GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services
Labor Standards Bureau

Office of Hearings and Adjudication
COMPENSATION REVIEW BOARD

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CRB (Dir. Dkt.) No. 03-115

CELANE DARDEN,

Claimant – Petitioner,

v.

GUEST SERVICES, INC. AND PROPERTY AND CASUALTY INSURANCE FUND,

Employer/Carrier - Respondent.

Appeal from a Compensation Order of
Administrative Law Judge Jeffrey R. Russell
OHA No. 01-430B, OWC No. 292465

Matthew Peffer, Esquire, for the Petitioner

Laura Garufi, Esquire, for the Respondent

Before LINDA F. JORY, FLOYD LEWIS and SHARMAN J. MONROE, *Administrative Appeals Judges.*

LINDA F. JORY, *Administrative Appeals Judge,* on behalf of the Review Panel:

DECISION AND ORDER

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board pursuant to D.C. Official Code § 32-1521.01 and 32-1522(2004), 7 DCMR § 230, and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01(February 5, 2005)[1].

[1] Pursuant to Administrative Policy Issuance No. 05-01, dated February 5, 2005, the Director of the Department of Employment Services realigned the Office of Hearings and Adjudication to include, *inter alia*, establishment of the Compensation Review Board (CRB) in implementation of the D.C. Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, D.C. Official Code §32-1521.01. In accordance with the Director's Directive, the CRB replaces the Office of the Director in providing administrative appellate review and disposition of workers' and disability compensation claims arising under the D.C. Workers' Compensation Act of 1979, as amended, D.C. Official Code §32-1501 *et seq.*, and the D.C. Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Official Code §1-623.1 *et seq.*, including responsibility for administrative appeals filed prior to October 1, 2004, the effective date of the D.C. Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004.

BACKGROUND

This appeal follows the issuance of a Compensation Order from the Administrative Hearings Division (AHD) of the Office of Hearings and Adjudication (OHA) in the District of Columbia Department of Employment Services (DOES). In that Compensation Order, which was filed on August 20, 2003, the Administrative Law Judge (ALJ), granted and denied Employer-Respondent's request for a modification of a prior Compensation Order by suspending Claimant-Petitioner's benefits, effective April 22, 2003, based upon his conclusion that Claimant-Petitioner had unreasonably refused Employer-Respondent's vocational rehabilitation pursuant to D.C. Code §32-1507 (d). The order also denied Employer-Respondent's request to modify Claimant-Petitioner's wage loss benefits pursuant to §32-1508(5) to reflect a voluntary limitation of income.

At the time of the Formal Hearing, Claimant-Petitioner was receiving temporary total disability pursuant to a Compensation Order issued on June 28, 2002. Therein, the Administrative Law Judge found Claimant-Petitioner had sustained an accidental injury to her left knee, arising out of and in the course of her employment, and, as a result was temporarily and totally disabled from December 3, 2001 to the present and continuing. Thereafter, Employer-Respondent filed a request for a modification of the existing Compensation Order based upon its allegations that Claimant-Petitioner had failed to cooperate with vocational rehabilitation, or in the alternative, had voluntarily limited her income by not pursuing employment employer alleged it made available to her.

ANALYSIS

As an initial matter, the scope of review by the Compensation Review Board (CRB) and this Review Panel (hereafter, the Panel) as established by the Act and as contained in the governing regulations 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* D.C. Workers' Compensation Act of 1979, as amended, D.C. Official Code §32-1501 *et seq.*, at §32-1522(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 Int'l. v. District of Columbia Department of Employment Services* 834 A.2d 882 (D.C. App. 2003). Consistent with this scope of review, the CRB and this panel are bound 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 where the reviewing authority might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

Turning to the case under review herein, Claimant-Petitioner asserts there is substantial evidence in the record to establish that she did not unreasonably fail to cooperate with vocational rehabilitation services. Claimant-Petitioner alleges also that there is substantial evidence in the record to establish that she cured her reasonable inability to participate in the vocational

rehabilitation process. Claimant-Petitioner re-asserts what she alleged at the Formal Hearing, i.e., that her unwillingness to participate in the vocational rehabilitation process was due to her efforts to follow her physician's orders, thus her failure to cooperate was reasonable.

Employer-Respondent's response does not challenge the ALJ's denial of its request to modify claimant's benefits based on a voluntary limitation of income. Instead Employer-Respondent asserts that the ALJ having observed both witnesses as they testified was in the best position to evaluate their credibility. Employer-Respondent also challenges Claimant-Petitioner's reliance on a decision rendered at the AHD level in *Scott v. George Washington University Hospital*, et al, OHA No. 93-279, OWC No. 172243 (June 28, 1994) (hereafter, *Scott*) and asserts that *Scott* is distinguishable from the instant facts. Specifically, Employer-Respondent proffers that *Scott* did not participate in the vocational rehabilitation process due to a temporary flare-up in her condition causing debilitating pain. Employer-Respondent asserts that the record reflects that Claimant-Petitioner outright refused to participate in the process without any allegation of a flare-up. Lastly, Employer-Respondent asserts that Claimant-Petitioner's argument with regard to her ability to cure the previous finding of failure to cooperate is moot as Employer-Respondent has voluntarily reinstated vocational services to Claimant-Petitioner as of September 29, 2003, based on Claimant-Petitioner's willingness to cooperate and that "claimant's sudden willingness . . . supports Judge Russell's decision and undermines the claimant's entire argument that she was physically unable to participate" and therefore her prior refusal was unreasonable.

Both parties have now referred to activities that have occurred after the Formal Hearing was conducted on July 30, 2003 and both are reminded that the issue of whether Employer-Respondent continued to make vocational rehabilitation available to Claimant-Petitioner as the Act requires and whether Claimant-Petitioner did demonstrate a willingness to participate to cure any failure to cooperate was not before the ALJ and can only be addressed in a modification of the prior order following the disposition of the instant appeal. It is not disputed that this jurisdiction has consistently held a suspension of benefits, pursuant to §32-1507(d) is only appropriate throughout the period that the injured employee unreasonably refuses to accept vocational rehabilitation. Upon demonstration of a willingness to participate in the vocational rehabilitation which Employer-Respondent is obligated to continue to provide, the suspension of benefit payments must end. *See generally Freddie Massey v. Sterling Textile Service*, Dir. Dkt. No. 98-72, H&AS No. 91-796A (January 14, 1999). Nevertheless this issue was not before the ALJ and cannot be addressed on appeal.

In addressing the §32-1507(d) "failure to cooperate" issue, the Administrative Law Judge found employer had met its burden of "demonstrating a change of conditions related to claimant's unreasonable refusal to co-operate with vocational rehabilitation efforts as of April 22, 2003 when claimant declined to meet with employer's vocational expert on any of three proposed meeting dates because in claimant's words her doctor had placed her on a total disability status". The Administrative Law Judge rejected Claimant-Petitioner's argument that her treating physician Dr. Rafik Muawaad's "repeated opinion that claimant cannot work justifies her refusal to participate in employer's [vocational] efforts". The ALJ added:

> What is evident from the medical reports is that claimant's knee condition (and back condition which is not causally related to the work injury) prevents her from

> working in, in the doctor's words, 'an employment that requires by strenuous activity'. His broader statements of her total disability are explained by his failing 'to see how she can go to work' because, in his opinion she does not have the skills for any light employment.

See Compensation Order, OHA No. 01- 430B at 5.

In a detailed recitation, the ALJ listed Dr. Muawaad's opinions concerning Claimant-Petitioner's status from May 13, 2002 to April 23, 2003. The list does not include any indication that Claimant-Petitioner's physical capacity had changed on or about April 23, 2003. Instead on April 23, 2003, Dr. Muawaad opined that he did not see how she could go to work; he did not see any purpose in an attempt to find her a job when she will not be able to perform any employment; and "she does not have the skills for any light employment". As the ALJ asserted, this statement of Dr. Muawaad's is not a medical opinion and as such cannot be afforded any preference usually accorded a treating physician. Dr. Muawaad's opinion is an expert opinion outside the scope of Dr. Muawaad's medical expertise, one more appropriately considered by a vocational rehabilitation expert.

Dr. Muawaad's opinion does not speak to the sedentary types of jobs that the vocational rehabilitation counselor did locate for petitioner and specifically identified by the ALJ in the Compensation Order as "Cashier positions at two different movie theaters and at a Gulf gas station". *Id* at 3. Although the vocational rehabilitation counselor may have found non sedentary type jobs also, there exists no evidence in the record that the cashier positions required standing or walking or exceeded the physical capacity as found in *Darden v. Guest Services*, OHA NO. 01-430 (June 28, 2002). Moreover, there is no reason to infer that Claimant-Petitioner was not aware that Employer-Respondent was in fact identifying sedentary positions, which Claimant-Petitioner physically had the capacity to do. Thus it is this panel's conclusion that Claimant-Petitioner's decision to abruptly stop all cooperation with Employer-Respondent's vocational efforts was unreasonable.

CONCLUSION

The Compensation Order of August 20, 2003, which suspended Claimant-Petitioner's temporary total disability benefits based upon her unreasonable failure to cooperate with Employer-Respondent's vocational rehabilitation efforts is supported by substantial evidence in the record and is in accordance with the law.

ORDER

The Compensation Order of August 20, 2003 is hereby AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

LINDA F. JORY

Administrative Appeals Judge

March 17, 2005