GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR

LISA MARÍA MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 12-003

SUSAN DAMEGREENE,
Claimant–Respondent,
v.

AMERICAN RED CROSS,
Self-Insured Employer-Petitioner.

Appeal from a December 12, 2011 Compensation Order on Remand of
Linda F. Jory, Administrative Law Judge
AHD No. 97-411F, OWC No. 532792

Robert C. Baker, Esquire, for the Petitioner
Benjamin T. Boscolo, Esquire, for the Respondent

Before JEFFREY P. RUSSELL,[1] HENRY W. MCCOY, *Administrative Appeals Judges* and LAWRENCE D. TARR, *Chief Administrative Appeals Judges*.

JEFFREY P. RUSSELL, *Administrative Appeals Judge,* for the Compensation Review Board.

DECISION AND REMAND ORDER

BACKGROUND

Respondent Susan DameGreene was awarded temporary partial disability benefits in a Compensation Order issued September 27, 2001. In a Compensation Order issued July 2, 2004, those benefits were modified to permanent partial disability benefits, to be calculated pursuant to D.C. Code § 32-1508 (3)(v)(ii)(II), with her net profits from self-employment being the measure of her post-injury earnings. Ms. DameGreene's self employment consisted of managing and operating a company by the name of "Bipster, Inc.", an endeavor that she claimed consumed all of her available work time.

In order to limit its ongoing and future liability for wage loss benefits, Petitioner American **R**~~r~~ed Cross (Red Cross) instituted a program of vocational rehabilitation. Ms. DameGreene's participation in the program was severely limited by her claims that her work injury, a poly-substance allergy, rendered it virtually impossible for her to work out side her home on a regular basis, or to attend job interviews in any but the most super-clean environments.

[1] Judge Russell was appointed by the Director of DOES as a Board member pursuant to DOES Administrative Policy Issuance No. 12-01 (June 20, 2012).

Red Cross's vocational consultants referred Ms. DameGreene to a program called Expediter. According to the consultant, the program would pay Ms. DameGreene training wages for 500 hours of telephone training and telephone solicitor/survey work, the work and training for this endeavor to be conducted via telephone from Ms. DameGreene's home. Ms. DameGreene advised the consultant that she was unable and/or unwilling to participate in this particular program because she was already employed full time with Bipster, that according to information from her attorney the Expediter position was not a "bona fide employment opportunity", that the Expediter position was only temporary, and other reasons.

Red Cross sought to modify the Compensation Order to suspend the permanent partial disability benefits claiming that Ms. DameGreene's failure to apply to numerous potential employers, the nature of her communications with those employers that she did contact, and her failure to undergo the Expediter program (in which Red Cross paid the wages) constituted an unreasonable failure to cooperate with vocational rehabilitation.

After a series of dismissals of the Red Cross's Application for Formal Hearing, appeals to the CRB and remands to AHD, the matter was appealed to the District of Columbia Court of Appeals (DCCA). The DCCA ruled that the CRB's affirmance of the last dismissal of the Application for Formal Hearing was in error, and remanded the matter to the CRB with instructions to determine whether there was sufficient evidence to warrant a hearing on modification, and if Ms. DameGreene was determined to be employed full time, to decide whether a claimant could be compelled to cooperate with vocational rehabilitation.

The CRB determined that there was sufficient evidence alleging a change of conditions warranting a formal hearing on modification, and remanded the matter to AHD to conduct that hearing and to decide the other issues for which the DCCA remanded. The hearing occurred on October 29, 2009.

On May 24, 2010, an ALJ issued a Compensation Order in which it was determined that a claimant employed full time remained under an obligation to cooperate reasonably with vocational rehabilitation, that being employed full time is a factor that could be considered in determining whether a claimant's failure to participate is unreasonable, and that Ms. DameGreene's failure to apply for numerous positions, given her poly-substance allergies and the inability to ensure that she would not be exposed to harmful allergens**,** did not constitute an unreasonable refusal to cooperate with vocational rehabilitation.

Red Cross appealed to the CRB, arguing that the ALJ's determination that the failure to apply to numerous positions was not unreasonable was unsupported by substantial evidence, and that the ALJ failed to address the failure to participate in the Expediter program, which it argued constituted a vocational rehabilitation program that did not require Ms. DameGreene to be exposed to anything outside her home.

The CRB affirmed the ALJ's determinations concerning an employee's continuing obligation to cooperate with vocational rehabilitation even if employed full time, and that such employment could be considered in connection with assessing the reasonableness of an employee's level of cooperation with those efforts. The CRB also affirmed the ALJ's determination that Ms.

DameGreene's level of cooperation relating to the several job leads received was not unreasonably uncooperative. However, the CRB remanded the matter because the ALJ failed to address Red Cross's argument that Ms. DameGreene's failure to participate in the Expediter program was a failure to cooperate.

On January 5, 2012, the ALJ issued a Compensation Order on remand, in which she again denied Red Cross's modification request, determining that Ms. DameGreene's refusal to participate in the Expediter program was not an unreasonable failure to cooperate. Red Cross appealed to the CRB, which appeal is now before us. We vacate the denial and remand for further consideration.

STANDARD OF REVIEW

The scope of review by the CRB is generally 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*, D.C. Workers' Compensation Act of 1979, as amended, D.C. Code § 32-1501, *et seq.*, (the Act) at § 32-1521.01 (d) (2) (A), and *Marriott International v. DOES*, 834 A.2d 882 (D.C. 2003). Consistent with this standard of review, the CRB and this review panel must affirm 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 where this panel might have reached a contrary conclusion. *Id.*, at 885.

DISCUSSION AND ANALYSIS

The following constitutes the entire "Discussion" in the instant Compensation Order on Remand:

> While the CRB has agreed with the undersigned's classification of Expediter as a vocational rehabilitation resource retained by insurance companies and employers seeking to return injured employees to work, the nature of Expediter and even the validity [sic] has been the subject of many workers' compensation adjudications in various jurisdictions. *See, Hawkins v. Newport News Shipbuilding and Dry Dock Company,* 200-LHC-0124, OWCP No. 5-5421 (1/17/2011), *Avramovic v. R.C. Moore Transportation,* 954 A.2d 449 (September 9, 2008) [,] *Bond v. Newport News Shipbuilding,* VWC File No. 189-783-90 (11/23/04), *General Electric v. Workers' Compensation Appeal Board,* 849 A.2d 1166 (May 27, 2004). To have this classification approved by the CRB in 2011 in this jurisdiction and require claimant to "cooperate" with it in 2006 is not humane. The undersigned finds no reason to question the sincerity of claimant's attorney's advice to claimant that he had information to establish that Expediter was not a bona fide employment opportunity. Claimant was well aware of her duty to cooperate with vocational rehabilitation, and testified that she did everything Ms. Bardecki [the vocational consultant] asked her to do with the exception of the Expediter lead [.] HT at 89, 91. Nevertheless, it is not reasonable to expect claimant to understand that her refusal to look into Expediter's opportunities would be an unreasonable refusal to cooperate with employer's vocational efforts in 2006.

> In sum, it is concluded that claimant did not refuse "opportunities" offered to her from Expediter and the undersigned further concludes that this refusal in 2006 was reasonable.

Compensation Order on Remand, page 5.

The ALJ's phraseology and reasoning are problematic.

First, the ALJ states "While the CRB agreed with the undersigned's classification of Expediter as a vocational rehabilitation resource retained by insurance companies and employers seeking to return injured employees to work, the nature of Expediter and even the validity [sic] has been the subject of many workers' compensation adjudications in various jurisdictions".

After listing a series workers' compensation decisions arising in other jurisdictions, the ALJ said "To have this classification approved by the CRB in 2011 in this jurisdiction and require claimant to 'cooperate' with it in 2006 is not humane."

The ALJ's meaning is opaque and her choice of words confusing.[2] Moreover, the ALJ mistakenly refers to the "CRB's classification".[3]

Further, the CRB did not make any finding that that the claimant was "required" to undertake the Expediter position: it remanded the matter for a determination by the ALJ to determine, in light of her finding that the Expediter program was a "vocational resource" retained for the purpose of facilitating "the return of injured employees to work," whether the claimant's failure to avail herself of the Expediter program, was reasonable. If her refusal was found to be reasonable than there is no "requirement" that it be undertaken and the CRB did not say otherwise. It left that determination for the ALJ in the remand.

Third, without addressing whether, as Petitioner argues in this appeal, the cases cited by the ALJ are critical of the Expediter approach to vocational rehabilitation, we can not tell whether the ALJ is taking administrative notice of some characteristic of Expediter based upon those cited cases, and if so, of what exactly. The facts regarding the Expediter program, as previously found by the ALJ and

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[2] There is apparently something missing from this passage. We can not tell whether it is the "CRB's classification" that the ALJ deems inhumane, or the "requirement" that the claimant cooperate is inhumane, or, that retroactively suspending benefits for five years is inhumane, or that some combination of these elements is inhumane. Nor is it clear what the ALJ means by the "CRB's classification".

[3] The CRB has not "classified" Expediter. The ALJ did. The CRB affirmed the ALJ's finding of fact that "Expediter is a vocational rehabilitation resource retained by insurance companies and employers seeking to return injured employees to work." The CRB made no independent findings of its own; rather, it determined that the ALJ's finding was supported by substantial evidence.

This is a significant finding, because the ALJ could have found otherwise. Rather than being a "vocational rehabilitation resource retained by insurance companies and employers seeking to return injured employees to work", the ALJ might have determined that the Expediter program was really merely "sheltered employment" existing for the purpose of limiting or eliminating the employer's exposure to liability for the full extent of claimant's disability, or a form of "job stuffing" with a similar aim. But the ALJ did not so find, and the record supports the finding that was made.

affirmed by the CRB, are already a matter of record in this case. Resort to sources outside the record to establish some fact concerning the nature of the Expediter program, particularly without affording the parties the opportunity to rebut such "facts", is an abuse of discretion. *Majors v. WMATA,* CRB No. 10-160, AHD No. 10-139, OWC No. 657877 (July 29, 2011).

Fourth, we are unable to discern whether the ALJ's decision not to suspend benefits was premised upon the length of time that has passed since the Expediter program was offered and declined. The ALJ twice references the fact that the events at issue occurred in 2006, suggesting but not making clear that something about the year 2006 is of signal importance, but the ALJ never spells it out clearly, leaving us unable to consider whether the denial is supported by substantial evidence as a conclusion flowing rationally from some fact related to the 2006 date.[4]

Lastly, we disagree with the other apparent reason that the ALJ held Ms. DameGreene reasonably refused to participate in Expediter; her attorney advised her that Expediter was not a bona fide employment opportunity. While her attorney gave her his best advice as to what to do, Ms. DameGreene chose to accept that ad ice. The final decision not to participate was Ms. DameGreene's.[5]

In conclusion**,** we are unable to say that the ALJ's COR is supported by substantial evidence or that the legal conclusions flow rationally from the facts as found because (1) we are unable to glean what the reasons behind the decision were, and upon what facts those reasons are based; (2) the reasons stated by the ALJ were improper: (i) drawing unspecified**,** but apparently negative**,** factual

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[4] Additionally, we note that prior to or after 2006, there have been no judicial or administrative determinations that held Expediter is not a legitimate vocational rehabilitation resource. Indeed, the only decided case is this ALJ's 2010 decision, affirmed on review, that Expediter is a legitimate vocational rehabilitation resource. Therefore, mere passage of time would not be a legitimate reason for excusing a claimant's participation.

[5] We further note the ALJ's consideration of the fact that the claimant relied upon the advice of her attorney that Expediter was not a "bona fide employment opportunity" raises a myriad of problems. Are claimants subject to cross-examination concerning the advice obtained from counsel? Can a claimant be asked whether, in addition to being advised that in counsel's opinion Expediter was not a bona fide employment opportunity, did counsel also advise that it was a "vocational rehabilitation resource" that the claimant might nonetheless be obligated to participate in? Can the attorney be examined under oath on these matters if an employer doubts that the advice was actually given, or suspects that other additional advice had also been given?

In our quasi-judicial system, precepts of attorney-client privilege militate strongly against allowing the issue of what legal advice a claimant received be central to a determination concerning a claimant's entitlement to benefits. It is not conducive to the fair, impartial administration of the workers' compensation law to interject the privileged communications between counsel and client into the mix.

One could question the practicality of a system in which an advocate for one party can enhance the party's chances of litigation success by merely giving a particular piece of legal advice. It should be kept in mind that there are numerous instances in which an employer obtains legal advice that turns out to be contrary to what an ALJ determines is proper. Such advice would not shield an employer from an ALJ finding bad faith or retaliatory discharge just as the legal advice Ms. DameGreene received does not shield her from an ALJ finding that even though she followed that advice, she unreasonably failed to cooperate with vocational rehabilitation.

inferences about the Expediter program as it existed in this case from the manner in which it is characterized outside this record in other cases from other jurisdictions based upon different facts, (ii) relying upon evidence concerning claimant's attorney's opinion as to whether the Expediter program constituted a "bona fide employment opportunity" to form the basis of a finding that failure to cooperate with vocational rehabilitation was not unreasonable; and (3) the ALJ's references (i) to the significance of the year 2006 and (ii) to the CRB having "approved" the classification of the Expediter program as "vocational rehabilitation resource retained by insurance companies and employers seeking to return injured employees to work" remain vague and render consideration of the propriety of her decision impossible to evaluate.

CONCLUSION AND ORDER

The ALJ's denial of the request for modification is vacated. The matter is remanded for further consideration in a manner consistent with the foregoing. The ALJ is not to assess the nature of the Expediter program by reference to anything external to the record, nor is the legal opinion of Respondent's attorney concerning whether the Expediter program constituted a "bona fide employment opportunity" to be considered. To the extent that the ALJ's determination turns upon the fact that the events in question occurred in 2006, the ALJ is to explain why that fact is significant to the outcome of this case.

FOR THE COMPENSATION REVIEW BOARD:

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JEFFREY P. RUSSELL
Administrative Appeals Judge

February 12, 2013
DATE