version of Claimant's testimony concerning this reason for Claimant's not returning to his pre-injury job:

THE WITNESS [Claimant]: The physical therapy was that my left leg was extremely weak, and my range of motion very poor. And I require significant amounts of narcotic pain medication to control the pain and keep my blood pressure within a reasonable range. *And Howard would not permit me to work on narcotics.* So I tried my best to get off.

So I did physical therapy, I worked in gyms, I had procedures to try to eliminate the pain – the source of the pain that was causing me to take narcotic medications.

HT at 64, lines 1 – 12 (emphasis supplied).

Taken alone, this testimony would appear to support the ALJ's stated factual assertion that Employer refused to permit Claimant to return to work while on injury related medication. However, the evidence becomes less clear—one is tempted to say contradictory—immediately:

JUDGE CALMEISE: All right. So the reason why you were not reinstated with Howard was that because part of your ongoing treatment required you to take pain medication during the day.

THE WITNESS: *I don't know. It was never stipulated that way.* The stipulation was that Howard urgently needed to replace me. And I had a meeting with Howard, and Howard said that after my surgery, if I let them know within let's say ten working days would I be back if it were reasonable, then the whole termination process would just be dismissed and thrown away because—

JUDGE CALMEISE: Okay. So that was before you finally did not get the approval by the president that all pre-dated the sign-off on by the president that didn't occur; is that correct?

THE WITNESS: Yes. That was before—before then.

HT 64, lines 13 through 65, line 8 (emphasis supplied). And then, on cross-examination:

Q [by counsel for Employer, Mr. Schladt]: And are you currently attempting to get back to work at Howard?

A Yes.

Q And the problem is because they don't have a position for you?

A No. That's not what the problem is. They have not replaced me. They have not done a search to replace me. There's no one there who does the kinds of things that I did.

Q Okay. But you could go back and teach at this point; is that correct?

A Yes. I could teach from a wheelchair. I need a scooter to get around and need one of these smart rooms, which is what I had to use prior to my injury.

Q Okay. And you have an — have you applied to any other universities?

A No. You can't apply without recommendations.

Q Okay. So the inability to go to another university has to do with the fact that you can't get recommendations from your colleagues?

A Yes.

HT 86, line 9 through 87, line 10.

Taking this record as a whole, it appears that the ALJ's finding that Claimant's lack of employment is related to his taking pain medication is not supported by substantial evidence, which must be "more than a mere scintilla". As noted above, our task is to review a Compensation Order for substantial evidence compliance. "'Substantial evidence' means more than just 'a mere scintilla.' It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Children's Defense Fund v DOES*, 726 A.2d. 1242 (D.C. 1999) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Claimant did not testify that he was ever told that he could not teach while taking the subject medication, we have seen no testimony from him that taking his medication impairs his teaching abilities, and he acknowledges that he is in fact capable of teaching but for the lack of professional recommendations. The ALJ's assertion that this record supports a required shifting of the burden to Employer, under *Logan*, "to demonstrate that claimant can return to his pre-injury duties while on narcotic medication" is unsupported by substantial evidence.

Further, the Compensation Order contains the following:

The professional opinion that is most contemporaneous to the claim for relief is the IME report of Dr. Marc Danziger. With regard to claimant's ability to work as a professor, Dr. Danziger opined on December 13, 2011:

I do believe he could return to his job as a professor at Howard University. He likely would have difficulty standing for long periods of time and he states he can stand up to 10 minutes on an occasional basis and that would be my limitation. Otherwise a sedentary job would be necessary. Teaching from behind a desk with occasional trips to the blackboard or computer would be well within his real [sic] of capability. Therefore, he is not completely and totally disabled from the injury. Rather he would be required to do sedentary work with 10 minutes of standing every two hours.

The undersigned agrees with counsel for employer's statement that employer need only show that claimant is able to return to his pre-injury employment and not actually offer him a position under the case law set forth in [*Muhktar*]. However the claimant in the instant matter has never been fully released to his pre-injury duties without limitations. Employers [sic] IME physician concedes that claimant has limitations such as standing 10 minutes every two hours occasionally.

Counsel's response to the undersigned's question if employer could accommodate claimant's physical limitation "There's no evidence they could not" HT at 105, appears to be placing the burden under [sic] on the claimant, and contrary to the burden shifting standard set forth in *Logan* and *Muhktar*. Without testimony from a representative of the employer that claimant would be able to stand up every two hours for ten minutes and be able to continue taking the necessary narcotic medications, it cannot be concluded that employer has met its burden of proof to overcome claimant's initial threshold showing of an inability to return to his pre-injury duties.

In this passage the ALJ demonstrates a misunderstanding of the burdens in this case. It is a claimant's burden to present evidence that the pre-injury job includes physical or other requirements that the work injury prevents the claimant from doing, not an employer's burden to demonstrate that any limitation a claimant has, or any skill or capacity a claimant lacks, is not part of the job.

The Compensation Order is devoid of any findings concerning the requirements of a claimant with Claimant's pre-injury job. Review of the hearing transcript reveals that no one ever asked a single question of Claimant concerning the physical or other requirements of the pre-injury job, and no documentary exhibit purports to describe the requirements of the job.

Claimant has failed to adduce any evidence that he is in any way precluded from performing his pre-injury job as a professor of philosophy. He certainly did not adduce evidence sufficient to shift the burden to Employer to demonstrate anything with regard to whether he is capable of performing the pre-injury job during the period for which benefits are claimed.

CONCLUSION AND ORDER

The finding that Claimant was precluded from performing his pre-injury job as a result of the work injury during the period claimed is unsupported by substantial evidence, and the award of temporary total disability benefits is therefore not in accordance with the law, and is vacated. The matter is remanded to the Administrative Hearings Division for entry of a supplemental Compensation Order denying the claim for temporary total disability.

FOR THE COMPENSATION REVIEW BOARD:



JEFFREY P. RUSSELL
Administrative Appeals Judge

January 27, 2015

DATE

LAWRENCE D. TARR, Chief Administrative Appeals Judge, *concurring in part, dissenting in part*:

While I concur with the majority's conclusion that the ALJ erred in finding that Claimant's inability to do his pre-injury job is related to taking pain medication, I respectfully disagree with the majority's finding that Claimant failed to meet his initial evidentiary burden under *Logan* and that the Compensation Order failed to make findings with respect to the requirements of the pre-injury work and with respect to how the ongoing disability prevents Claimant from doing that work.

Under *Logan*, the claimant had the initial evidentiary burden to prove that his 2002 work injury prevents him from doing his pre-injury job as a professor of philosophy. At the hearing, Claimant testified several times during direct examination that after knee replacement surgery in 2007, he only could do his job with accommodations:

Q. (By Claimant's attorney) We're talking subsequent to October 2007 after you had the surgery...when were you then able to go back to work?

A. (By Claimant) Oh, I was able to go back to work fall semester 2007 with accommodations.

Q. And did you go back to work?

A. No. I was told that I could not come back to work because they could not provide accommodations.

(HT 60-61)

Q. Okay. Do you recall going to John O'Donnell for independent medical evaluation in July 2008?

A. I saw Dr. O'Donnell I 'm not sure of the date.

Q. Now, at the time that you saw Dr. O'Donnell, were you able to go back to work at that period of time?

A. I was always—except when I was septic, I could have worked if I had proper accommodations.

Q. And what do you mean by proper accommodations?

A. Reasonable accommodations like if I had a smart room in which to work. That's a computerized desk where just like you're sitting at a desk and you would type and things would appear on the bulletin board and students can plug their computers in.

{HT at 68)

Q. (By ALJ) So this [smart room] would keep you from having to stand and walk around the classroom?

A. Yes. Yes.

Q. All right. So you needed to be seated primarily?

A. Yes. Yes. I was not permitted to do prolonged standing or even really long, long sitting. I had to move around, but I definitely couldn't do prolonged standing. And sitting in certain positions was also a no-no.

(HT at 68-69)

Similar evidence was adduced during cross-examination:

Q. (By Employer's attorney) Dr. Brown...In 2008, when you were going to go back to Howard, you talked to them about your reinstatement, and you were ready to go back to work at that time?

A. Yes. I could have worked with accommodations.

Q. Right. And you just—they didn't give you the job back; they said they needed—

A. Correct.

Q. So you could have gone back with the accommodations at Howard and gone to teach the courses that you were doing at that time?

A. Yes....

(HT at 82-83).

Q. Okay. But you could go back and teach at this point; is that correct?

A. Yes. Could teach. I would have to have like—I would have to teach from a wheelchair. I need a scooter to get around and need one of these smart rooms, which is what I had to use prior to my injury.

(HT at 86-87).

The ALJ incorporated this evidence into the Compensation Order:

Without testimony from a representative of the employer that claimant would be able to stand up every two hours for ten minutes and be able to continue to take narcotic medications, it cannot be concluded that employer has met its burden of proof to overcome claimant's initial threshold showing of an inability to return to his pre-injury duties.

CO at 9.

Therefore, while I agree with the majority that the record does not support the ALJ's finding with respect to narcotic medicine, I must respectfully disagree with the majority that the Claimant failed to establish his prima facie case.

Moreover, since the undisputed evidence proved Employer did not provide the necessary accommodations after the accident, I would affirm the award of temporary total benefits.

/s/ Lawrence D. Tarr

LAWRENCE D. TARR

Chief Administrative Appeals Judge