

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services
Labor Standards Bureau

Office of Hearings and Adjudication
Compensation Review Board

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NATHALIA BROWN,

Claimant – Petitioner

v.

PEPCO,

Self-Insured Employer – Respondent.

Appeal from a Compensation Order of
Administrative Law Judge Henry W. McCoy
AHD No. 98-259B, OWC No. 525617

Matthew Peffer, Esq., for the Petitioner

Emily C. Hvizdos, Esq., for the Respondent

Before FLOYD LEWIS, SHARMAN J. MONROE and JEFFREY P. RUSSELL, *Administrative Appeals Judges.*

SHARMAN J. MONROE, *Administrative Appeals Judge*, on behalf of the Review Panel:

DECISION AND ORDER

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board pursuant to D.C. Official Code §§ 32-1521.01 and 32-1522 (2004), 7 DCMR § 230, and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005).¹

¹ Pursuant to Administrative Policy Issuance No. 05-01, dated February 5, 2005, the Director of the Department of Employment Services realigned the Office of Hearings and Adjudication to include, *inter alia*, establishment of the Compensation Review Board (CRB) in implementation of the District of Columbia Fiscal Year 2005 Budget Support Act of 2004, Title J, the D.C. Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, sec. 1102 (Oct. 1, 1994), *codified at* D.C. Code Ann. § 32-1521.01 (2005). In accordance with the Director's Policy Issuance, the CRB replaces the Office of the Director in providing administrative appellate review

BACKGROUND

This appeal follows the issuance of a Compensation Order from the Administrative Hearings Division (AHD) of the Office of Hearings and Adjudication (OHA) in the District of Columbia Department of Employment Services (DOES). In that Compensation Order, which was filed on January 18, 2007, the Administrative Law Judge (ALJ) denied the Claimant-Petitioner's (Petitioner) request for permanent total disability benefits continuing from June 24, 2005 with a supplemental allowance, finding that the Petitioner had failed to cooperate with vocational rehabilitation and voluntarily limited her income. The Petitioner now seeks review of that Compensation Order.

As grounds for this appeal, the Petitioner alleges as error that the decision below is arbitrary, capricious and unsupported by substantial evidence in the record.

ANALYSIS

As an initial matter, the standard of review by the Compensation Review Board (CRB) and this Review Panel, as established by the Act and as contained in the governing regulations, is 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. D.C. Official Code § 32-1521.01 (d)(2)(A). "Substantial evidence," as defined by the District of Columbia Court of Appeals, is such evidence as a reasonable person might accept to support a particular conclusion. *Marriott Int'l. v. District of Columbia Department of Employment Services*, 834 A.2d 882 (D.C. App. 2003). Consistent with this standard of review, the CRB and this Review Panel are constrained to uphold 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 the reviewing authority might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

Turning to the case under review herein, the Petitioner alleges that she made a *prima facie* showing per *Logan v. D.C. Department of Employment Services*, 805 A.2d 237 (2002), that she is unable to perform her usual employment duties as a lead shop mechanic. The Petitioner asserts that, in response to the Respondent's rebuttal evidence, she showed that the method used by the Respondent's vocational consultant was unreliable as the consultant did not take into account the Petitioner's age, and showed that she diligently sought employment with the Respondent, including identifying some positions she might be able to perform with the Respondent, but that the Respondent never offered her these positions. Further, the Petitioner asserts that positions identified by the Respondent's vocational consultant were never communicated to her.

and disposition of workers' and disability compensation claims arising under the D.C. Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §§ 32-1501 to 32-1545 (2005) and the D.C. Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Code Ann. §§ 1-623.1 to 1.643.7 (2005), including responsibility for administrative appeals filed prior to October 1, 2004, the effective date of the D.C. Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004.

Consequently, the Petitioner argues that she provided substantial evidence that the Respondent failed to establish suitable employment available within her restrictions and she is entitled to permanent total disability benefits.

As the ALJ indicates, the standard for evaluating the evidence on the nature and extent of an injured worker's disability is set forth in *Logan, supra*, to wit:

Once a claimant establishes a *prima facie* case of total disability [demonstrates an inability to perform his or her usual job], the employer must present sufficient evidence of suitable job availability to overcome a finding of total disability. If the employer meets that evidentiary burden, the claimant may refute the employer's presentation -- thereby sustaining a finding of total disability -- either by challenging the legitimacy of the employer's evidence of available employment or by demonstrating diligence, but a lack of success, in obtaining other employment.

Logan, 805 A.2d at 242-244.

The Court noted that a claimant "is not required to show that he tried to get the identical jobs the employer showed were available [but] merely show that he was reasonably diligent in attempting to secure a job 'within the compass of employment opportunities shown by the employer to be reasonably attainable and available.'" *Logan*, 805 A.2d at 244 (citation omitted).

By way of background, the Court indicated

"that the employer can meet [its] burden 'by proof short of offering the claimant a specific job or proving that some employer specifically offered claimant a job'" and that "job availability should incorporate the answer to 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, 805 A.2d at 243 (citations omitted).

After reviewing the record, the Panel rejects the Petitioner's argument. Although the Petitioner emphasizes that Ms. White Fowler, the Respondent's vocational consultant, did not take the Petitioner's age into consideration, a review of the record reveals that Ms. White Fowler, in doing her vocational assessment and locating jobs for the Petitioner, focused on not engaging in age discrimination against the Petitioner. *See* Hearing Transcript (HT) at pp. 208-211. Moreover, contrary to her assertions, the record shows that the Petitioner did not diligently seek

employment with the Respondent or other employer.² While the Ms. White Fowler asked the Petitioner to make a list of positions with the Respondent which she might be able to perform, the Petitioner did not make such a list. *See* HT at pp. 74-75, 206. Indeed, the Petitioner testified that she did not exert any efforts on her own behalf to look for another job. *See* HT at pp. 61, 87. With respect to the allegation that positions were not communicated to her, the record shows that the Petitioner received positions or job leads from Ms. White Fowler. *See* HT at pp. 39, 41. What Ms. White Fowler did not provide to the Petitioner was a copy of the labor market research report that she generated. *See* HT at pp. 184-186.

In sum, the record was thoroughly reviewed and the Panel finds that the ALJ's factual findings are supported by substantial evidence on the record as a whole, and are, therefore, conclusive. *Marriott Int'l. v. Dist. of Columbia Department of Employment Services*, 834 A.2d 882 (D.C. 2003); D.C. Workers' Compensation Act of 1979, as amended, D.C. Code Ann. § 32-1501 to 32-1545 (2005), at § 32-1521.01(d)(2)(A). Further, the ALJ's conclusions of law rationally flow from the findings and are in accordance with the law. The record fully supports the ALJ's thorough, well reasoned decision, and the Panel, therefore, adopts the reasoning and legal analysis expressed by the ALJ in that decision in affirming the Compensation Order in all respects.

CONCLUSION

The Compensation Order of January 18, 2007 is supported by substantial evidence in the record and is in accordance with the law.

ORDER

The Compensation Order of January 18, 2007 is hereby AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

SHARMAN J. MONROE
Administrative Appeals Judge

May 15, 2007
DATE

² The Panel notes that the Petitioner seems to argue that *Logan* requires an injured worker to diligently seek employment with his/her current employer only. *See* Claimant's Memorandum of Points and Authorities at p. 11. This is an incorrect statement of the law. *Logan* requires that a claimant show "diligence, but a lack of success, in obtaining *other* employment", which means suitable employment with the current or other employer. *See Logan*, 805 A.2d at 244, n. 4. ("The claimant must merely show that he was reasonably diligent in attempting to secure a job . . .").