

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 16-006,

ANGELA METTS,
Claimant-Petitioner,

v.

PITNEY BOWES
and ACE/ESIS,
Employer/Third-Party Administrator-Respondent.

Appeal from an December 21, 2015 Compensation Order by
Administrative Law Judge Nata K. Brown
AHD No. 14-031A, OWC No. 633238

and

CRB No. 16-058

ANGELA METTS,
Claimant-Respondent,

v.

PITNEY BOWES
and ACE/ESIS,
Employer/Third-Party Administrator-Petitioner,

Appeal from an April 1, 2016 Compensation Order by
Administrative Law Judge Amelia G. Govan
AHD No. 14-031B, OWC No. 633238

(Decided August 31, 2016)

David M. Snyder for Claimant
Julie D. Murray for Employer and Insurer

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2016 AUG 31 PM 12 20

Before LINDA F. JORY, GENNET PURCELL and JEFFREY P. RUSSELL *Administrative Appeals Judges*.

LINDA F. JORY for the Compensation Review Board.

DECISION AND REMAND ORDER - CRB No. 16-006
DECISION AND ORDER - CRB No. 16-058

INTRODUCTION

In CRB No. 16-006, Claimant appeals the December 21, 2015 Compensation Order issued by an administrative law judge (“ALJ”) in the Administrative Hearings Division (“AHD”) of the Department of Employment Services (“DOES”). The ALJ found that Angela Metts’ (“Claimant”) workers’ compensation benefits should be suspended because Claimant failed to cooperate with vocational services offered by her employer, Pitney Bowes (“Employer”).

In CRB No. 16-058, Employer appeals the April 1, 2016 Compensation Order issued by a different ALJ. The ALJ granted Claimant’s claim for causally related medical expenses including specific protocols recommended by Claimant’s treating physician.

Pursuant to 7 DCMR § 261.12, the Compensation Review Board (“CRB”) has consolidated the appeal in CRB No. 16-006 with the appeal in CRB No. 16-058.¹

BACKGROUND

Claimant, age 50, was injured while working as a manager in Employer's mailroom when she attempted to catch a falling box of mail. She has been treating with neurologist Michael E. Batipps, M.D. since she was authorized to do so in October of 2014. On March 27, 2015 Dr. Batipps noted that due to lumbosacral radiculopathy, Claimant has continuing, severe daily pain, and antalgic gait, and decreased range of spinal motion. Dr. Batipps opined that Claimant's disability and impairment are permanent and measures for pain management and pain control are necessary. Claimant is unable to take analgesic medications due to liver dysfunction. Dr. Batipps March 27, 2015 recommendations were that Claimant try using a lidocaine patch, which he prescribed, and that she have a pain management consultation.

At Employer's request, Claimant was examined by neurological specialist Ronald Cohen, M.D. four times between June 9, 2010 and November 14, 2013; he issued an Addendum on September

¹ 7 DCMR § 261.12 provides:

Cases may, in the sole discretion of the Board, be consolidated for purposes of an appeal upon the motion of any party or upon the Board's own motion where there exist common parties, common questions of law or fact or both, or for such other circumstances as justice and the administration of the Acts requires.

3, 2015. Dr. Cohen expressed the opinion that because Claimant has reached maximum medical improvement with regard to her 2006 work injury, no further treatment is warranted.

A full evidentiary hearing was held on February 23, 2015 before Administrative Law Judge Nata K. Brown, who issued a December 21, 2015 Compensation Order ["CO 1"] suspending Claimant's wage loss benefits. In that CO 1, it was decided that Claimant could not return to her usual employment due to residual lumbar symptoms related to her 2006 lumbar work injury but that she failed to cooperate with Employer's vocational rehabilitation efforts and her benefits were ordered to be suspended. *Metts v. Pitney Bowes*, AHD No. 14-031A, OWC No. 633238 (December 21, 2015). Claimant timely filed an Application for Review and supporting memorandum. Employer timely opposed and also filed a memorandum. While the CO 1 remained on appeal before the CRB, Claimant filed another Application for Formal Hearing ("AFH") requesting AHD authorize causally related medical care and treatment protocols recommended by her treating neurologist Dr. Batipps including lidocaine patches and consultation with a pain management specialist.

Following a hearing before a different ALJ on March 16, 2016 and before the appealed CO 1 was assigned to a CRB Panel, Claimant's claim for causally related medical expenses was granted. *Metts v. Pitney Bowes*, AHD No. 14-031B, OWC No. 633238 (April 1, 2015) ("CO 2"). Employer timely filed an Application for Review and supporting memorandum. Claimant timely opposed and also filed a memorandum.

In response to an Order to Show Cause issued by the Chief Administrative Appeals Judge, Claimant indicated she did not oppose the consolidation of the two appeals. Employer has not filed a response.

DISCUSSION AND ANALYSIS

Because our decisions in the two combined cases depend on the decision in CRB No. 16-006, we shall discuss that case first.

Claimant asserts:

. . . [T]he CO initially made a finding that it lacked jurisdiction to modify a Final Order issued by the Office of Workers' Compensation. CO at 2. This being the case, then the analysis should have ended here and the ALJ should never have reached the merits of the case. This is because, under the Workers' Compensation Act, a party in interest may request a previously issued Compensation Order be reviewed at any time prior to one year after the date of the last payment, if the amount of compensation payable has changed. See D.C Code Ann. 32-1524(a)(1). In a request for modification of an existing benefit award, a preliminary determination must be made, prior to considering the evidence adduced at the evidentiary hearing that there is reason to believe a change in the claimant's condition has occurred. *Snipes v. DOES*, 542 A.2d 832 (D.C. 1988); *Washington Metro Area Transit Auth. v. DOES*, 703 A.2d 1225, 1230 (D.C. 1997). The purpose of this preliminary hearing is to examine the evidence which,

if credited, could potentially establish a change of conditions or change in the amount of compensate payable. See *Walden v. DOES*, 759 A.2d 186, 192 (D.C. 2000). This initial determination pursuant to *Snipes* requires a preliminary examination of the evidence which will be submitted at the evidentiary hearing. (citation omitted). If there is no reason to believe a change has occurred, the application is dismissed and an evidentiary hearing will not occur. (citation omitted). Here, there was a determination made by the ALJ, following the initial presentation of evidence and argument by both the Employer/Insurer and Ms. Metts, that the Employer/Insurer did not meet its burden under *Snipes* to modify the prior Final Order due to either a change in conditions or a change in the amount of compensation owed to Ms. Metts. HT at 13. As noted *supra*, in the written Compensation Order, the ALJ instead determined that a *Snipes* hearing was not necessary and simply proceeded to the merits of this case. This was improper because either the ALJ was correct in the CO that there was not jurisdiction for the Office of Hearings and Adjudication to modify the Final Order from the Office – in which case this matter should have been dismissed – or the ALJ was correct on the record when she determined that either Employer had not met its burden under *Snipes* – in which case this matter also should have been concluded. It was improper for the ALJ to hold an evidentiary hearing and to issue a CO regarding additional evidence in either case. As such this CO should be vacated.

Claimant's Brief at 7, 8.

Employer responds:

The Claimant seems to take issue with Judge Brown's notation that the Administrative Hearings Division lacked jurisdiction to modify the Final Order of the Office of Workers' Compensation and Claimant's argument seems to be that the Final Order from the Office of Workers' Compensation cannot be modified at all before the Administrative Hearings Division. This argument also lacks merit. If the Administrative Hearings Division lacks jurisdiction, this would essentially mean that the Employer and Insurer had no redress to ever modify the Office of Workers' Compensation's Final Order. Indeed, prior to proceeding to Formal Hearing on February 23, 2015, this matter had previously been scheduled for a Formal Hearing, and Judge Roberson had ruled that the Office of Workers' Compensation should first hear the case. In light of this, the parties first proceeded to an Informal Conference, which was held on April 24, 2014. Following this Informal Conference, the Application for Formal Hearing which resulted in the December 21, 2015 Compensation Order was issued [sic]. Claimant's argument carries no weight because it would essentially mean that a Final Order issued by the Office of Workers' Compensation is never permitted be [sic] to re-visited, which is an incorrect statement of the law.

As explained *supra*, assuming, *arguendo* that the Claimant's argument has merit, Judge Brown's analysis regarding *Snipes* is merely a harmless error because the

Employer and Insurer presented new evidence showing a change in the Claimant's condition, which is the requirement under D.C. law to modify a prior Order. Thus, Judge Brown properly considered the merits of the case and concluded that the Claimant had unreasonably failed to cooperate with vocational rehabilitation.

Employer's Brief at 18.

We agree with Employer's position with regard to both the jurisdiction of AHD to modify a prior order of the Office of Workers' Compensation ("OWC") and the *Snipes* hearing.

We however, agree the ALJ incorrectly stated in the CO 1:

On December 15, 2014, the parties appeared for a full evidentiary hearing before Nata K. Brown, Administrative Law Judge. Employer requested a *Snipes* hearing, claiming that Claimant had a worsening of her condition. The *Snipes* hearing is moot, as the Office of Hearings and Adjudication lacked jurisdiction to modify a Final Order issued by the Office of Workers' Compensation.

CO 1 at 2.

Review of the transcript from the hearing that was conducted by the ALJ on December 15, 2014 ("HT 1"), reveals that the ALJ clearly understood that she was conducting a *Snipes* hearing at that time. See HT 1 at 5. While Counsel for Employer asserted at the *Snipes* hearing that Claimant's condition had worsened, Counsel explained that the conditions that had worsened i.e., Claimant's positive HIV status and liver problems were unrelated to the back injury condition. HT 1 at 7. Employer explained that the suspension of benefits it was seeking was due to Claimant's failure to cooperate with vocational rehabilitation because of the unrelated medical conditions. HT 1 at 20.

The ALJ advised the parties at the *Snipes* hearing that she did not find there was a reason to believe that there was a change in Claimant's condition as it relates to the injury that she sustained in 2006. HT 1 at 26, 27. The ALJ then adjourned the *Snipes* hearing.

Review of AHD's administrative file does not reveal that any Order was issued by the ALJ with respect to a *Snipes* determination. Another hearing was conducted by the ALJ which led to the appealed CO 1. The ALJ noted for the record that a *Snipes* hearing had in fact been held and a written decision had not issued, explaining that she was incorporating the *Snipes* issue with the three issues raised by Employer. The ALJ indicated Employer was seeking termination of temporary total disability benefits and listed the issues as: voluntary limitation of income, failure to cooperate with vocational rehabilitation and nature and extent of disability.²

We find no error with the ALJ's decision to go forward with the formal hearing to determine if a modification of the OWC's order was warranted despite her conclusion at the *Snipes* hearing that

² As correctly asserted by Counsel for Claimant the proper remedy for a failure to cooperate with vocational rehabilitation is a suspension of benefits and not a termination.

there had not been a change in Claimant's condition as it pertained to her physical injury. D.C. Code § 32-1524 (a) provides in pertinent part:

. . . the Mayor may, upon his own initiative or upon application of a party in interest, order a review of a compensation case pursuant to the procedures provided in §32-1520 where there is reason to believe that a change of conditions has occurred which raises issues concerning:

- (1) The fact or the degree of disability or the amount of compensation payable pursuant thereto; or
- (2) The fact of eligibility or the amount of compensation payable pursuant to §32-1509.

A Claimant could be found ineligible for benefits if found he or she refused to accept vocational rehabilitation. With regard to the ALJ's determination that Employer had met its burden of establishing Claimant unreasonably refused its vocational rehabilitation services, Claimant asserts incorrectly that:

Employer did not establish that Ms. Metts was advised of the perceived unreasonable refusal and given an opportunity to "cure" the defect.

Claimant's Brief at 10.

As is well settled in this jurisdiction, the case law created "notice and opportunity to cure" rule is not the law under the Act. As we stated in *Al-Khatawi v. Hersons*, CRB No. 15-032, (August 3, 2015): "A claimant's and employer's obligations are defined by the Act and the regulations; they contain no such specific requirement; and we decline to create or perpetuate one".

Claimant further asserts:

As noted supra, Ms. Metts participated in vocational rehabilitation to the greatest extent possible given [sic] her functional capacity and life situation. Therefore, although Ms. Metts contends that the CO improperly found that she refused to cooperate with vocational rehabilitation services, there was no determination that this refusal was unreasonable. As such, this Honorable Board should reverse this determination if it reaches the merits of the case.

Claimant's Brief at 12, 13.

We must note at this juncture that the ALJ erred in referring to or even reviewing the vocational activity that occurred in 2008 as the modification request is limited to new evidence that is developed after an order is in effect. D.C. Code § 32-1524 (2)(b). Beginning with the second period of vocational rehabilitation services that began on July 3, 2013, the ALJ found that Claimant failed to cooperate with vocational rehabilitation services because she failed to attend 28 of 38 scheduled meetings between the vocational rehabilitation case manager ("VRCM") and applied to ten of sixty-eight job leads provided to her by the VRCM.

As Claimant did attend some of the meetings, 25% by the ALJ's calculations, and applied to some of the job leads, it is difficult to ascertain when Claimant began her failure to cooperate. Further although the VRCM conceded in her October 20, 2014 report, Claimant's barriers are unrelated medical issues which require a lot of medical treatment and hospitalization at times and that the medical issues have made it difficult for the counselor and Claimant to get started with an aggressive job search, the ALJ provided no analysis as to why Claimant's failure to attend meetings and apply for jobs was unreasonable.

The determination as to whether a worker has refused to participate in vocational rehabilitation without justification is made on a case-by-case determination.

The totality of the circumstances of each case, including but not limited to, the medical status of the employee, the conduct of the employee, as well as the conduct of the vocational rehabilitation service, and of the employer, are examined and weighed for indicia of a pattern of conduct evincing an unwillingness to cooperate with vocational rehabilitation.

Johnson v. Epstein, Becker and Green, Dir. Dkt. No. 01-11 (September 22, 2004).

The ALJ recited the list of excuses Claimant gave to the VRCM for not attending the meetings which include "liver issues, unrelated court, headache, testing for liver at NIH, ill relative, leaving town to see an ill relative, red blood cells oversized, accompanying her sister to the hospital, and shingles". CO 1 at 8. The ALJ did not reach a conclusion that Claimant was not credible or that the excuses were not valid excuses. Moreover, we find that merely restating the number of times Claimant did not attend a meeting or did not apply for a job lead without discussing the unreasonableness of the activity renders the ALJ's determination contrary to the law in this jurisdiction.

The ALJ's finding that Claimant failed to cooperate with vocational rehabilitation and that her benefits should be suspended is VACATED. The matter is remanded to AHD for further consideration of only the new evidence proffered by Employer pursuant to D.C. Code § 32-1524 (2)(b) for further analysis as to why Claimant's activities and excuses listed above are unreasonable and when the unreasonable refusal began, if applicable.

CRB No. 16-058

As noted above, before CRB No. 16-006 was assigned to a Panel, Claimant filed an AFH requesting AHD authorize causally related medical care and treatment protocols recommended by her treating neurologist Dr. Batipps including lidocaine patches and consultation with a pain management specialist. The matter was assigned to a different ALJ, who after an evidentiary hearing granted Claimant's claim for causally related medical expenses.

Employer appealed the award of causally related medical expenses, asserting only that the ALJ failed to apply the proper standard and engage in the proper analysis of the evidence contained in the record.

Although not raised by Employer, this Panel must acknowledge that for the period of time that Claimant's benefits were suspended for non-cooperation, Employer was under no obligation to provide medical benefits. D.C. Code § 32-1507(d) provides:

If at any time during such period the employee unreasonably refuses . . . to accept vocational rehabilitation the Mayor shall by order, suspend the payment of further compensation, medical payments and health insurance coverage during such period unless the circumstances justified the refusal.

Consistent with the plain meaning of § 32-1507(d) and the DCCA ruling in *Brown v. DOES*, 134 A.3d 316 (March 24, 2016), AHD lacked authority to issue any award of benefits.

Nevertheless, inasmuch as we have now determined that the suspension was in error, it follows that the ALJ's determination that the requested medical care should be provided should be affirmed as of the date of this order which vacates the suspension. The result might have been different if these cases had not been consolidated, but given the fact that they have been, we are faced with the facts as they are presented in both cases. It would be unduly technical for us to conclude that the fact that the Claimant was subject to a now-vacated suspension should impede her obtaining medical care that she would otherwise have been entitled, but for the erroneous suspension.

In concluding that Claimant met her burden of establishing entitlement to the request medical care, the ALJ found:

The record testimony of Claimant, and reports from her treating medical provider, describe findings of significant physical impairment, related to the work injury, which affected Claimant's ability to perform activities of daily living. Her radicular symptoms particularly affect her ability to ambulate, sit or stand, or participate in living without debilitating pain.

Employer has submitted a medical opinion that agrees with Dr. Batipps' conclusion that Claimant's lumbar condition has reached maximum medical improvement. However, the more persuasive record evidence does not effectively contradict or refute Claimant's claim for medical treatment. There is no authority to support the contention that reaching maximum medical improvement obviates an injured workers' entitlement to medical care. Without sufficient persuasive evidence to the contrary, the Claimant as met her burden of proving entitlement to the relief sought.

CO 2 at 3.

Inasmuch as Employer had the opportunity to challenge the reasonableness and necessity of further medical treatment but elected to rely on its maximum medical improvement defense, we find no reason to disturb the ALJ's decision to award all causally related medical expenses, however in the event the ALJ finds Claimant did unreasonably refuse vocational rehabilitation in CRB No. 16-006, then the ALJ shall suspend all indemnity and medical benefits as of the date the ALJ determines the refusal began.

CONCLUSION AND ORDER

The December 21, 2015 Compensation Order is not supported by substantial evidence in the record nor is it in accordance with the law. The finding that Claimant failed to cooperate with vocational rehabilitation is VACATED and this case REMANDED to the ALJ for further consideration consistent with the above discussion and analysis.

The April 1, 2016 Compensation Order is supported by substantial evidence; in accordance with the law and is AFFIREMD.

So ordered.