

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 16-059

MARY PROCTOR,
Claimant-Petitioner,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
Self-Insured Employer-Respondent

Appeal from an March 31, 2016 Compensation Order on Remand by
Administrative Law Judge Lilian Shepard
AHD No. 14-268, OWC No. 625285

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2016 SEP 8 AM 9 02

(Decided September 8, 2016)

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

Before HEATHER C. LESLIE, GENNET PURCELL, and JEFFREY P. RUSSELL, *Administrative Appeals Judges*.

HEATHER C. LESLIE, for the Compensation Review Board.

DECISION AND REMAND 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 prior Decision and Remand Order ("DRO"):

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 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.

ANALYSIS¹

Claimant's first and second arguments center around whether the ALJ properly applied the third step in the *Logan* analysis.² Claimant argues:

In applying *Logan*, and analyzing job availability, the ALJ is charged with answering two substantive questions:

(1) Considering claimant's age, background, etc., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do? (2) Within this category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he could realistically and likely secure? **This second question in effect requires a determination of whether there exists a reasonable likelihood, given the claimant's age, education, and vocational background that he would be hired if he diligently sought the job.**

Logan v. DOES, 805 2d 243 (quoting *Joyner v. DOES*, 502 A.2d 1027 n.4) (emphasis added).

Claimant's Application for Review at 2.

Claimant argues the evidence presented in the case is uncontroverted that Claimant was diligent in her employment search but was unsuccessful, thus satisfying her burden under *Logan*. Employer counters this argument stating that the ALJ was correct in concluding Claimant is not permanently and totally disabled because she is in fact employable.

Turning to the COR, we note the ALJ, in the findings of fact, outlines the efforts put forth by Claimant to seek employment with the vocational counselor within her physical restrictions:

Claimant has been working with Ms. Camilla Mason, a vocational counselor, for approximately four years. During that time, Claimant pursued all the leads she was given and sought jobs on her own initiative. She applied for over 100 jobs but only received two interviews and no job offers. Claimant has a Bachelor's degree in religious education, a Master's in church administration, a Doctorate of Divinity in

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.

² Neither party has appealed the ALJ's handling of the first and second step in the burden shifting scheme in *Logan*.

2003, and a Doctorate of Humane Letters Degree in 2005. Claimant's prior employment included being a Chief Financial Officer. Claimant acknowledged that she was a qualified candidate for jobs in counseling, teaching or church administration.

COR at 3.

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 5. After taking into consideration *Logan* and our remand instructions, the ALJ determined:

Claimant testified that she would be interested in pursuing jobs in teaching, counseling or church administration, all of which she is imminently 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 in Doctorate of Divinity and the other, Doctorate of Humane Letters. Claimant is basing her claim for permanent total disability on her inability to find employment but her search efforts and inability to find employment does not equate to permanent total disability.

Claimant's physical restrictions and lack of success in obtaining employment do not bring her within the category of permanent total disability pursuant to the Act.

COR at 6.

We agree with Claimant that the above analysis is in error. An inability to find employment after diligently searching for said employment is a factor that can lead to a finding of permanent total disability.

Logan states:

The employer's showing must address these questions and may be challenged by the claimant as to either answer. Moreover, even if the employer has shown "a reasonable likelihood . . . that [the claimant] would be hired if he diligently sought [a] job," *Joyner*, 502 A.2d at 1031 n.4, **a substantial body of law holds that "the claimant may still establish disability by showing that he has diligently sought appropriate employment, but has been unable to secure it."** *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 542 (4th Cir. 1988) (citing *Trans-State Dredging v. Benefits Review Bd.*, 731 F.2d 199, 200 (4th Cir. 1984)).³ *Accord, e.g., DM & IR Ry. Co. v. Director, Office of Workers' Comp. Programs*, 151 F.3d 1120, 1123 (8th Cir. 1998); *Edwards v. Director, Office of Workers Comp. Programs*, 999 F.2d 1374, 1376 n.2 (9th Cir. 1993); *CNA Ins. Co. v. Legrow*, 935 F.2d 430, 434 (1st Cir. 1991); *Palombo v. Director, Office of Workers' Comp. Programs*, 937 F.2d 70, 73 (2d Cir. 1991). That principle too is consistent with our decisions, and we adopt it.

Logan at 244. (Emphasis added.)

We cannot tell if the ALJ is concluding that Claimant was not diligent in seeking employment as the findings of fact outline all the efforts Claimant put forth in attempting to obtain employment. Nothing in the COR that we have seen suggests any lack of diligence, and the ALJ does not explain “Claimant’s physical restrictions and lack of success in obtaining employment do not bring her within the category of permanent total disability.” It is not a self-evident proposition and the ALJ does not identify what facts this conclusion flowed rationally from.

It may be that the ALJ is stating there still exists within the labor market suitable alternative employment the Claimant could reasonably secure.³ If so, the ALJ must identify the record evidence upon which this finding is based. As it is, we simply cannot tell. We are forced to remand the case for further conclusions of law consistent with *Logan*, quoted above.

Finally, Claimant also argues the ALJ failed to take into account Dr. Glor’s opinion, Claimant’s physical limitations or the effects of the narcotic medications have on Claimant’s ability to pursue job leads. We point out that in the first CO, which has been incorporated in its entirety, the ALJ recognized the several medications Claimant takes, as well as the limitations Dr. Glor placed upon Claimant. The ALJ found the opinion of Dr. Glor persuasive that Claimant was 100% disabled from work.

CONCLUSION AND ORDER

The March 31, 2016 Compensation Order on Remand’s conclusion that Claimant failed to satisfy the third prong of the Logan burden shifting scheme is not in accordance with the law nor supported by the substantial evidence in the record. The Compensation Order on Remand is VACATED and REMANDED for further consideration consistent with the above discussion

So ordered.

³ On this point, the court in *Logan* noted:

We observe that although it is enough under *Joyner* for the employer to show “that a range of jobs exists that is reasonably available and that the disabled employee could realistically secure and perform,” *Bunge Corp. v. Carlisle*, 227 F.3d 934, 941 (7th Cir. 2000), this showing must be specific enough to show compatibility between the claimant’s actual skills and limitations and the duties of the proffered job positions. *See id.* at 942 (“[A] report simply matching general statements of [the claimant’s] job skills with general descriptions of jobs fitting those skills is not enough to show that suitable employment alternatives existed for [him].”)

Logan at 245, n. 5.