GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR

LISA M. MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 10-145

CHRISTOPHER L. VENABLE,
Claimant–Petitioner,

v.

SAFEWAY, INC.,
Self-Insured Employer—Respondent

Appeal from a Compensation Order by
Administrative Law Judge Anand K. Verma
AHD No. 08-137B, OWC No. 642725

Benjamin T. Boscolo, Esquire, for the Claimant-Petitioner
Lisa A. Zelenak, Esquire, for the Employer-Respondent

Before: HENRY W. MCCOY, MELISSA LIN JONES, and JEFFREY P. RUSSELL[1], *Administrative Appeals Judges*.

HENRY W. MCCOY, *Administrative Appeals Judge*, for the Compensation Review Board;
JEFFREY P. RUSSELL, *Administrative Appeals Judge*, concurring.

DECISION AND ORDER

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board (CRB) pursuant to D.C. Official Code §§ 32-1521.01 and 32-1522 (2004), 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. 11-01 (June 23, 2011).

OVERVIEW

This case is before the CRB on the request for review filed by Claimant of the June 17, 2010 Compensation Order (CO) issued by an Administrative Law Judge (ALJ) in the Hearings and Adjudication section of the Office of Hearings and Adjudication (OHA) of the Department of Employment Services (DOES). In that CO, the ALJ denied Claimant's request for permanent total disability benefits from October 5, 2009 and causally related medical expenses with interest on accrued benefits.

BACKGROUND FACTS OF RECORD

Claimant sustained an accidental work-related injury to his left elbow on May 28, 2007. The next day, Claimant treated with his primary care physician, Dr. Donna Chaco, who diagnosed pain with tenderness and strain, prescribed pain medication, and released him to light duty with a restriction on lifting heavy objects.

Dr. Chaco referred Claimant to Dr. Donald Martin who rendered a similar diagnosis and maintained him in a light duty status with a 10 pound lifting restriction. Over the course of the next year, Claimant alternated treatment with Drs. Chaco and Martin with his work status also alternating between off work and light duty depending on the examination results at the time.

On July 13, 2007, Claimant treated with Dr. Peter Trent for an orthopedic consultation. He was diagnosed with lateral epicondylitis of the left elbow, administered a local injection to the left elbow and prescribed a forearm Count-R-Force band. In a follow-up on October 16, 2007, Dr. Trent placed Claimant in an off work status until November 27, 2007 and in the next series of follow-up visits continued him off work until February 26, 2008. On February 26, 2008, Dr. Trent released Claimant to return to work on February 27, 2008 with virtually a total restriction on the use of his left arm.

Claimant was seen by Dr. Robert Collins on November 20, 2007 for an independent medical evaluation (IME). Dr. Collins diagnosed contusion and bruising of the left forearm and elbow, recommended a course of physical therapy, and opined that he could return to work with a twenty pound lifting restriction.

In a September 9, 2008 examination, Dr. Trent released Claimant to regular duty with the advice to refrain from any activity that would exacerbate his underlying condition. After returning to work, Claimant returned to Dr. Trent on December 30, 2008 complaining of severe pain over the lateral aspect of his left elbow. Dr. Trent deemed this an exacerbation of his underlying condition, injected the elbow, and returned him to light duty with no lifting or carrying with the left arm. Claimant was retained in this status through February 10, 2009.

On February 10, 2009, Claimant underwent an IME with Dr. Louis Levitt. Dr. Levitt also diagnosed epicondylitis and recommended a three week course of work hardening in lieu of working, at the end of which Claimant should be able to return to full duty with no restrictions. Dr. Levitt also opined that should Claimant remain symptomatic after work hardening, surgical intervention would be recommended. On this date, Claimant also saw Dr. Trent who agreed that he would benefit from a work hardening program but also noted he was not interested in surgical treatment.

Claimant saw Dr. Trent for follow-up visits in July, September, and November 2009; with a permanent restriction placed on using the left arm to lift or carry no more than 10 pounds. Dr. Trent noted over the course of these visits Claimant's continuing complaints of left elbow pain with little relief from conservative treatments. Dr. Trent made the same evaluation on January 26, 2010 and noted Claimant continued to decline surgical intervention.

After a second IME on March 15, 2010, Dr. Levitt deemed Claimant to have reached maximum medical improvement and that he could return to work with no limit or modification in his work activity.

Employer caused a Labor Market Survey (LMS) to be conducted and a report was produced on March 19, 2010. Searching for jobs with a light physical demand level and cognizant of Dr. Trent's permanent restriction on lifting no more than 10 pounds and to refrain from repetitive movements with the left arm, the LMS identified twelve (12) positions deemed appropriate for Claimant, including, driver, security guard, parking-lot attendant, and greeter, with an average salary of $9.39 per hour. As for vocational rehabilitation for Claimant, Employer terminated its provision after Claimant failed to show for the second scheduled meeting with the counselor.

In his final follow-up report submitted for the record, Dr. Trent, on March 23, 2010 found Claimant's condition to be unchanged. Dr. Trent opined that Claimant had the capacity to perform some work if the restrictions associated with his left arm were respected. Dr. Trent also lowered Claimant's restriction on lifting and carrying with the left arm to 5 pounds.

The ALJ found Claimant's complaints of disabling pain in the left arm to be exaggerated and incredible due to the absence of a regimen of regular medications and physical therapy to alleviate the alleged left arm pain, which also was not corroborated by any medical test.

After reviewing all the evidence, the ALJ denied Claimant's claim for relief citing the failure to cooperate with vocational rehabilitation and a failure to establish entitlement to permanent total disability benefits. The record shows that although the ALJ claims to have left the record open 30 days after receipt of the hearing transcript, which was received on May 19, 2010, by stating in the CO that the record closed on June 21, 2010, the CO was issued on June 17, 2010. Claimant timely appealed with Employer filing in opposition.

On appeal, Claimant argues for reversal because the ALJ erred in determining that he was not permanently and totally disabled, that the finding that Claimant was not adversely affected by his medications was not supported by substantial evidence in the record, and that the CO was issued before the record closed. Claimant argues to the contrary and that the Compensation Order on Remand (COR) should be affirmed.

DISCUSSION AND ANALYSIS

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. *See* D.C. Workers' Compensation Act of 1979, as amended, § 32-1501 *et seq.*, 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 International v. D.C. Dept. of Employment Services*, 834 A.2d 882 (D.C. 2003).

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 conclusion, and even if the CRB might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

Turning to the case under review, Claimant argues that contrary to the finding by the ALJ, he is permanently and totally disabled, that Employer did not provide sufficient evidence of suitable alternative employment that took into consideration his physical restrictions and medication-induced drowsiness, and that the CO was issued prior to the record closing which precluded his being able to present his final position on the issues. While the ALJ's reasoning contains two analytic errors, we are of the opinion they do not rise to the level requiring reversal.

The first is that the ALJ has misstated the burden of proof to be borne by a claimant in establishing the nature and extent of disability. On page 7 of the CO, citing *Logan v. DOES*, 805 A. 2d 237 (D.C. 2002), he wrote that "In order to recover an award for permanent total disability, a claimant must present substantial credible evidence that his condition is maximally medically improved and that he is unable to return to his usual or any other employment consistent with his medical restrictions." While the ALJ is correct that this case is governed by the principles enunciated in *Logan*, claimant's burden in establishing the nature and extent of a disability is to demonstrate that entitlement by a preponderance of the evidence, not by "substantial credible evidence".[2]

It may be said that under *Logan*, producing substantial credible evidence of the inability to return to the pre-injury employment is what is required to meet the *prima facie* showing of total disability under *Logan*, but it is wrong to state that that standard is the standard by which the claim is ultimately to be decided. Fortunately, this error was ameliorated when, on page 9, the ALJ properly described the actual nature of the *Logan* burden shifting scheme.

The second was in his handling of the opinion of Dr. Trent to the effect that

> "I do believe with a reasonable degree of medical certainty the patient does have the capacity to work if reasonable limitations on the use of the left arm for the abovementioned activities (involving lifting, carrying, or repetitive activities) could be stipulated and respected by the employer, (CE 6, p.1)" Therein, Dr. Trent expressed his apprehension that claimant's inactivity might result in stiffness or weakness in the arm that would necessitate physical therapy. (CE 6, p.2). *In other words, Dr. Trent ruled out that claimant is permanently totally disabled*.

CO, p. 7 – 8 (emphasis added). The italicized portion of the quotation from the Compensation Order suggests an incorrect understanding of the law in this jurisdiction as it pertains to medical versus vocational opinion. As has been made clear by the DCCA[3], a physician's opinion as to whether a claimant can "work" is not controlling on the issue of whether a claimant is disabled under the Act; disability being a vocational matter, the physician's medical opinion as to a

[2] *WMATA v. DOES*, 926 A.2d 149 (D.C. 2007)
[3] See *Negussie v. DOES*, 915 A.2d 391 (D.C. 2007)

claimant's physical capacity can *inform* a disability determination, but it can not control it. Again, fortunately, the ALJ did not apply this misapprehension. Rather, it appears that he proceeded to assess the evidence using the *Logan* scheme.

Nonetheless, Claimant argues that that application was performed incorrectly, because the ALJ failed to take the effects of certain medications that Claimant testified to taking on a daily basis that he claims make him drowsy, which he argues renders him unable to perform the jobs identified in the LMS, which formed the basis of the ALJ's determination that Claimant is employable. He argues that since the his testimony was uncontradicted to the effect that he takes two medications daily and that they make him drowsy, the ALJ was bound to accept that testimony and conclude that the jobs identified in the LMS were not "suitable".

The ALJ addressed this argument, and found no basis to conclude that Claimant required "daily", as opposed to merely occasional, administration of either medication. Claimant's argument that no employer would hire him if it was aware of his use of a narcotic pain medication is mere speculation, which speculation would not have been needed had Claimant actually applied for the positions. Indeed, the ability to "diligently seek" employment in the identified jobs, as contemplated in *Logan*, is the route to avoiding such speculation.

Lastly, Claimant argues that the ALJ erred in issuing the Compensation Order before receiving his closing statement. It is true that the ALJ did not give the Claimant the 30 days that he indicated would be available for submission of a closing statement before issuing the Compensation Order. Neither the statute nor due process requires that an ALJ receive non-evidentiary closing arguments prior to issuing a decision.

We affirm the Compensation Order as being supported by substantial evidence and in accordance with the law.

CONCLUSION AND ORDER

The Compensation Order of June 17, 2010 is supported by substantial evidence in the record and is in accordance with the law and is therefore AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

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HENRY W. MCCOY
Administrative Appeals Judge

February 28, 2012
DATE

JEFFREY P. RUSSELL, *concurring:*

I join entirely in the majority Decision in this matter. However, I have one additional point that I feel ought to be made.

Claimant argues that the ALJ erred in issuing the Compensation Order before receiving his closing statement. My colleagues reject that argument, reasoning that because closing arguments are not evidence, there is no statutory or due process violation in not waiting out the referenced 30 day time period.

While I do not disagree with that analysis, I think it best if we also not forget that the statute itself sheds light on the matter. D.C. Code § 32-1520 (c) provides that Compensation Orders be issued within 20 days of the formal hearing. While the District of Columbia Court of Appeals has held that this deadline is "directory" and not mandatory (see, *Hughes v. DOES*, 498 A.2d 567, 571 (D.C. 1985), I am not prepared to say that issuing a decision outside that 20 day period is nonetheless too soon, requiring reversal.

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JEFFREY P. RUSSELL
ADMINISTRATIVE APPEALS JUDGE