GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR

LISA M. MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 12-137

CORNELIUS SAVOY,
Claimant–Respondent,

v.

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

Appeal from a Compensation Order by
The Honorable David L. Boddie
AHD No. 08-411A, OWC No. 637087

David J. Kapson, Esquire, for the Claimant-Respondent
Mark H. Dho, Esquire, for the Self-Insured Employer-Petitioner

Before: HENRY W. MCCOY, MELISSA LIN JONES and LAWRENCE D. TARR, *Administrative Appeals Judges*.

HENRY W. MCCOY, *Administrative Appeals Judge*, for the Compensation Review Board.

DECISION AND ORDER

JURISDICTION

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

FACTS OF RECORD AND PROCEDURAL HISTORY

Claimant was working as a transportation supervisor on March 17, 2007 when he fell off a Metro station platform onto the concrete track bed sustaining injuries to his head, neck, right shoulder, lower back, right hip, and left knee. Claimant's multiple injuries were confirmed through objective tests, with his treating physicians at Phillips & Green pursuing a course of conservative treatment including physical therapy.

With regard to his persistent low back pain radiating into his legs, Claimant was referred to a neurosurgeon who, based upon the results of an MRI, recommended back surgery. Claimant elected not to pursue the option of surgical intervention.

In January 2008, Claimant's treating physicians deemed him capable of returning to sedentary work with restrictions on lifting no more than 20 pounds, limited stair climbing, bending, stooping, minimal pushing and pulling, and frequent breaks. Claimant was referred to and participated in vocational rehabilitation and also participated in job placement efforts wherein he applied for numerous positions over a two year period without success.

After Claimant elected not to pursue surgical intervention, his treating physicians deemed him to be at maximum medical improvement (MMI) and discharged him from active treatment. Claimant subsequently filed a claim for permanent total disability benefits.

Following a formal hearing, the presiding administrative law judge (ALJ) found Claimant had reached MMI, that he was unable to return to his pre-injury job as a transportation supervisor, that none of the jobs identified in a labor market survey constituted suitable alternative employment and therefore Claimant was permanently and totally disabled from his job. Accordingly, Claimant's claim for permanent total disability benefits was granted.[1] Employer has timely appealed with Claimant filing in opposition.

On appeal, Employer primarily argues that the ALJ's findings are not supported by substantial evidence. Claimant argues to the contrary and that the Compensation Order (CO) should be affirmed.

STANDARD OF REVIEW

The scope of review by the CRB, 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

[1] *Savoy v. WMATA*, AHD No. 08-411A, OWC No. 637087 (July 20, 2012).

conclusions drawn from those facts are in accordance with applicable law.[2] *See* D.C. Workers' Compensation Act of 1979, as amended, D.C. Code §§ 32-1501 to 32-1545 (2005), at § 32-1521.01(d)(2)(A). 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.

It is well established in this jurisdiction that in order to support a claim for permanent total disability, an injured worker must show that his condition has reached MMI and that he is unable to return to work in his usual employment as a result of that work injury. Once the injured worker establishes this *prima facie* case of total disability, the burden shifts to the employer to present sufficient evidence of suitable job availability. If the employer meets its burden, the injured worker may refute the employer's evidence, and thereby sustain a finding of total disability, either by challenging the legitimacy of the evidence of available employment or by demonstrating due diligence, but a lack of success, in obtaining other employment.[3] The employer can meet its burden short of offering a specific job or proving that some employer specifically offered the injured worker a job.[4]

In the instant appeal, Employer does not dispute that Claimant has reached MMI and is unable to return to his pre-injury job. Rather, Employer takes issue with the ALJ's findings on whether it met its burden of showing suitable alternative employment and whether Claimant made the proper showing by a preponderance of the evidence once the burden shifted back to him.

Employer argues that the ALJ's findings are not supported by substantial evidence insofar as the ALJ incorrectly found there was no evidence of suitable alternative employment because its vocational specialist testified to several job openings that met Claimant's physical limitations and background. It addition, Employer asserts that Claimant limited his job search by failing to apply online for positions and failed to take online training classes with the basic argument being that he did not diligently participate in searching for work within his restrictions.

In addressing Employer's second assignment of error first, we note that this is an argument which basically amounts to an assertion that Claimant failed to cooperate with vocational rehabilitation. However, this was not raised as a contested issue for resolution at the formal hearing. To the contrary, the ALJ specifically footnoted that failure to cooperate was not an issue.[5] In

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[2] "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 International v. DOES,* 834 A.2d 882 (D.C. 2003).

[3] See *Logan v. DOES*, 805 A.2d 237, 242-244 (D.C. 2002).

[4] *Washington Post v. DOES*, 675 A.2d 37, 41 (D.C. 1996) (quoting Joyner v. DOES, 502 A.2d 1027, 1031 n. 4(D.C. 1986)).

[5] *Savoy, supra,* p. 8.

addressing Claimant's job search efforts, while the ALJ noted the vocational counselor's testimony of Claimant's reticence to apply for jobs online, it was also noted that Claimant did apply for "10 to 12 jobs" while he was working with her and that the counselor's reservation that "Claimant's age and permanent light duty restrictions could limit him in the job market, as well as the four year gap in time since he had last worked."[6] As Employer did not raise this issue at the formal hearing, it is precluded from doing so here for the first time on appeal.[7]

With regard to its burden to show the availability of suitable alternative employment, Employer asserts that it did so and that the ALJ erred in finding that its evidence "only provided simple matching of actual skills and limitations to the available position."[8] In addressing the evidence presented by Employer, the ALJ stated:

> The Employer has presented evidence through the testimony of Nicole Crawford, a vocational rehabilitation manager who worked with the Claimant with job placement assistance, and from Labor Market Surveys of numerous jobs in the relevant labor market of the District of Columbia which they contend are actually available and the Claimant could reasonably pursue, obtain and perform. "[A]lthough it is enough under *Joyner [v. DOES*, 502 A.2d 1027, 1031 n. 4 (D.C. 1986),] to show 'that a range of jobs exists that is reasonably available and that the disabled employee could realistically secure and perform,' 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."[9]

The ALJ had also factored in the testimony of Ms. Crawford regarding the two Labor Market Surveys. The first, on June 23, 2011, was based on Claimant's permanent work restrictions imposed by his treating physicians limiting him to lifting no more than twenty pounds; and, the second, on July 19, 2011, that was based on a June 1, 2011 Functional Capacity Evaluation (FCE) that increased his lifting capacity to forty pounds, although this increase was not based on any change in Claimant's medical condition as assessed by his treating physicians. The ALJ also noted that Claimant had applied for "10 to 12" jobs without success and that Ms. Crawford testified that his permanent light duty restrictions and age limited his success in the job market.

The ALJ accordingly reasoned and concluded that:

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[6] *Id*.

[7] See *Transportation Leasing v. DOES,* 690 A.2d 487 (D.C. 1997).

[8] Memorandum of Points and Authorities in Support of Employer's Application for Review, p. 2.

[9] *Savoy, supra*, p. 10.

> Based upon the evidence in the record as a whole, I find the more persuasive and accord the greater weight to the Claimant's evidence, based upon the testimony of the Claimant's vocational rehabilitation expert, that there is no evidence of suitable alternate (sic) employment available to the Claimant, considering his age, education, employment background, transferable skills, and physical limitations and medical restrictions. Considering this evidence, and the medical opinions that the Claimant has reached maximum medical improvement, I find that the Claimant is permanently and totally disabled.[10]

In reaching this conclusion, the ALJ has basically followed the burden shifting device set forth in *Logan*. With it uncontested that Claimant was at MMI, the burden was upon Employer to present evidence of suitable alternative employment. While Employer did make its showing, the ALJ in essence reasoned that upon the burden being shifted back to Claimant that the identified jobs were not compatible with Claimant's actual job skills and work restrictions as determined by Claimant's own vocational counselor, in the alternative, Claimant had demonstrated diligence in pursuing "10 or 12" jobs but without success.[11]

Thus, the ALJ determined that Claimant not only successfully challenged the legitimacy of the evidence of suitable available employment, but also demonstrated due diligence, but lack of success, in obtaining other employment. As this is supported by substantial evidence in the record, the ALJ's conclusion will not be disturbed.

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[10] *Id*.

[11] The ALJ's conclusion also flowed from his findings that:

> I find that the Claimant is sixty-one years old and has worked in the transportation industry for 35 years. I find that the Claimant has a high school diploma. I find that in general aptitude testing performed the Claimant tested below the high school level. I find that the Claimant has limited knowledge or ability in working with computers. I find that the Claimant has few transferable skills. I find that the Claimant's age, education, and limited employment background, and the fact that he has not worked in four years would (sic) are all significant obstacles to his being able to compete and successfully obtain a job in today's market.
>
> I find that no specific jobs identified in the Employer's Labor Market survey satisfy the requirement of showing that it is or would be suitable alternative employment for the Claimant given his age, education, employment background, transferable skills, and physical and medical limitations. I find that the Claimant is permanently and totally disabled as a result of his March 17, 2007 work injury.

Savoy, supra at p. 3.

CONCLUSION AND ORDER

The Compensation Order of July 20, 2012 concluding that Claimant is permanently and totally disabled is supported by substantial evidence in the record and is in accordance with the law. Accordingly, the Compensation Order is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

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HENRY W. MCCOY
Administrative Appeals Judge

November 15, 2012
DATE