

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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CRB No. 05-225

SHIRLEY MASSEY,

Claimant-Respondent

v.

UNIVERSITY OF THE DISTRICT OF COLUMBIA,

Employer-Petitioner

Appeal from a Compensation Order of  
Administrative Law Judge Robert R. Middleton  
OHA/AHD No. PBL XX-876B, DCP No. LTUNK000560

Alan S. Toppelberg, Esquire, for Claimant-Respondent

Thelma Chichester Brown, Esq., for Employer-Petitioner

Before: JEFFREY P. RUSSELL, SHARMAN MONROE, *Administrative Appeals Judges*,  
and FLOYD LEWIS, *Acting Administrative Appeals Judge*.

JEFFREY P. RUSSELL, *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 § 1-623.28, § 32-1521.01, 7 DCMR § 118, and DOES Director's Directive Administrative Policy Issuance No. 05-01 (Feb. 5, 2005), and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005).<sup>1</sup>

<sup>1</sup> 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 and disposition of workers' and disability compensation claims arising under the D.C. Workers' Compensation Act of 1979, as amended, D.C. Code

## BACKGROUND

This appeal follows the issuance of a Final Compensation Order by the Acting Assistant Director for Labor Standards of the District of Columbia Department of Employment Services, approving and adopting a Recommended Compensation Order from the former Office of Hearings and Adjudication, currently the Administrative Hearings Division (AHD) of the Office of Hearings and Adjudication (OHA). In that Recommended Compensation Order (the Compensation Order), which was filed on March 1, 2005, the Administrative Law Judge (ALJ) granted Respondent's claim for restoration of her temporary total disability benefits, payment of unpaid medical bills and provision of future causally related medical benefits, in connection with a work injury sustained on June 7, 1989.

Petitioner's Petition for Review requests the following action be taken in connection with its appeal: reversal of that portion of the Compensation Order which restored Respondent's temporary total disability benefits.

In the Petition for Review, Petitioner identifies the grounds for this appeal as follows: "The decision rendered [by the ALJ] that the Respondent is entitled to temporary disability compensation twenty six years post injury and further that Employer is required to provide a light duty assignment to an employee deemed totally disabled is an erroneous application of the law and therefore, the decision must be reversed". Application for Review (AFR), page 3.

Concerning the two specific matters raised as being erroneous, the first is an allegation of error concerning a causal relationship between the work injury and the current alleged disability. In that regard, Petitioner claims that the ALJ erred because he "chose to credit the reports of Claimant's physicians over those of the Independent Medical Examiners, despite the fact that those reports were written following examinations in 1998 (Dr. Lorenz Ng) and 1999 (Dr. Robert Bunning). While Claimant presented a report from Dr. [Christopher] Magee, dated July 22, 2002, his evaluation was not pursuant to any ongoing treatment in this matter". AFR, at page 6.

The second alleged error is that the finding of temporary total disability status requires a showing that "an employee [...] is unable to engage in the only type of gainful employment for which he/she is qualified", citing *Logan v. Dist. of Columbia Dep't. of Employment Servs.*, 805 A.2d 237 (D.C.. 2002). Petitioner provides no argument or discussion of how the ALJ misapplied the supposed standard, beyond stating what the Petitioner believes the standard to be.

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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.

Lastly, Petitioner alleges that the ALJ erred in finding that Respondent's disability status is "temporary" as opposed to permanent. Petitioner does not indicate how such an alleged error, if changed to a finding of permanent disability, would yield a different result as it relates to Respondent's entitlement to total disability benefits.

Following the filing of the AFR, Respondent, through counsel, filed a Motion to Dismiss the AFR. The two bases for the motion were (1) Respondent's allegations of non-compliance by Petitioner with the Compensation Order itself, and (2) Petitioner's alleged failure to file Memorandum in Support of the AFR.

Respondent's motion cites no authority for the proposition that failing to comply with the Compensation Order under review constitutes a ground for dismissal of the appeal, and we are aware of no such authority. Beyond this, the CRB has no jurisdiction to make factual findings or other determinations concerning the truth or falsity of the claim of non-compliance. That function rests solely with the Administrative Hearings Division (AHD), the branch of the Office of Hearings and Adjudication (OHA) charged with the responsibility for conducting fact-finding proceedings. Further, even were non-compliance stipulated to by the parties, dismissal of the appeal would not appear to be an appropriate action under the Act.

Regarding the alleged failure on the part of Petitioner to file a Memorandum in Support of the AFR, review of the AFR itself reveals that it contains the arguments and legal citations relied upon by Petitioner. Although not styled as such, it appears in form and content to satisfy the requirements of such a memorandum. Accordingly, we deny the motion to dismiss the AFR.

Respondent has not filed any additional response to the AFR.

#### ANALYSIS

As an initial matter, the scope of review by the Compensation Review Board (CRB) and this Compensation 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. Comprehensive Merit Personnel Act of 1978, as amended, D.C. Official Code § 1-623.01, *et seq.*, at § 1-623.28 (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. Dis. of Columbia Dep't. of Employment Servs.*, 834 A.2d 882 (D.C. 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, Petitioner first alleges that the ALJ erred in finding a causal relationship between the work injury and the current alleged disability, specifically complaining that the ALJ erred because he “chose to credit the reports of Claimant’s physician over those of the Independent Medical Examiners, despite the fact that those reports were written following examinations in 1998 (Dr. Lorenz Ng) and 1999 (Dr. Robert Bunning). While Claimant presented a report from Dr. Magee, dated July 22, 2002, his evaluation was not pursuant to any ongoing treatment in this matter”. Petitioner argues that the IME reports that it submitted were “substantial evidence to conclude that that any causal connection between Claimant’s disabling conditions and the work related incident of 1989 had been severed”. AFR, page 6.

This argument represents a fundamental misunderstanding<sup>2</sup> of the CRB’s role in reviewing the Compensation Order. The fact that Respondent may have submitted “substantial evidence” in support of its position is beside the point. Our role is to determine, in the face of an allegation of a *lack* of substantial evidence, whether there is indeed substantial evidence to support the conclusion that the ALJ reached. The argument presented by Petitioner is nothing more than that, in Petitioner’s view, the evidence that it presented was more persuasive, because it is somewhat more current and is the “most comprehensive” medical evidence in the record. AFR pages 5 – 6.

It has long been established that once a claim for disability benefits has been accepted and those benefits have been commenced, any subsequent modification of those benefits in the nature of a reduction or termination must be supported by “persuasive medical evidence”. *Chase*, ECAB No. 82-9 (July 9, 1992); *Mitchell*, ECAB No. 82-28 (May 28, 1983); and *Stokes*, ECAB No. 82-33 (June 8, 1983). Although he did not specifically cite this rule, the ALJ clearly reviewed the evidence and concluded that Petitioner’s evidence did not meet this standard. He did this in part by relying upon the treating physicians’ opinions, but it is noteworthy that the ALJ also made numerous specific findings concerning Respondent’s physical limitations, which were at odds with the IME conclusions, (see, Compensation Order, page 3) and which are therefore in the nature of credibility findings, findings which are especially within the discretion of the ALJ and entitled to special deference upon review. That is, the ALJ chose to accept Respondent’s

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<sup>2</sup> Petitioner appears to be misconstruing the effect of substantial evidence in opposition to a “presumption” of causal relationship, and arguing that “rebutting” the presumption of a causal relationship is the same as disproving that connection. First, such an analysis is entirely inapposite in public sector compensation cases, because there is no “presumption” of causal relationship under that act. Unlike the D.C. Workers’ Compensation Act covering private sector workers’ compensation claims, D.C. Official Code §§ 32-1501 to 32-1545, which has a statutory presumption of compensability (at § 32-1521) which has been judicially interpreted to include a presumption of causal relationship (see *Whittaker v. Dist. of Columbia Dep’t. of Employment Servs.*, 531 A.2d 844 (D.C. 1995)), the Act governing these proceedings contains no presumptions. Second, even under “presumption” analysis, an employer who presents evidence sufficient to overcome, or “rebut”, the presumption is not entitled to a victory. Rather the evidence is then weighed by the fact finder, as was done in this case, and which Petitioner concedes was done, with the ALJ choosing to accept the treating physician’s opinions in preference to those of the IME physicians, a choice that is in accord with the long established principle in both public and private sector cases, of giving such opinions greater weight. See *Butler v. Boatman & Magnani*, OWC No. 044699, H&AS No. 84-348 (Dec. 31, 1986), *Short v. Dist. of Columbia Dep’t. of Employment Servs.*, 723 A.2d 845 (D.C. 1998), and *Stewart v. Dist. of Columbia Dep’t. of Employment Servs.*, 606 A.2d 1350 (D.C. 1992).

description of her condition rather than the IME physicians' descriptions, and that choice is one that he, as the person observing the Petitioner firsthand, is in the best position to make.

Regarding the second area of contention, Petitioner attacks the finding of temporary total disability status, arguing that such a status requires a showing that "an employee [...] is unable to engage in the only type of gainful employment for which he/she is qualified", citing *Logan, supra*. Petitioner makes no argument, and the AFR contains no discussion concerning how the ALJ misapplied the supposed standard beyond stating what the Petitioner believes the standard to be. Petitioner apparently (but not explicitly) argues that the IMEs upon which it relies demonstrate some level of employability, which it implies (but does not explicitly state) is sufficient to defeat a claim of total disability, under *Logan*. This is somewhat amplified by Petitioner's assertion in the "Standard of Review" portion of the AFR that the ALJ erred by supposedly finding that "Employer is required to provide a light duty assignment to an employee who has been deemed totally disabled". AFR, page 4.

First, Petitioner's description of the *Logan* standard is not accurate. The Court of Appeals in *Logan* established a framework in which the first question to be addressed is whether a claimant is capable of returning to the pre-injury job without restriction. If the answer is yes, then there is no ongoing disability. If the answer is no, the burden has shifted to employer to demonstrate job availability, either by producing evidence that employer has offered a suitably modified job to the claimant, or has identified other suitable jobs in the relevant labor market that are available and for which the claimant could compete. If such jobs are shown to be such that a claimant could be expected to earn the same or more wages as the pre-injury average weekly wage, there is no wage loss attributable to the work injury, and hence no disability; if those available jobs would be expected to pay less than the pre-injury average weekly wage, there is a partial disability measured by the difference in pre-injury wages and available wages. In either case, upon employer's making a showing of such actual or theoretical availability, the burden shifts back to the claimant to demonstrate that employer's evidence is flawed or inferior to claimant's counter-evidence concerning the ability to compete for a job in the labor market, either by offering contrary physical capacity and/or labor market evidence, or demonstrating that despite diligence in attempting locate employment, none has been obtained, or both.

As the ALJ noted, and Petitioner does not dispute, Petitioner never presented evidence that it had offered Respondent a modified job within her physical capacity, found her a suitable, lighter duty job, or that there were specific, identifiable jobs in the relevant labor market paying specific wages that were within Respondent's physical capacity and for which she could compete. Coupled with the ALJ's finding that Respondent's physical condition is not conducive to a return to her pre-injury job as a secretary, a finding that Petitioner does not dispute anywhere in the AFR, such a failure in production on Petitioner's part compels a finding of ongoing total disability under *Logan*.

Lastly, Petitioner alleges that the ALJ erred in finding that Respondent's disability status is "temporary" as opposed to permanent. Petitioner does not indicate how such an

alleged error, if "corrected" to a finding of permanent disability, would yield a different result as it relates to Respondent's entitlement to total disability benefits. Accordingly, we decline to impose a finding of permanent total disability, as opposed to temporary total disability, leaving that change in status to be arrived at in the normal course of future proceedings, if it becomes appropriate.

#### CONCLUSION

The Compensation Order of March 1, 2005 is supported by substantial evidence and is in accordance with the law.

**ORDER**

The Compensation Order of March 1, 2005 is hereby affirmed.

FOR THE COMPENSATION REVIEW BOARD:

  
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JEFFREY P. RUSSELL  
Administrative Appeals Judge

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May 11, 2005  
DATE