

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

**Department of Employment Services**

**MURIEL BOWSER**  
MAYOR



**ODIE DONALD II**  
ACTING DIRECTOR

**COMPENSATION REVIEW BOARD**

**CRB No. 16-137**

**MARY PROCTOR,**  
**Claimant–Respondent,**

**v.**

**WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,**  
**Self-Insured Employer–Petitioner.**

Appeal from a September 19, 2016 Compensation Order on Remand by  
Administrative Law Judge Lilian Shepard  
AHD No. 14-268, OWC No. 625285

(Decided February 13, 2017)

Frank R. Kearney for Claimant  
Mark H. Dho for Employer

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

**HEATHER C. LESLIE**, for the Compensation Review Board.

**DECISION AND ORDER**

**FACTS OF RECORD AND PROCEDURAL HISTORY**

The procedural history pertinent to the current appeal is described by the Compensation Review Board (“CRB”) in a Decision and Remand Order:

On February 8, 2006, the Claimant was working as a systems maintenance worker when she injured her neck and back when attempting to pick up a piece of equipment. Claimant was paid temporary total disability pursuant to a Compensation Order issued on August 9, 2007. *Mary Daniels v. WMATA*, AHD No. 06-335, OWC No. 625285 (August 9, 2007). Claimant’s treating

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physician, Dr. Daniel Glor, opined Claimant was permanently 100% disabled on November 18, 2013.

Employer sent Claimant for an independent medical evaluation (IME) with Dr. Marc Danziger on August 12, 2014. Dr. Danziger took a history of Claimant's injury, treatment, and performed a physical exam. Based on his examination, and prior examinations of Claimant at other IMEs, Dr. Danziger opined Claimant was at maximum medical improvement and could return to work without restrictions.

Claimant began vocational rehabilitation on April 16, 2010 with Ms. Camilla D. Mason. Claimant did not obtain employment. A labor market survey was completed in June of 2014 identifying appropriate jobs within a light physical demand level Claimant was qualified to do.

A full evidentiary hearing was held on December 10, 2014. At the hearing, the Claimant sought to modify a prior Compensation Order which awarded Claimant temporary total disability benefits and sought an award of permanent total disability benefits from November 15, 2013 to the present and continuing, as well as interest on accrued benefits. The Employer contested the nature and extent of the Claimant's disability. In a Compensation Order issued August 31, 2015, the Administrative Law Judge (ALJ) first determined Claimant had satisfied her preliminary burden under *Snipes v. DOES*, 542 A.2d 832 (D.C. 1988) and then that Claimant had sufficient evidence to show there is reason to believe that a change of conditions has occurred which could result in a modification of the prior award. The CO granted the Claimant's request for permanent total disability.

The Employer timely appealed. Employer argues the CO erred in not addressing Claimant's vocational capacity and did not properly apply the burden shifting scheme as enunciated by the District of Columbia Court of Appeals (DCCA) in *Logan v. DOES*, 805 A.2d 237 (D.C. 2002) (*Logan*). The Claimant opposes, arguing that the substantial evidence in the record supports the ALJ's determination that the Claimant is permanently and totally disabled.

*Proctor v. WMATA*, CRB No. 15-162 (May 9, 2016). (Footnote omitted.)

In the DRO, the CRB determined the Compensation Order ("CO") was not supported by the substantial evidence in the record as the Administrative Law Judge (ALJ) had failed to apply the analysis outlined in *Logan v. DOES*, 805 A.2d

237 (D.C. 2002) (“*Logan*”) when determining the nature and extent of Claimant’s disability.

A Compensation Order on Remand (“COR”) was issued on March 31, 2016. The COR concluded that Claimant had failed in her burden of proving that she is permanently and totally disabled.

Claimant appealed. Claimant argues the ALJ erred in applying *Logan*, specifically when tasked to determine whether there is a reasonable likelihood Claimant would be hired if she diligently sought a job. Claimant further argues the ALJ failed to address Claimant’s physical restrictions, including the effects medications Claimant takes on her ability to work.

Employer opposes Claimant’s appeal, arguing the COR is supported by the substantial evidence in the record and is in accordance with the law.

*Proctor v. WMATA*, CRB No. 16-059 (September 8, 2016) (“DRO2”).

In the DRO2, after having considered the parties’ arguments, the CRB concluded the COR erred in the analysis surrounding the third step of *Logan*. The CRB remanded the case for further analysis, taking into consideration Claimant’s job search efforts and its impact, if any, on the ALJ’s determination.

A Compensation Order on Remand (“COR2”) was issued on September 19, 2016. The COR2 granted Claimant’s request for permanent total disability benefits.

Employer appealed. Employer argues the conclusion that Claimant is permanently and totally disabled is in error as the ALJ did not properly consider all the evidence and that the conclusion that Claimant diligently sought out employment is not supported by the substantial evidence.

Claimant opposes the appeal, arguing that the COR2 should be affirmed as it is supported by substantial evidence in the record and is in accordance with the law.<sup>1</sup>

## ANALYSIS<sup>2</sup>

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<sup>1</sup> Concurrent with Claimant’s opposition, counsel also filed a Motion for Leave to File her Opposition To Employer’s Application for Review Out of Time, stating her opposition was late due to inadvertent error in believing the due date to be November 7<sup>th</sup> rather than November 4<sup>th</sup>. As the Employer has not filed any opposition to the Motion, Claimant’s Motion is granted.

<sup>2</sup> 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.

Employer's first argument is that the ALJ did not adequately weigh all of the evidence, including the IME physician opinions, the vocational counselor, the FCE and the Labor Market Survey. We disagree.

As the COR2 notes, it incorporated the Findings of Fact set forth in the August 31, 2015 CO and the March 31, 2016 COR. Along with those two prior orders, and the COR2, it is clear the ALJ took into consideration the medical evidence presented, as well as the Functional Capacity Evaluation ("FCE"), the Labor Market Survey, and the testimony of the vocational rehabilitation counselor, Ms. Mason. For instance, the ALJ states:

Employer's vocational rehabilitation counselor conducted a labor market survey based on Claimant's educational background, physical capabilities, and transferrable skills. Efforts were made to identify jobs within the light physical demand level of Ms. Proctor. These jobs included Administrative Assistant/Officer Manager and Office Coordinator positions. Ms. Mason, the Vocational Rehabilitation Counselor, was of the opinion that there are a range of jobs that exist for Claimant in the Washington, DC, labor market. Ms. Mason found no permanent barriers to Claimant's employment and opined that Claimant is motivated and believes she is employable. In her view, Claimant is highly educated and qualified for various types of jobs such as registrar, social welfare administrator, placement director, manager, etc. The results of the Labor Market Survey revealed that numerous job vacancies currently exist within the Claimant's geographical area, of a varied nature which would be appropriate for Claimant to pursue.

COR2 at 4.

In analyzing the above evidence, the ALJ correctly noted that at the third step in *Logan*, Claimant is tasked with challenging the legitimacy of Employer's contention that there is employment available, or demonstrate diligence, but lack of success, in obtaining other employment. COR at 4. The ALJ stated:

Employer's evidentiary submissions fail to demonstrate the availability of suitable alternative employment for Claimant. While a permanently and totally disabled person remains under an obligation to cooperate with an employer's efforts to return that person to the labor market and while that person's entitlement to ongoing permanent total disability benefits is contingent upon that cooperation, that person is nonetheless permanently and totally disabled until such time as that person is employable. Then, the person's condition may be said to have changed, rendering him or her either only partially disabled or not disabled at all, depending upon the level of wage earning capacity that has been recovered. *Braswell v. Greyhound Lines, Inc.*, CRB No 12-120 (November 13, 2012).

Claimant testified that she would be interested in pursuing jobs in teaching, counseling or church administration, all of which she is imminently [sic] qualified to pursue. She had applied for over 100 jobs over the four year period of working with Ms. Camilla Mason and only received two interviews but no job offers. Claimant possesses two post graduate degrees, one a Doctorate of Divinity, and the other, a Doctorate of Humane Letters. Claimant is limited in jobs that she can do because of her inability to sit for a prolonged period of time and the impact the medication she takes has on her ability to function. Claimant's physical restrictions and lack of success in obtaining employment bring her within the category of permanent total disability pursuant to the Act.

COR2 at 5.

Thus, contrary to Employer's argument, the ALJ did take into consideration the evidence presented, including evidence submitted by Employer and Employer's arguments, when concluding Claimant was permanently and totally disabled. We find no error in the ALJ's analysis and find the conclusion that Claimant is permanently and totally disabled is supported by the substantial evidence in the record.

Employer does not point this panel to an error of law, but rather Employer's arguments and selective reading of the record ask this panel to reweigh the evidence, a task we cannot do. As stated above, the CRB 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.

#### CONCLUSION AND ORDER

The September 19, 2016 Compensation Order on Remand is AFFIRMED.

*So ordered.*