

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA M. MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 12-010

SYLVIA GORHAM,

Claimant–Respondent,

v.

MARRIOTT AT WARDMAN PARK and MARRIOTT CLAIM SERVICES,

Employer/Carrier–Petitioner.

Appeal from a Compensation Order on Remand by
The Honorable Karen R. Calmeise
AHD No. 07-388A, OWC No. 619390

Alan D. Sundburg, Esquire for Petitioner
William P. Newton, Esquire for Respondent

Before HEATHER C. LESLIE,¹ MELISSA LIN JONES, and LAWRENCE D. TARR, *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 27, 2011, Compensation Order on Remand (COR), issued by an Administrative Law Judge (ALJ) in the Hearings and Adjudication Section² of the District of Columbia’s Department of Employment Services (DOES).

In that COR, the ALJ granted the claimant’s request for temporary total disability benefits. We affirm.

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 Formerly known as the Administrative Hearings Division.

FACTS OF RECORD AND PROCEDURAL HISTORY

On September 25, 2005, the Claimant injured her back lifting trash during the course of her employment with the Employer. Conservative treatment was unsuccessful, and in November 2006, the Claimant began treating with Dr. Warren Yu, a surgeon who performed lumbar decompression in August 2007. After surgery, the Claimant continued to treat with Dr. Yu.

Since her injury, except for a brief period in 2009, the Claimant has not worked for the Employer. After an unsuccessful attempt to return to work, the Employer suspended payment of benefits claiming the Claimant was voluntarily limiting her income. A Formal Hearing was held on July 24, 2009 where the Claimant requested temporary total disability benefits from March 3, 2009 to the date of the formal hearing and continuing. Those benefits were granted in a Compensation Order dated November 9, 2009, in large part because the Claimant was dependent on narcotic pain medication.

The Employer timely appealed to the CRB. In a Decision and Remand Order dated August 10, 2011, the CRB concluded that the findings of fact and conclusions of law in the November 9, 2009 Compensation Order were not supported by substantial evidence in the record. Specifically, the CRB vacated that part of the order that granted treatment to “decrease [Ms. Gorham’s] use and dependence on narcotic pain medication” as neither party requested nor addressed this issue. The CRB further reversed and remanded the case back to the ALJ for a determination of the Claimant’s work capacity after March of 2009 and to apply the correct burden of proof.

The COR was issued on December 29, 2011. The ALJ again awarded the requested claim for relief, finding that although the light duty job offered in July was within her medical restrictions, the Claimant’s use of narcotic medication to control her pain rendered her unable to work.

The Employer timely appealed. The Employer argued that the Claimant voluntarily limited her income after July 15, 2009 because of her overuse of narcotic pain medication. The Claimant opposed the Employer’s appeal, arguing that the COR is supported by the substantial evidence in the record.

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 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

Preliminarily, we note that in response to the prior remand order, the ALJ did begin by utilizing the correct burden of proof when assessing the issue of nature and extent of disability, that of preponderance of the evidence, quoting *Golding-Alleyne v. DOES*, 980 A.2d 1209 (D.C. 2009). COR at 4. However, the ALJ then went on to state that “in order to prevail on her claim for said benefits, Claimant has the burden of demonstrating by substantial evidence that she incurred a total wage loss and that said wage loss is a function of her work-related injury.” *Id.*

Normally, as with the prior remand order, this would require us to remand the COR as we cannot affirm an administrative determination that “reflects a misconception of the relevant law or a faulty application of the law.” See *D.C. Department of Mental Health v. DOES*, 15 A.3d 692 (D.C. 2011). That being said, the ALJ then later corrects this apparent error when she states that the “Claimant has shown, by a preponderance of the evidence that she remains unable to return to her pre-injury duty as a result of the September 2005 workplace accident.” COR at 5. Thus, we conclude that the reference to the “substantial evidence” standard of proof was an apparent oversight on the part of the ALJ and that the correct standard of proof, preponderance of the evidence, was ultimately utilized when assessing the nature and extent of the Claimant’s disability.

Turning to the Employer’s argument, the Employer does not contend that the ALJ was in error awarding benefits between March 3, 2009 through July 14, 2009 and we will not disturb this finding. The Employer argues specifically that the ALJ was in error in not finding the Claimant to have voluntarily limited her income after July 15, 2009 as the job offered by the Employer, and found by the ALJ, was within her physical restrictions. Employer’s Argument at 7. The Employer specifically takes issue with the ALJ’s finding that the Claimant’s use of narcotic prescription medication prevented her from returning to work based on the ALJ’s observation of the Claimant at the Formal Hearing and posits that no medical evidence supports her conclusion.

A review of the COR finds that the ALJ, after acknowledging the job offered in July of 2009 was within the Claimant’s restrictions, stated,

When asked, the Claimant admitted that the treating surgeon had not advised her to take the pain medication every hour. (HT 58) The Claimant further testified that when she takes the medication it made her feel sleepy and drowsy. (HT 33) Claimant also testified that she had taken the narcotic medication prior to the Formal Hearing. (HT 49-50) At a point in the Formal Hearing the undersigned called a recess to allow the Claimant to refocus her attention to the hearing proceedings. (HT 68-69)

When questioned as to why she did not remain at work on July 15, 16, and 17, 2009 Claimant explained that she left each day due to medical emergencies. The EMS was called on each day to address Claimant's unresponsiveness, sleeping, and nodding out. (HT pgs 70-73). It is uncontested that Claimant's presence and

reactions at work in July 2009 generated medical emergency response and concern for her safety by Employer. (HT 42-47)

Based upon my consideration of Claimants' behavior and demeanor at the Formal Hearing and consideration of her testimony, I find Claimant did not voluntarily limit her income. I find Claimant was unable to perform the work duties assigned because Claimant's prescribed pain medication caused her to become drowsy and sleepy after she reported to work.

COR at 8.

We find no error in the above reasoning. Although the Claimant admittedly was taking more than what was prescribed to treat her symptoms as a result of the injury, the ALJ was within her authority to take the effects of the medication on the Claimant into consideration and find that this rendered her unable to work, based in part on her observation of the Claimant at the Formal Hearing. We will not disturb this finding.

This facts presented in this case are not unlike those in *Oliver v. George Washington University*, CRB No. 09-001, AHD No. 95-376E (November 17, 2008). In *Oliver*, the ALJ found that the Claimant's narcotic pain medication and subsequent loss of concentration and extreme drowsiness did not allow the Claimant to perform sedentary work.³ The ALJ ultimately held the Claimant to be permanently and totally disabled until such time as the Claimant's use of and dependence on narcotic medication was addressed. The CRB affirmed the Compensation Order and the ALJ's reasoning as based upon the substantial evidence in the record, as this panel affirms the ALJ's reasoning in the case *sub judice*.

We must also take note that after July 23, 2009, the Claimant was taken out of work completely by her treating physician, Dr. Yu. Thus, regardless of the Claimant's use of narcotic medication above and beyond what Dr. Yu prescribed, by July 23, 2009 the Claimant was again experiencing an increase in back pain causing Dr. Yu to issue a disability slip after this time.

While there may be substantial evidence to the contrary, we are constrained to affirm a Compensation Order if there is substantial evidence to support its ultimate conclusion. What the Employer is asking us is to re weigh the evidence in its favor, a task we cannot do.

³ It is also noteworthy that the Employer's Independent Medical Evaluator, Dr. London, after noting a history of the Claimant "spending most days sedated" did recommend the Claimant be encouraged to "avoid narcotics and other sedating medications."

CONCLUSION AND ORDER

The findings of fact and conclusions of law in the December 27, 2011 Compensation Order on Remand is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

HEATHER C. LESLIE
Administrative Appeals Judge

March 2, 2012
DATE
