GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR

LISA M. MALLORY
DIRECTOR

Compensation Review Board

CRB No. 12-174

BARRY J. WILLIAMS,
Claimant–Petitioner,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
Self Insured Employer-Respondent

Appeal from a Compensation Order by
The Honorable Gerald D. Roberson
AHD No. 12-302, OWC No. 646212

David J. Kapson, Esquire, for the Claimant/Petitioner
Sarah O. Rollman, Esquire, for the Self-Insured Employer/Respondent

Before: HENRY W. MCCOY, JEFFREY P. RUSSELL,[1] *Administrative Appeals Judges* and LAWRENCE D. TARR, *Chief Administrative Appeals Judge*.

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 as amended, 7 DCMR § 230, *et seq*., and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005).

[1] Judge Russell has been appointed by the Director of the DOES as an interim CRB member pursuant to DOES Administrative Policy Issuance No. 12-01 (June 20, 2012).

FACTS OF RECORD AND PROCEDURAL HISTORY

Claimant worked for Employer as a bus operator. On June 6, 2008, the Metro bus Claimant was operating was struck by another Metro bus causing Claimant to sustain injury to his mid and lower back with radiating numbness down both legs, but primarily his right leg. Following initial emergency room treatment, Claimant has received ongoing treatment from orthopedic surgeon Dr. Michael Goldsmith.

As a result of his work injury, Claimant has missed various periods of work. Employer made voluntary payments of temporary total disability (TTD) for the periods January 7, 2008 to August 10, 2008; December 17, 2008 to March 13, 2010; and April 30, 2011 to August 22, 2011. Employer had Claimant examined by Dr. John Cohen, an orthopedic surgeon, on July 7, 2011, who opined that Claimant was capable of returning to work full duty as a bus operator. It was based on this opinion that Employer ceased voluntary payments to Claimant on August 22, 2011.

Claiming he was still disabled and unable to work from August 23, 2011 until May 4, 2012 when he found another job, Claimant requested a formal hearing seeking TTD benefits for that period. On September 25, 2012, a Compensation Order (CO) was issued granting Claimant's claim for relief in part with Employer ordered to pay TTD benefits from August 23, 2011 to October 16, 2011, but denying benefits from October 17, 2011 to May 4, 2012.[2] Claimant timely appealed with Employer filing in opposition.

On appeal, Claimant asserts that the ALJ's findings that he was not disabled from performing his pre-injury job for the excluded period is not supported by substantial evidence thus requiring that part of the CO be reversed and the entire period of his claim for relief should be granted. Employer counters that the CO should be affirmed because there is substantial evidence in the record to support the ALJ's decision notwithstanding there being substantial evidence to support a contrary conclusion. We agree and affirm.

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 conclusions drawn from those facts are in accordance with applicable law.[3] *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

[2] *Williams v. WMATA*, AHD No. 12-302, OWC No. 646212 (September 25, 2012).

[3] "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).

conclusion, and even where the reviewing authority might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

Claimant argues on appeal that contrary to the ALJ's conclusion he was disabled from performing his pre-injury job for the entirety of the period he requested wage loss benefits due to chronic back pain and radicular complaints. Claimant goes on to assert that with this credible showing he made out the *prima facie* case of total disability requiring Employer to demonstrate suitable alternative employment, which it failed to do.[4] We are not persuaded as there is substantial evidence in the record to support the ALJ's conclusion.

The record evidence in this matter is such that following his January 6, 2008 work injury, Employer voluntarily paid TTD benefits for various periods when Claimant's disabling symptoms prevented him from working. Following the period of December 17, 2008 to March 13, 2010, Claimant returned to work until the bus he was driving on April 29, 2011 hit a speed bump causing a flare-up in his symptoms. Employer resumed voluntary payments commencing April 30, 2011 and ending August 22, 2011, ostensibly based on a July 2, 2011 independent medical evaluation (IME) by Dr. John Cohen.

Dr. Cohen acknowledged that while Claimant complained of chronic back pain, he did not feel another surgery was justified. Dr. Cohen was of the opinion that Claimant had reached maximum medical improvement (MMI) and that he "should be able to return to his previous duty but will have intermittent episodes of pain" and "would advise him to either have a functional capacity evaluation or return to work under medical supervision." EE 2. The ALJ acknowledged these findings on page 5 of the CO.

The ALJ also found that on June 13, 2011, Claimant's treating orthopedist, Dr. Goldsmith, recommended that Claimant undergo another surgery, a decompression and fusion with instrumentation at L5-S1 and possibly L4-5. Dr. Goldsmith advised Claimant to remain off work. Although Claimant wanted the surgery, authorization was denied.

In his final examination report on September 14, 2011, Dr. Goldsmith noted and the ALJ found that Claimant reported improvement in his neck symptoms but continued to have lower back spasms and discomfort that worsened with walking or increased activity. Dr. Goldsmith recommended another course of physical therapy and a functional capacity exam (FCE) through work hardening. Claimant was to "remain off work for another month and will plan to return 10/17." CE 1, p. 8. Dr. Goldsmith signed a disability certificate checking "Estimated return to work on: October 17, 2011." CE 1, p. 12. No specific medical restrictions are given.

Dr. Goldsmith also authored a letter on September 15, 2011 addressed "To whom it may concern" which repeatedly mentions Claimant's substantial pain and disability. Claimant also testified as to his residual disabling symptoms that prevented him from returning to his pre-injury job. He specifically mentioned his chronic low back pain and numbness in his legs and foot and the

[4] See *Logan v. DOES*, 805 A.2d 237, 242-243 (D.C. 2002).

inability "to drive a 3-8 hour shift due to his symptoms and his inability to get up and stretch."[5] While the ALJ recites Claimant's testimony, no specific credibility determination is made.

There is also the deposition testimony of Dr. Goldsmith. In his testimony the doctor stated that the goal of the recommended fusion surgery was to eliminate Claimant's back and leg pain. EE 1, Deposition Transcript (DT) at 42. The doctor repeated that he had requested a FCE to determine what Claimant could do upon returning to work. DT at 46. The doctor also gave general medical restrictions application to anyone slated to undergo fusion surgery, specifically stating these allowed the individual to sit with their back straight with the proviso that people with discogenic back pain, caused by degenerative disc disease, would have pain when sitting and they would be advised to change position as necessary.

Based on this review of the evidence, including Employer's IME performed by Dr. Mark Scheer on October 10, 2011 that opined Claimant could returned to full duty as a bus operator (EE 3), the ALJ reasoned:

> Upon examining Dr. Goldsmith's deposition testimony, Dr. Goldsmith appears to offer medical restrictions based on the general nature of the proposed surgery without providing specific findings related to Claimant. He does not state Claimant can return to work with a 15 pound lifting restriction, or impose any limitations on Claimant's ability to bend, and his expressed limitations related to impact loading (running and jumping) do not appear to be applicable to Claimant's work duties. Dr. Goldsmith did not address the question whether Claimant could return to work after October 17, 2011. The parties never asked him to specifically address Claimant's disability status during his deposition, and Dr. Goldsmith does not explain whether Claimant could return back to work without the benefit of an FCE through work hardening.
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> Even when accepting the general limitations outlined by Dr. Goldsmith, the record does not contain adequate evidence to support entitlement to temporary total disability benefits for the period of October 17, 2011 to May 4, 2011 [sic]. The physical requirements for a bus operator do not appear to conflict with general limitations noted in the deposition testimony of Dr. Goldsmith. The physical job demands summary notes a bus operator is required to adjust mirrors, seat and steering wheel, and assist elderly and handicapped customers. The summary states lifting and carrying are not required in the job, but the job requires the driver to push 0-10 pounds (push wheel chair onto bus). The job also does not require pulling. The position requires repetitive use of hand, hand grip and reaching below the shoulder level 3-6 hours frequently, and pinch grip, push or pull and reach above shoulder level 1-3 hours occasionally. A driver is required to sit constantly 6-8 hours, twist his neck frequently 3-6 hours, and occasionally stand and bend his neck (look up or down) for 1-3 hours. EE 7. As such, Claimant has

[5] CO at p. 9, citing Hearing Transcript, p. 35.

> not established entitlement to temporary total disability benefits from October 17, 2011 to May 4, 2011 [sic]. CO at 10.

The ALJ's determination that the physical requirements for a bus operator do not appear to conflict with the general physical limitations outlined by Dr. Goldsmith for someone like Claimant who is a candidate for fusion surgery is supported by substantial evidence in the record. These physical requirements also match closely the physical job demand summary for a bus operator contained in Employer's exhibit 7. In addition, not only did Dr. Scheer's IME report conclude that Claimant could return to full duty work, Claimant's medical examination on October 31, 2011 by Employer to regain his commercial driver's license found no impairments and Claimant would have been cleared to return to work except for a positive drug screening.

Claimant faults the ALJ for not undertaking the burden-shifting analysis established by the Court of Appeals in *Logan*. However, the failure to do so does not result in an automatic reversal. As the ALJ noted, Claimant has the burden of showing entitlement to the requested wage loss benefits by a preponderance of the evidence.[6]

In assessing the record evidence, the ALJ started his analysis with Claimant's argument that his back problems and radiculopathy to both legs disabled him from performing his pre-injury job as a bus operator for the entirety of the requested period. Claimant also argued that his treating orthopedist, Dr. Goldsmith, recommended a spinal fusion and never released him to return to work.

However, the ALJ interpreted the evidence as showing that in his final medical examination report of September 14, 2011, Dr. Goldsmith gave no medical restrictions when he stated Claimant could plan to return to work on October 17, 2011. While Dr. Goldsmith recommended that Claimant undergo a FCE and noted he would be available to reevaluate Claimant when provided the results, there is nothing to indicate that he was holding Claimant off work until he had an opportunity to review those results. In addition, the ALJ reasoned that the absence of any medical reports after September 14, 2011 gave further justification that Dr. Goldsmith was releasing Claimant to return to work on October 17, 2011.

The ALJ took Claimant's testimony of what he deemed himself capable of doing and overlaid that with the physical demands of a bus operator and the generalized restrictions offered by Dr. Goldsmith of someone about to undergo fusion surgery and determined that Claimant was not disabled from returning to work on October 17, 2011, the date Dr. Goldsmith indicated he should plan to return to work. In addition, there is the October 10, 2011 IME of Dr. Scheer that Claimant could return to full duty and Claimant's passage of the medical evaluation to regain his commercial driver's license, but for the positive drug screen, further add to the substantial evidence in the record supporting the ALJ's conclusion. While there may be substantial evidence in the record to support an opposite outcome, we are precluded from re-weighing the evidence to accommodate that view.[7]

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[6] *Burge v. DOES*, 842 A.2d 661, 666 (D.C. 2004); *Upchurch v. DOES*, 783 A.2d 623, 628 (D.C. 2001).

[7] *Marriott, supra*.

CONCLUSION AND ORDER

The Compensation Order of September 25, 2012 is supported by substantial evidence in the record and is in accordance with the law and therefore is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

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HENRY W. MCCOY
Administrative Appeals Judge

January 31, 2013
DATE