GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR

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INTERIM DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 14-109

DEPT. OF EMPLOYMENT SERVICES
COMPENSATION REVIEW BOARD
2015 JAN 27 AM 11 21

WILLIAM H. LITTLE,
Claimant–Respondent,

v.

COMPASS GROUP and
GALLAGHER BASSETT SERVICES,
Employer/Carrier–Petitioner.

Appeal from an August 27, 2014 Compensation Order by
Administrative Law Judge Amelia G. Govan
AHD No. 14-084A, OWC No. 708285

Allen J. Lowe for the Claimant
Anthony J. Zaccagnini for the Employer

Before, LINDA F. JORY, HEATHER C. LESLIE, *Administrative Appeals Judges and Lawrence D. Tarr, Chief Administrative Appeals Judge.*

LINDA F. JORY for the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

Claimant worked in the employer's Shipping and Receiving Department performing heavy physical labor. On February 23, 2010, the claimant was unloading cases of sodas when he injured his right upper extremity. Claimant treated with Dr. Benjamin S. Shaffer who found claimant had findings consistent with ulnar neuritis. Dr. Shaffer determined that claimant had permanent restrictions of no lifting or carrying with his right arm. Employer paid claimant temporary total disability benefits from February 23, 2010 until the employer terminated the claimant's benefits on December 27, 2013. The Notice of Controversion filed on December 23, 2013 indicated that benefits were being terminated because claimant had reached MMI.

A full evidentiary hearing occurred on April 10, 2014. The claimant sought an award of permanent total disability benefits from December 28, 2013 to the present and continuing as well as a penalty pursuant to D.C. Code § 32-1528(b) for termination of compensation benefits in bad faith. Following a formal hearing before an administrative law judge (ALJ), a Compensation

Order (CO) issued on August 27, 2014. The ALJ concluded the claimant is permanently totally disabled and is entitled to permanent total disability benefits effective December 28, 2013, as well as bad faith penalties set forth in § 32-1528 of the Act.

The employer timely appealed. The employer asserted that the CO should be reversed as it is neither in accordance with applicable law nor is it supported by substantial evidence. The claimant opposed the employer's appeal, asserting the ALJ applied the law correctly and relied on substantial evidence in reaching her conclusions.

STANDARD OF REVIEW

The scope of review by the Compensation Review Board (CRB) and this Review Panel (hereafter, the 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. Code § 32-1501, *et seq.*, (the Act) at § 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. DOES,* 834 A.2d 882 (D.C. 2003). Consistent with this scope of review, the CRB and this Panel are bound 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.

ISSUES ON APPEAL

1. Is the August 27, 2014 Compensation Order supported by substantial evidence and in accordance with the law?

2. Did the ALJ properly apply the *Logan* burden-shifting analysis to determine the claimant's entitlement to permanent total disability benefits?

2. Does the evidence support the ruling that the employer acted in bad faith in terminating the claimant's wage loss benefits?

ANALYSIS

In support of its request for review, the employer asserts the ALJ made findings that have no evidentiary support and made conclusions of law that did not rationally follow the factual findings. Specifically, the employer defined its "Legal Argument" as:

> 1. The Employer/Insurer contend the ALJ's decision [that] Claimant is permanently and totally disabled is incorrect as a matter of law based on the evidence proffered by the parties.

2. The Employer/Insurer contend that the ALJ's conclusion [that] Claimant is entitled to the bad faith penalty set forth in §32-1528(b) is incorrect as it is not supported by substantial evidence or case-law.

3. The Employer/Insurer reserve the right to supplement the Legal Argument upon further review.

The claimant has correctly asserted the employer's Memorandum of Points and Authorities does not specify which findings of facts are not supported by substantial evidence. Nor does the employer identify which legal conclusions drawn from the ALJ's findings of facts are not in accordance with the applicable law. Claimant asserts that the CO is supported by substantial evidence and in accordance with the law. Employer has not provided any facts to suggest the ALJ failed to base her decision on substantial evidence.

The ALJ properly set forth the standard set forth in *Logan v. DOES,* 805 A.2d 237 (D.C. 2002)(*Logan*) for determining the nature and extent of a disability[1].

The ALJ concluded that the claimant demonstrated a *prima facie* case of total disability under the *Logan* test. The ALJ explained:

> In support of Claimant's position, I relied upon the expert opinions of Dr. Phillip Bussey in addition to all of the medical records in evidence. Claimant has demonstrated the requisite medical evidence regarding his physical, mental, educational and vocational limitations, over a sufficient period of time, to support the determination that his unemployable.

With regards to employer's burden, the ALJ stated:

> Employer does not contend, and has not shown, that there is employment available or that Claimant has failed to demonstrate diligence, but lack of success, in obtaining other employment.

CO at 5.

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[1] In *Logan* , the District of Colombia Court of Appeals explained the system employed under the Act for determining the extent of disability A claimant must establish in the first instance that the work injury prevents the performance of the claimant's pre-injury job. If the claimant establishes this, a *prima facie* showing of total disability is established, shifting to the employer the burden of rebutting that showing, either by demonstrating that the claimant can in fact return to the pre-injury job, or showing that the employer has offered a modified position to the claimant which is within the claimant's physical capacity, or showing that there are other suitable alternative jobs available in the employment marketplace to persons such as the claimant for which the claimant could compete in light of claimant's age, education work experience, and physical capacity. If the employer does this, the burden shifts back to the claimant to demonstrate that employer's evidence is faulty or inadequate, by, for example, demonstrating that the claimant has actively and diligently sought employment but failed to obtain work.

The ALJ concluded:

> Thus, at this juncture, Claimant's work-related medical limitations, physical restrictions, and other barriers to employment bring him within the category of permanent total disability pursuant to the Act. *See Logan, supra*; *Smith v. D.C. Department of Employment Services*, 548 A.2d 95 (D.C. 1988); *Joyner v. D.C. Department of Employment Services*, 502 A.2d 1027, 1031 (D.C. 1986); *Wormack v. Fischback & Moore Electric*, CRB No. 03-159 (July 22, 2005); *Negussie v. D.C. Department of Employment Services*, 915 A.2d 391 (D.C. 2007).

CO at 5.

This panel acknowledges that while the ALJ concisely listed as an issue "Is Claimant's current total disability permanent or temporary in nature?", she did not go into great detail how she concluded that claimant's disability was permanent. This Panel finds no reversible error in the ALJ's approach as the ALJ's findings of fact support her conclusion. Specifically, the ALJ found:

> Claimant has been permanently medically restricted from returning to the full duties of his usual employment. To date, Employer has neither offered Claimant any suitable alternative light duty nor provided vocational rehabilitation assistance. At this time, Claimant has no transferrable skills which would enable him, with his current medical restrictions, from (sic) competing in the labor market. In February 2014, Claimant was awarded SSI disability benefits.
>
> Claimant's treating physician, Benjamin S. Shaffer, M.D. determined that his right upper extremity condition reached maximum medical improvement by August 16, 2013. Because of findings consistent with ulnar neuritis, Claimant is permanently restricted from any work activities which involve depending upon his right upper extremity for any overhead work, lifting or carrying. His only transferable skills are honesty and simple record-keeping. Employer has not offered Claimant any vocational rehabilitation services; if he underwent a two-year period of retraining, he still would not be competitive in the current labor market.
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> Vocational Rehabilitation Consultant Phillip Bussey, Ph.D., CRC, was retained on Claimant's behalf. Dr. Bussey reviewed medical and other records before he interviewed and evaluated Claimant on September 18, 2013; he provided a Vocational Assessment report on September 23, 2013. His conclusion was that Claimant is unable to obtain and/or sustain gainful employment, that he is no longer an employable person and that this is a permanent status.

CO at 3.

The ALJ's findings of fact and conclusion of law that claimant is permanently and totally disabled is supported by substantial evidence and is in accordance with the law.

With regard to claimant's request for bad faith penalties pursuant to § 32-1528 of the Act, the ALJ correctly identified the pertinent language of the Act and the applicable standard set forth by the CRB in *Bivens v. Chemed/Roto Rooter Plumbing Services*, CRB No. 05-215, AHD No. 01-002B, OWC No. 560668 (April 28, 2005).

The ALJ determined that pursuant to *Bivens* test, claimant had established (1) entitlement to his wage loss benefits; (2) employer had knowledge of claimant's entitlement to the wage loss benefits and (3) employer did not pay those benefits after December 27, 2013. Accordingly, the burden shifted to the employer to show a good faith basis for not paying the benefits.

With regard to employer's burden the ALJ stated:

> Employer's position is that Claimant was able to return to the full duties of his usual employment, as indicated in the IME report of Dr. Johnson. It is argued that if vocational rehabilitation had been offered, Claimant could have returned to suitable alternative gainful employment earning his prior average weekly wage. Employer further suggests that Claimant may have been unwilling to participate in vocational rehabilitation or to return to work.

CO at 6

Although the Notice of Controversion was not made part of the record, the ALJ accepted the testimony of Teri Wise, claims adjuster for insurer, that she filed the Notice of Controversion at the advice of counsel on December 23, 2013 and that the stated reason for denial of the claim was the Claimant was deemed to have reached MMI. CO at 3, n.1. The ALJ further acknowledged that Ms. Wise testified at the hearing that although the Notice of Controversion stated "MMI", the termination of benefits was actually based upon the IME opinion of Dr. Johnson. CO at 4. Nevertheless, the ALJ determined:

> Employer has failed to show a good faith basis for not paying the benefits, in that Employer's own IME permanently restricted Claimant from returning to his usual employment.

CO at 6, 7.

The ALJ's characterization of the IME physician's restrictions as "permanently restricting Claimant from returning to his usual employment", despite Dr. Johnson's statement that he saw "no compelling evidence that would suggest he cannot do full duty work at his previous level of employment" stems from her finding that claimant's usual work duties included overhead lifting and overhead work activity and Dr. Johnson did state that he would provide claimant with overhead lifting restriction. The ALJ made two findings that claimant's work duties involved overhead lifting and she found claimant to have testified credibly. CO at 2, 3. The Panel can find nothing in the record that contradicts the ALJ's findings on this issue.

The Panel further notes that the employer's attempt to speculate at the hearing what claimant would do if in fact it offered vocational rehabilitation does not establish a good faith effort for terminating claimant's benefits.

The ALJ's determination that employer acted in bad faith when it terminated claimant's benefits is accordingly affirmed.

CONCLUSION AND ORDER

The ALJ did not err in ruling that claimant had established that he was permanently and totally disabled. The August 27, 2014 Compensation Order is supported by substantial evidence and is accordance with the law and is hereby AFFIRMED.

LINDA F. JORY
Administrative Appeals Judge

January 27, 2015
DATE