GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR

LISA M. MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 12-002

NANCY E. BUSSEY

Claimant–Respondent,

v.

REUTERS AMERICA, LLC.,

AND

ESIS SOUTHEAST.

Employer/Insurer – Petitioners.

DEPT. OF EMPLOYMENT SERVICES
COMPENSATION REVIEW BOARD
2012 FEB 28 AM 11 31

Appeal from a Compensation Order by
The Honorable Nata K. Brown
AHD 11-244, OWC No. 641448

Eric M. May, Esquire for the Claimant
Mary G. Weidner, Esquire for the Employer

Before HEATHER C. LESLIE,[1] HENRY MCCOY, and JEFFREY P. RUSSELL,[2] *Administrative Appeals Judges.*

HEATHER C. LESLIE, *Administrative Appeals Judge*, for the Compensation Review Board.

DECISION AND ORDER

OVERVIEW

This case is before the Compensation Review Board (CRB) on the request of the Employer – Petitioner (Employer) for review of a December 5, 2011, Compensation Order (CO), issued by

[1] Judge Heather C. Leslie is appointed by the Director of DOES as an interim Board Member pursuant to DOES Administrative Policy Issuance No. 11-02 (June 13, 2011).

[2] Judge Russell has been appointed by the Director of the DOES as a interim CRB Member pursuant to DOES Administrative Policy Issuance No. 11-02 (June 13, 2011).

an Administrative Law Judge (ALJ) in the Hearings and Adjudication Section[3] of the District of Columbia's Department of Employment Services (DOES).

In that CO, the ALJ granted the claimant's request for permanent total disability benefits. We affirm.

BACKGROUND FACTS OF RECORD

The Claimant was working as a journalist for the Employer, reviewing raw war footage from Iraq which contained some graphic and violent images. Due to her duties, the Claimant developed post traumatic stress disorder and was treated by Dr. Thomas C. Goldman. Dr. Goldman recommended the Claimant return to work in a part time capacity which the Employer was able to accommodate for a time. This part time employment ceased in 2008.

The Employer provided the Claimant with vocational rehabilitation beginning in the summer of 2008. The Claimant's first vocational counselor was Issa Cappers who was replaced with Ellen Pace in 2009. The Claimant was never offered a job despite her efforts.

Dr. Goldman opined on January 30, 2010[4] that the Claimant was incapable of gainful employment and that her condition was unlikely to improve over time. The Employer sent the Claimant for an Independent Medical Evaluation (IME) with Dr. Brian Schulman. Dr. Schulman opined that the Claimant could return to gainful employment and did not suffer from any mental impairment as a result of her work injury.

Approximately two weeks prior to the Formal Hearing on October 4, 2011, the Employer assigned to the Claimant a new vocational counselor, Mr. Charles Kishick. The Claimant and Mr. Kishick met once prior to the Formal Hearing.

At the Formal Hearing, the Employer attempted to introduce the testimony of Mr. Kishkick. The Claimant opposed. After argument, the ALJ denied the Employers request to allow the testimony of Mr. Kishkick. The Employer raised the defense of voluntary limitation of income and that the Claimant was not permanently and totally disabled.

A CO was issued granting the Claimant's claim for permanent total disability. The ALJ found the Claimant did not voluntarily limit her income and that the Employer had failed, pursuant to *Logan v. DOES*, 805 A.2d 237 (D.C. 2002), to show the availability of jobs that the Claimant could perform.

The Employer timely appealed with the Claimant opposing.

THE STANDARD OF REVIEW

The scope of review by the CRB is limited to making a determination as to whether the factual findings of the appealed Compensation Order are based upon substantial evidence in the record

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[3] Formerly known as the Administrative Hearings Division.

[4] The CO refers to a January 30, 2011 report of Dr. Goldman. A review of the evidence reveals a January 30, 2010 report and not a January 30, 2011 report. We will treat the reference to 2011 as a clerical error.

and whether the legal conclusions drawn from those facts are in accordance with applicable law. "Substantial evidence" is relevant evidence a reasonable person might accept to support a conclusion. *Marriott International v. DOES*, 834 A.2d 882, 885 (D.C. 2003) and §32-1521.01(d)(2)(A) of Act.

Consistent with this standard of review, the CRB is constrained to uphold a Compensation Order that is supported by substantial evidence, even if there also is contained within the record under review substantial evidence to support a contrary conclusion and even if the CRB might have reached a contrary conclusion. *Marriott, supra.*

ANALYSIS

The Employer first argues that the ALJ "did not correctly evaluate the evidence" and that the award for permanent total disability is not supported by substantial evidence in the record. The Employer posits that the testimony of Dr. Goldman supports that the Claimant can return to work in some capacity. The Employer further points to the opinion of Dr. Schulman, who opined she did not have any residuals from her work related injury that would prevent her from returning to work in gainful employment, as support that the Claimant is not permanently and totally disabled.

A review of the CO reveals that the ALJ, quoting *Logan*, acknowledged the burden shifting approach to evaluate the evidence regarding the extent of a claimant's disability. Once the claimant demonstrates an inability to perform his/her usual job, a *prima facie* case of total disability is established, which the employer may then seek to rebut by establishing the availability of other jobs which the claimant could perform. *Logan, supra* at 240, citing *Crum v. General Adjustment Bureau,* 238 U.S. App D.C. 80, 738 F.2d 474 (1984). The ALJ found that the Claimant had established a prima facie case of total disability through the credible testimony of the Claimant, the opinions of Dr. Goldman and the vocational expert, Ms. Pace. Specifically, the ALJ relied upon Dr. Goldman's January 30, 2011 opinion that the Claimant's condition rendered her incapable of employment in view of her age and that her symptoms had not improved. *Bussey, supra* at 6. The ALJ also found persuasive the opinion of Ms. Pace, stating,

> Ms. Pace, however, is a vocational expert who was hired by Employer. She opined, within a reasonable degree of certainty within her field of specialty, that Claimant will continue to have difficulty in locating employment based on the barriers of the part-time work restrictions, her age, 58, the state of the economy, and the strong decline in the number of people employed within journalism. (CE 4) Further, Ms. Pace opined that the employment outlook for media is bleak, and that it is not probable that Claimant will find a position.
>
> Claimant's treating physician has restricted her to working only in a part-time capacity, and preferably for eight hours three days per week. Despite the restrictions, Claimant submitted between 900 and 1000 applications for employment for both full-time and part-time positions, and received either rejections or no response at all. She worked diligently with the vocational rehabilitation counselors for three years, following up with their leads, and

> applying for jobs she found on her own. The numbers speak for themselves. Employer has not met its burden to show the availability of other jobs that Claimant can perform.

Bussy, supra at 7.

We find no error in the ALJ's reasoning. Contrary to the Employer's argument, there is substantial evidence in the record to support the ALJ's finding that the Claimant was permanently and totally disabled. Although there may be substantial evidence to support a contrary result, what the Employer is asking us to do is to re-weigh the evidence in the Employer's favor, a task we cannot do.

The Employer next argues that the ALJ was in error when she excluded the testimony of Mr. Charles Kishick, a vocational expert hired by the Employer approximately two weeks prior to the Formal Hearing. The Employer relies upon *Washington Post v. DOES*, 675 A.2d 37 (D.C. 1996), commonly referred to as *Mukhtar*, to support its contention that the ALJ committed error. The Claimant argues that evidentiary issues are discretionary, relying upon *Woodfork v. WMATA*, CRB No. 09-033, AHD No. 640037 (April 13, 2009). We agree with the Claimant.

In *Woodfork*, the CRB stated,

> As the District of Columbia Court of Appeals has made clear, in non-administrative proceedings, all parties must take the necessary steps to complete discovery and prepare for trial within the time limits established by the scheduling order, which may not be modified except by leave of court upon a showing of good cause. *Dada v. Children's National Medical Center,* 715 A.2d 904 (D.C. 1998). Of course, in an administrative proceeding adjudicating a workers' compensation case, the presiding ALJ has broad discretion to determine all questions on procedure and evidence. See D.C. Official Code §§ 32-1525(a), 2-509; 7 DCMR §§ 221.3, 223.3.
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> Most recently, the Court of Appeals has upheld an ALJ's exclusion of medical evidence which was not timely filed pursuant to a Scheduling Order. *Ned Sinkavitch v. DOES (& Cardinal Construction),* DCCA No. 07-AA-950, CRB No. 07-121 (November 3, 2008). There, the Court held that under circumstances in which (1) the party seeking to submit the exhibits had been issued, and failed to respond to, a show cause order granting a grace period for submission and (2) the ALJ allowed each party to depose a doctor of its choice, and indicated she would consider the opinions reflected in those depositions, it was "not persuaded that the ALJ committed error by excluding the exhibits".
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> As noted in *Geddie v. District of Columbia Department of Child and Family Services,* CRB No. 08-175, AHD No. PBL 07-074A, DCP No. 760006-0002-2005-0026 (September 11, 2008), although the ALJ is empowered to take affirmative steps to see to the acquisition of necessary evidence to make appropriate awards, taking such steps is not mandatory, and is at the discretion of

the ALJ. *See Geddie,* p. 4. In the instant matter, the ALJ's denial of Petitioner's Motion was neither arbitrary nor capricious; rather, it was absolutely consistent with the Scheduling Order which governed the proceedings.

In the case at bar, Mr. Kishick was retained by the Employer two weeks prior to the Formal Hearing date (according to the Employer's argument). The ALJ took into consideration the Employer's arguments but found that the lack of timely notice to the agency and the Claimant a bar to Mr. Kishick's testimony at the Formal Hearing. This was within the ALJ's discretion. We find no error in the ALJ's decision to exclude the testimony of Mr. Kishick.

CONCLUSION AND ORDER

The December 5, 2011 Compensation Order is supported substantial evidence and is in accordance with the law. It is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

HEATHER C. LESLIE
Administrative Appeals Judge

February 28, 2012
DATE

APPEAL RIGHTS

Any party aggrieved by this Decision and Order may petition the District of Columbia Court of Appeals for its review. D.C. Court of Appeals Rule 15 (a) requires that the Petition for Review be filed within thirty (30) calendar days of the mailing date shown on the Certificate of Service.

The Court of Appeals is located at 430 E Street, N.W. Washington, D.C. 20001 The Court is open from 8:30 a.m. to 5:00 p.m., Monday through Friday, except legal holidays.

In addition to filing a Petition for Review with the Court of Appeals, you must send a copy of the Petition and any motions, briefs, or other documents that you submit to the court, to the opposing party in this case, and also to:

Todd S. Kim, Solicitor General
Office of the Solicitor General
441 4th Street NW, Suite 600 S
Washington, DC 20001

and

Chief Clerk
Compensation Review Board
Labor Standards Bureau
Department of Employment Services
64 New York Avenue, N.E., 3rd Floor
Washington, D.C. 20002

Bussey v. Rueters America, LLC,
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CERTIFICATE OF SERVICE

I certify that the attached Decision and Order was deposited in the U.S. Mail, postage pre-paid, or hand-delivered on February 28, 2012 addressed as indicated below:

Eric M. May, Esq. Law Office of Eric M. May, P.C. 1201 15th Street NW Suite 320 Washington DC 20005	Certified Mail: Return Receipt Requested No. 7005 3110 0000 9467 8162
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Chief Administrative Law Judge Office of Hearings and Adjudications Department of Employment Services Washington DC 20002	Hand Delivery

Emma Harbaugh
Deputy Clerk