

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA M. MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 11-082

ELVIN UMANZOR,

Claimant-Petitioner,

v.

TRICON CONSTRUCTION, INC. AND ERIE INSURANCE EXCHANGE

Employer and Carrier-Respondents.

Appeal from a Compensation Order by
The Honorable Amelia G. Govan
AHD No. 10-383A, OWC No. 659635

Michael Kitman, Esquire for the Petitioner
Jeffrey Ochsman, Esquire for the Respondent

Before HEATHER C. LESLIE,¹ JEFFREY P. RUSSELL,² and LAWRENCE TARR, *Administrative Appeals Judges*.

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

DECISION AND REMAND ORDER

OVERVIEW

This case is before the Compensation Review Board (CRB) on the request for review filed by the Employer - Petitioner (Employer) of the July 28, 2011, Compensation Order (CO) issued by an Administrative Law Judge (ALJ) in the Office of Hearings and Adjudication of the District of Columbia Department of Employment Services (DOES). In that CO, the ALJ denied the Claimant's request for temporary total disability benefits. We REVERSE and REMAND.

¹Judge 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).

FACTS OF RECORD AND PROCEDURAL HISTORY

On May 11, 2009, the Claimant suffered an injury to his neck, head, back left hand and right knee when he fell through a glass window. The Claimant sought medical treatment, ultimately coming under the care and treatment of Dr. Joseph Lieberman. Dr. Lieberman opined in a leave slip on December 18, 2010 that the Claimant was totally disabled from working from December 15, 2010 to February 15, 2011. Dr. Lieberman subsequently extended the Claimant's total disability to July 1, 2011. The Claimant has not worked in any capacity since December 2010.

The Employer sent the Claimant for an Independent Medical Evaluation (IME) with Dr. Gary W. London on two occasions, November 4, 2009 and August 4, 2010. Dr. London opined that the Claimant could return to work full duty and that any complaints were unrelated to the work injury.

A Formal Hearing was held on June 28, 2011. The Claimant sought an award of temporary total disability from December 15, 2010 to the present and continuing. The only issue to be adjudicated was the nature and extent of the Claimant's alleged disability. A CO was issued on July 28, 2011 denying the Claimant's claim for relief in its entirety. The CO found the Claimant to be an incredible witness and gave greater weight to the opinion of the Employer's IME physician over that of the treating physician.

The Claimant timely appealed the CO with the Employer 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 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. See District of Columbia Workers' Compensation Act of 1979, D.C. Code, as amended, §32-1501 *et seq.* at §32-1521.01(d) (2) (A) of the ("Act") and *Marriott International v. DOES*, 834 A.2d 882 (D.C. 2003).

Consistent with this standard of review, the CRB must uphold a Compensation Order that is supported by substantial evidence, even if there is substantial evidence in the record to support a contrary conclusion, and even where the CRB might have reached a contrary conclusion. *Id.* at 885.

DISCUSSION AND ANALYSIS

Initially we note that the issue to be decided was the nature and extent of the Claimant's disability, if any. A review of the CO reveals the following:

There is no presumption regarding nature and extent of disability. *Dunston v. D.C. Dep't of Emp't Servs.*, 509 A.2d 109, 111 (D.C. 1986). It is well-established that a Claimant has the burden of producing substantial evidence necessary to establish a right to the particular level of benefit requested under the Act. See *Stocks v. Wash. Hosp. Ctr.*, 2010 DC Wrk. Comp. LEXIS 92, 95-6 (DC Wrk. Comp. 2010); See *Dunston*, 509 A.2d at 109. Where conflicting medical positions have been

proffered, the fact-finder can draw any reasonable inference from the evidence presented. *George Hyman Constr. Co. v. Dep't of Emp't Servs.*, 498 A.2d 563, 566 (D.C. 1985).

CO at 5.

The District of Columbia Court of Appeals (DCCA) has held the correct burden of proof when deciding the nature and extent of a Claimant's disability is preponderance of the evidence. Specifically,

Despite the statement by the ALJ in this, and many other cases, that the claimant's burden of proving the extent of a disability is "substantial credible evidence," the correct burden of proof is a preponderance of the evidence. *WMATA v. DOES and Browne, Intervenor*, 926 A.2d 140 (D.C. 2007). See also *Burge v. DOES*, 842 A.2d 661, 666 (D.C. 2004); *Upchurch v. DOES.*, 783 A.2d 623, 628 (D.C. 2001).

Moreover, the DCCA has held that the CO must clearly identify that the ALJ utilized the correct standard of proof. In *WMATA v. DOES and Payne Intervenor*, 992 A.2d 1276 (D.C. 2010), the Court of Appeals also stated,

[H]ere the hearing examiner's analysis of the nature and extent of a claimant's disability reflect[ed] confusion as to the correct allocation of the burden of proof, the court could not determine whether conclusions legally sufficient to support the decision flow[ed] rationally from the findings, and thus a remand was necessary for further consideration of the evidence by the examiner under the proper standards.

In the case *sub judice*, we ultimately cannot tell what burden of proof was utilized, that of substantial evidence (which would be in error) or preponderance of the evidence. We will note that the ALJ correctly states the Claimant must *produce* substantial evidence to support the claimed level of disability. However, the ALJ failed to state additionally that the Claimant also had the *burden* of demonstrating the claimed level of disability by a preponderance of the evidence.³ Such failure, pursuant to *Payne, supra*, requires us to remand the case back for "further consideration of the evidence by the examiner under the proper standards." Until such time, the Claimant's arguments are rendered moot.

³ The evidence presented in the case does not compel one conclusion over the other to the exclusion of any other inference, which could allow the board to uphold the denial. *Payne, supra* at 1282.

CONCLUSION AND ORDER

The findings of fact and conclusions of law contained in the July 28, 2011 Compensation Order is REVERSED and REMANDED.

FOR THE COMPENSATION REVIEW BOARD:

HEATHER C. LESLIE
Administrative Appeals Judge

March 30, 2012
DATE