

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

**Department of Employment Services**

MURIEL BOWSER  
MAYOR



DEBORAH A. CARROLL  
DIRECTOR

**COMPENSATION REVIEW BOARD**

**CRB No. 15-094**

**ELIZABETH LAGON,  
Claimant-Petitioner,**

**v.**

**WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,  
Self-Insured Employer-Respondent.**

Appeal from a May 6, 2015 Compensation Order  
by Administrative Law Judge Gerald D. Roberson  
AHD No. 14-599, OWC No. 679055

(Decided September 30, 2015)

David M. Snyder for the Claimant  
Mark H. Dho for the Employer

Before LAWRENCE D. TARR, *Chief Administrative Appeals Judges*, LINDA F. JORY and HEATHER C. LESLIE, *Administrative Appeals Judges*

LAWRENCE D. TARR for the Compensation Review Board.

**DECISION AND ORDER**

This case is before the Compensation Review Board (“CRB”) on the Application for Review filed by Elizabeth LaGon (“Claimant”) of the May 6, 2015 Compensation Order (“CO”) issued by an Administrative Law Judge (“ALJ”). In the CO, the ALJ found that Claimant unjustifiably refused to cooperate with vocational rehabilitation and determined that Washington Metropolitan Area Transit Authority (“Employer”) was entitled to a credit for the voluntary workers’ compensation benefits it paid during the period Claimant unjustifiably refused vocational rehabilitation.

**Facts of Record and Procedural History**

Claimant, a bus operator for Employer, was injured at work on March 23, 2011, when another vehicle struck her bus. Claimant injured her right arm, right leg, elbow and head in the accident.

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Employer accepted her claim and voluntarily began paying Claimant workers' compensation benefits.

Claimant eventually came under the care of Dr. Matthew Ammerman who performed a cervical discectomy and fusion in February 2012. Dr. Ammerman released Claimant to light duty work on October 8, 2012, with restrictions that prevented her from doing her pre-injury job.

Employer initiated vocational rehabilitation services on January 8, 2013. Claimant was assigned several vocational rehabilitation counselors, the most recent being Ms. Melissa Street, who began working with Claimant in May 2014. After several months of services, Employer believed Claimant was unreasonably refusing to participate in vocational rehabilitation so it ended voluntary payment of benefits on September 14, 2014. Employer filed a Notice of Controversion on September 15, 2014.

On September 18, 2014, Claimant, by counsel, sent a letter to Employer's claims adjuster stating that she disagreed with suspending her benefits and that she was willing to meet with the vocational rehabilitation counselor and participate in vocational rehabilitation. Employer ultimately resumed voluntary payments on November 6, 2014 and reinstated vocational rehabilitation services.

Claimant filed a claim for benefits and an evidentiary hearing was held before the ALJ on March 18, 2015. The hearing record closed on April 10, 2015 and the ALJ issued his CO on May 6, 2015. In the CO, the ALJ held Claimant unreasonable refused to accept vocational rehabilitation services. The ALJ further held that Claimant's counsel's September 18, 2014 letter cured the unreasonable refusal as of the date of the letter. The ALJ suspended benefits for the period he determined Claimant unreasonably refused vocational rehabilitation services, July 9, 2014 to September 18, 2014, granted Employer a credit for any temporary total disability benefits Employer voluntarily paid Claimant during the period of her refusal, and ordered Employer to continue to provide vocational rehabilitation services.

Only Claimant has appealed the ALJ's decision. Claimant argues that the ALJ had no authority to grant Employer a credit and if he did, his finding that she unreasonably refused vocational services is not in accordance with the law.

#### ANALYSIS

Claimant first argues that the ALJ erred by suspending Claimant's benefits and granting Employer a credit for the benefits it voluntarily paid during the period in which he found Claimant unreasonably refused vocational rehabilitation services. Claimant argues that pursuant to *Epstein, Becker & Green v. DOES*, 850 A. 2d 1140 (D.C. 2004), a claimant must be given notice and a chance to cure before benefits can be suspended. Claimant asserts:

The procedure for suspending benefits, however, must be done in accordance with the law as set forth by the District of Columbia Court of Appeals. In *Epstein, Becker & Green v. D. C. Dep't of Empl. Servs.*, the Court noted two specific requirements which are conditions precedent the [sic] suspension of benefits

when there is an alleged unreasonable refusal of vocational rehabilitation: first, the employer must give notice of an allegation that the injured worker is unreasonably refusing vocational rehabilitation and second, the employer must give the injured worker a chance to cure the defect. 850 A.2d 1140, 1143, (D.C. 2004). The Employer did not comply with these requirements until September 15, 2014. As such, there is no basis for the CO to award the Employer a retroactive credit for benefits voluntarily paid.

Claimant's Memorandum at 6.

*Epstein, Becker & Green v. DOES* provides authority against Claimant's position, not for it.

In *Epstein, Becker & Green*, 812 A.2d 901 (D.C. 2002) an ALJ found that the Claimant unreasonably failed to co-operate with the vocational rehabilitation. On appeal, the Director, who had appellate authority then, reversed. The District of Columbia Court of Appeals ("DCCA") reversed the Director's decision and directed the Director on remand to address the two arguments raised by the Claimant: (1) that she did not unreasonably fail to cooperate with the employer's offered vocational rehabilitation services and (2) because she was not given notice that her actions constituted a failure to cooperate, she was improperly denied an opportunity to cure, contrary to the rehabilitative intent of D.C. Code § 32-1507(d)

On remand, the Director agreed with the Claimant's second argument. The Director held that the employer was required to give the claimant notice and an opportunity to correct her behavior before it can suspend benefits for unreasonably refusing vocational rehabilitation services. *Johnson v. Epstein, Becker and Green*, Dir. Dkt. No. 01-11, OHA No. 98-273B, OWC No. 519621 (January 30, 2003).

The Employer again appealed to the DCCA. The DCCA again reversed and remanded. The Court held that since the requirement of notice and opportunity to cure was not in the statute or regulations, or foreshadowed in prior decisions, application of the requirement deprived the employer of basic procedural due process. The Court remanded solely for a determination of whether the claimant cooperated with vocational rehabilitation:

The Director, accordingly, must make that determination rather than the abbreviated one he made. In assessing Johnson's cooperation, of course, the Director may consider whether Epstein's own actions (or inaction) may have led her to believe that her cooperation was not in question. But what he may not do is short-circuit the inquiry solely by reference to a newly-fashioned requirement of notice and opportunity to cure.

*Epstein, Becker & Green v. DOES*, 850 A.2d 1140, 1144.

In *Al-Khatawi v. Hersons Glass*, CRB 15-032, AHD No. 11-231, OWC No. 560167 (August 3, 2015), the CRB held:

The Decision of the Director in which the [notice and cure] rule was enunciated is *Johnson v. Epstein, Becker, and Green*, Dir. Dkt No. 01-11, OHA No 98-273B, OWC No. 519621 (January 30, 2003). Although the Director required Epstein, Becker notify the claimant of her failure to cooperate and offer her an opportunity to cure that failure before any suspension could be imposed, the Act has numerous provisions requiring that one party give specific notice of certain facts in order to be in compliance with the Act, and none of these provisions are contained in the law or regulations governing the provision of vocational rehabilitation, and most notably, no such requirement is included in the suspension of benefits provision.

Since the *Epstein, Becker & Green* case, neither the Director nor the CRB has imposed a “notice and opportunity to cure” condition precedent to suspending benefits for unreasonably refusing vocational rehabilitation services nor has there been any Code or regulatory changes to that effect.

D.C. Code § 32-1507-(d) requires that a claimant’s compensation shall be suspended during the period that the claimant unreasonably refuses vocational rehabilitation. The ALJ properly suspended benefits during the period in which he found Claimant unreasonably refused vocational rehabilitation services.

Claimant’s other assignment of error relates to the credit that was granted Employer. The ALJ determined Employer should be granted a credit an amount equal to the voluntary indemnity payments it made to Claimant during the period of her refusal.

Claimant first argues, “Employer failed to adduce any authority which states it is entitled to retroactively suspend temporary total disability benefits that it has been paying voluntarily.” Claimant’s Memorandum at 5.

As Employer correctly points out,

Claimant’s assertion that the ALJ ‘retroactively’ suspended claimant’s temporary total disability benefits misapprehends the procedural nature of [sic] claim during period of July through September of 2014. The temporary total disability benefits were voluntary during this period of time. The ALJ made a determination that claimant refused to cooperate and the employer should be entitled to a credit for the period when it made voluntary payment of benefits.

Employer’s Memorandum at 6.

Claimant also argues that the ALJ exceeded his authority by granting a credit for voluntary payments of compensation made during the period of the refusal.

D.C. Code § 32-1515(j) states:

If the employer has made advanced payments of compensation, he shall be entitled to be reimbursed out of any unpaid installment of installments of

compensation due. All payments prior to an award, to an employee who is injured in the course of and scope of his employment, shall be considered advance payments of compensation.

The ALJ determined Claimant refused to cooperate between July 9 and September 18, 2014. Employer made voluntary payments of temporary total disability benefits during this period, and the ALJ correctly awarded Employer a credit for the benefits paid.

As to Claimant's other assignment of error, we also affirm the ALJ's finding that Claimant unreasonably refused vocational services. The evidence established that Claimant was expected to meet with her counselor, identify and contact between 10 and 15 potential employers each week, apply for appropriate jobs on her own or with help from Ms. Street, and keep a job search log. When Claimant told Ms. Street she did not have computer skills, Ms. Street located a free computer training course, which Claimant did not attend.

The ALJ held:

In this case, Claimant's actions demonstrate she unreasonably refused to accept vocational rehabilitation within the meaning of Section 32-1507(d). The record is replete with instances of Claimant's failure to cooperate with vocational rehabilitation. The most obvious examples concerns Claimant's unwillingness to maintain a job log and submit it to the Vocational Case Manager only a weekly basis. As noted above, Claimant failed to submit job logs for the period of July 9, 2014 to September 10, 2014. At the hearing, Claimant disagreed that she did not provide job logs from July 9, 2014 to September 10, 2014. HT p. 41. Claimant did not offer an explanation for why she did not submit the job logs, and she did not produce any job logs for the period in question to support her contentions that she had cooperated with vocational rehabilitation. The vocational case manager testified Claimant's role during the process was to meet with her on a weekly basis, and apply for positions on her own. HT p. 48. Ms. Street stated the job log has a carbon copy, and Claimant would retain a copy and Ms. Street kept a copy to keep everybody on the same page. HT p. 49. Ms. Street testified the job logs would document when Claimant applied for positions on her own, and Claimant's reasonable effort would include searching for 10-15 jobs per week, which would include job applications or telephone contacts. HT p. 49. Ms. Street testified she was the only one that applied for jobs during the period of May 2014 through September 2014. HT p. 79. Claimant's unwillingness to submit job logs detailing her employment contacts is an unreasonable refusal to participate in vocational rehabilitation services.

Claimant's lacks computer skills, and has demonstrated an unwillingness to participate in free computer classes. At the hearing, Ms. Street stated she spoke to Claimant at the first and second meeting about computer training and an online course in particular. HT p. 56. Ms. Street testified the prior vocational case manager, Ms. Mason, had recommended Claimant attend a computer class on April 23, 2014 at local Good Will, and Claimant did not want to attend the

classes. HT pp. 27 and 56-57. During cross-examination, Claimant stated she did not want to take the computer classes because her neck injury prevented her from sitting for a long period of time. HT p. 28. Claimant also testified she did know how long each class was. HT p. 40. Ms. Street testified there is a computer training course online that allowed you to work at your own pace as long as you needed. HT p. 56. The record reveals Claimant has limited computer skills, and the vocational case manager would input computer applications on Claimant's behalf. HT p. 61. While the evidence reveals Claimant did not have a working computer, Ms. Street testified Claimant could apply for positions at the library and work force centers. HT p. 65. Ms. Street stated in this day and age, most employers want electronic applications. As such, Claimant's unwillingness to participate in computer training classes is an unreasonable refusal to participate in vocational rehabilitation.

CO at 4-5.

Claimant does not dispute that she failed to do what the ALJ found she failed to do. Rather Claimant argues that her actions during this period showed she did not refuse vocational rehabilitation:

During the relevant time for which the Employer claimed a credit, Ms. Lagon maintained contact with the vocational counselor, has met with her from time to time, and applied for jobs.

Claimant's Memorandum at 7.

The issue before us is not whether there is some evidence that supports a contrary finding. Rather the CRB reviews the CO to see if there is substantial evidence to support the ALJ's determination that Claimant unjustifiably refused vocational rehabilitation.

When judged against this standard we find that there is substantial evidence to support the ALJ's findings that Claimant unreasonably refused vocational rehabilitation services.

#### **CONCLUSION AND AWARD**

The May 6, 2015 CO is supported by substantial evidence in the record and is in accordance with the law. The CO is **Affirmed**.

*So ordered.*