

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 16-054

**ELIZABETH P. LAGON,
Claimant-Respondent,**

v.

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

Appeal from a March 22, 2016¹ Compensation Order
by Administrative Law Judge Gwenlynn D'Souza
AHD No. 14-599A, OWC No. 679044

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2016 AUG 26 AM 8 46

(Decided August 26, 2016)

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

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

JEFFREY P. RUSSELL for the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

Elizabeth P. LaGon (Claimant) was employed by Washington Metropolitan Area Transit Authority (Employer) as a bus driver. On March 23, 2011, she sustained an injury while employed by Employer. The injury included cervical damage which resulted in a cervical discectomy and fusion performed February 2, 2012. Her injuries have resulted in her being disabled from her pre-injury job due, in part, to her inability to turn her neck sufficiently to maintain a commercial driver's license, a requirement for her to perform her pre-injury job. The injury also resulted in limitations on Claimant's ability to use her arms to their previous degree, including lifting limitations imposed by her treating physician, Dr. Matthew Ammerman, consisting of 25 pounds infrequently, and 15 pounds otherwise.

¹ The Application for Review states that the Compensation Order was issued March 21, 2016, which is the date the Administrative Law Judge placed below her signature line. However, the date of mailing as set forth in the Certificate of Service is March 22, 2016.

Employer instituted vocational rehabilitation services (VR), in the nature of job placement assistance, and Employer sought a determination that Claimant was non-cooperative in those efforts in a prior formal hearing before an Administrative Law Judge (ALJ) in the Administrative Hearings Division (AHD) within the Office of Hearings and Adjudication (OHA) of the District of Columbia Department of Employment Services (DOES).

In that prior proceeding, the prior ALJ found that Claimant had unreasonably failed to co-operate with VR, and imposed a suspension of benefits.

Employer voluntarily reinstated Claimant's benefits when Claimant expressed a willingness to cooperate, and VR was resumed April 15, 2015.

Dissatisfied with Claimant's level of co-operation, Employer again suspended Claimant's benefits commencing October 27, 2015. On November 15, 2015, Claimant filed an Application for Formal Hearing (AFH) in AHD, seeking temporary total disability benefits from October 27, 2015 through the date of the formal hearing and ongoing.

Preliminary to the formal hearing, the parties filed a Joint Pre-Hearing Statement and Stipulation form (JPHS), in which the parties stipulated to "Nature and Extent of Disability", without including what the nature and extent of that disability was. The only contested issue identified was "Failure to Cooperate" pursuant to D.C. Code § 32-1507. Claimant's Claim for Relief was identified as "Temporary Total Disability" from October 27, 2015 to the present and continuing.

The formal hearing was conducted on February 18, 2016 before an ALJ in AHD (the ALJ), at which time the ALJ and counsel reviewed the JPHS and confirmed that it was accurate, and specifically, that the parties "stipulated" to nature and extent of disability.

However, at the time of the formal hearing, the parties and the ALJ engaged in a colloquy prior to commencing the receipt of testimony, in which Employer argued that the only decision for the ALJ to make was whether Claimant was cooperative, and that if it was found she was not, Employer would be obligated to repay the benefits withheld and resume TTD payments thereafter. Claimant asserted that, in the event of such a finding by the ALJ, in addition to an order directing repayment of withheld benefits, Claimant would be entitled to an award including continuation thereof. *See* HT 9 – 11.

Following the formal hearing, the ALJ issued a Compensation Order on March 21, 2016 (the CO). The CO identified the "Claim for Relief" as "Claimant seeks temporary total disability benefits from October 27, 2015, to the present and continuing, and interest on accrued benefits." The "Issues" were identified as "Whether Claimant has failed to cooperate with Employer's vocational rehabilitation efforts contrary to D.C. Code § 32-1507(d)? [sic]" and "Whether Claimant is entitled to her claim for relief? [sic]"

In the "Conclusion of Law", the ALJ wrote "Based upon the record, I conclude, by a preponderance of the evidence, that Claimant reasonably cooperated with vocational

rehabilitation, by increasing her independent job search activities, given her medical status. I further conclude that this administrative court may award the claim for relief.”

In the “Order”, the ALJ wrote “It is hereby **ORDERED** that Claimant’s claim for relief be, and hereby is, **GRANTED**. Claimant is awarded temporary total disability benefits from October 27, 2015, to the present and continuing, and interest on accrued benefits.”

Employer filed an Employer/Carrier’s Application for Review and Employer’s Memorandum of Law in Support of its Application for Review (Employer’s Brief) with the Compensation Review Board (CRB), in which Employer requests that the CO be vacated, arguing that the finding that Claimant had cooperated with VR is not supported by substantial evidence, and that the award of TTD is not in accordance with the law.

Claimant filed Claimant’s Opposition to the Application for Review (Claimant’s Brief), arguing that the CO is supported by substantial evidence and should be affirmed.

Because the CO is supported by substantial evidence and the award of a stipulated level of TTD is not contrary to law, the CO is affirmed.

ANALYSIS

The first issue on appeal is whether the determination that Claimant had not unreasonably cooperated with VR is supported by substantial evidence.

Employer argues that it is not, asserting that “there is no credible evidence to support a finding that claimant did not unreasonably refuse to cooperate with vocational rehabilitation.” Employer’s Brief at 5. The basis of this assertion is twofold: first, that “the preponderance of the evidence demonstrated that claimant intentionally sought out reasons to not participate or find positions within her capacity”, and that the ALJ “improperly credited the claimant’s testimony about her limitations rather than compare and make findings also based on the medical records”, “improperly credited the claimant’s testimony about her own understanding as to how to file [sic] out the Employer Contact Logs”, that “claimant cannot lower the standard of cooperation for her own benefit” and her actions “demonstrate a passive and negative attitude towards her responsibility to participate in vocational rehabilitation.” *Id.*, at 5 – 6.

The gravamen of these arguments is that, since Claimant had certain limitations imposed by Dr. Ammerman, Claimant was obligated to apply for every potential job identified by the VR counsellor that did not violate those physical restrictions, and that failure to do so is unreasonable non-cooperation.

What Employer fails to recognize is that the ALJ also found that, in addition to the physical limitations based upon her anatomical incapacities, Claimant was also taking medications since November 2014 under the direction of Dr. Jose Suros, a pain management specialist, and the ALJ credited Claimant’s testimony that these medications had a sedative effect upon her, and that Claimant was found to be a credible witness who declined to apply for some positions because they were beyond her vocational skill level, were too distant from her home, or that

making self-directed online job applications online was beyond her competency with computers. *See* CO at 3. The ALJ also listed a number of record-based activities that Claimant did undertake, some at the direction of the VR counsellor, some on her own, and that she filled out job search logs in a manner consistent with her understanding as to how they were to be completed. *Id.*, at 3 – 5.

Employer's arguments reveal their own shortcomings: they are complaints about the evidence that the ALJ credited, and Employer's view as to in which party's favor that evidence preponderates. Both these general complaints concern matters to which a fact-finder's assessments are entitled to great weight, and to which we are required to give great deference. Employer is asking that we reweigh the evidence and substitute our judgment for that of the ALJ, something we are not empowered to do. Where the ALJ's decision is supported by substantial evidence, we have no authority to do so, even where the record contains substantial evidence from which a contrary conclusion could have been drawn. *Washington Vista Hotel v. DOES*, 721 A.2d 574, 578 (D.C. 1998); *Gary v. DOES*, 723 A.2d 1205, 1209 (D.C. 1998).

Further, the challenged findings and conclusions in the CO regarding cooperation are based in large part upon the ALJ accepting Claimant's testimony concerning her ongoing complaints, her understanding of the VR process, the effects of her injuries and medications upon her ability to engage in VR. These are questions of credibility. An ALJ's credibility determinations are to be given great deference, due to an ALJ's opportunity to observe the nature and character of a witness's demeanor. *Dell v. DOES*, 499 A.2d 102, 106 (D.C. 1985); *Georgetown University v. DOES*, 830 A.2d 865, 870 (D.C. 2003).

We see no reason to depart from these principles in this case.

Employer's second attack is upon the ALJ's determination that she had the authority to make a specific award for TTD. It argues that "there was no dispute" as to the nature and extent of disability, that it was "stipulated", and since there was no dispute, including the TTD award in the CO amounts to an "advisory opinion". As a practical matter, it appears that what Employer seeks to avoid is the entry of a Compensation Order placing it under an obligation to either continue to pay benefits, or seek a modification of the award if Claimant's future conduct or condition, in its view, warrants cessation of benefits. Employer would prefer, it seems, to retain the option of ceasing payment without seeking modification.

While there is some logical force to the argument, we must ultimately reject it. When Employer stipulated to the nature and extent of Claimant's disability, there is only one thing that that could mean in this case: Employer stipulated that Claimant is temporarily totally disabled.

A stipulation serves to establish a fact or legal status that would otherwise require evidentiary proof concerning a relevant issue in dispute. In this case, the relevant question at the formal hearing was whether Claimant was entitled to the TTD benefits sought. Part of the legal requirement for such entitlement is that the Claimant be temporarily totally disabled. The parties could either fight it out or stipulate. Because it was not in dispute, the stipulation path was chosen.

But the ultimate question, Claimant's entitlement to the benefits sought, was in dispute. By suspending Claimant's benefits, Employer placed Claimant's entitlement to those benefits at issue. No award of benefits can be effective unless it contains within it sufficient factual and legal bases for the award. Once entitlement is at issue a determination as to all the elements underlying such an award must be made part of the award.

Employer could have avoided the "risk" of placing itself under an award of benefits by not suspending benefits to which it recognized Claimant was otherwise entitled, but-for the alleged non-cooperation. However, by bringing the matter to AHD for adjudication, it has transformed the voluntary nature of the payments into a disputed one requiring legal resolution. Such a resolution is not properly done piecemeal: once the issue of legal entitlement to benefits is placed before AHD for adjudication, it must be adjudicated.

We see no error in the ALJ making an award as prayed by Claimant. We also see no reason why, once Claimant has established entitlement to receive ongoing TTD payments in a contested case, Employer should be relieved of the normal requirements attendant to terminating those benefits should circumstances change in the future.

CONCLUSION AND ORDER

The findings that Claimant has not unreasonably failed to cooperate with vocational rehabilitation are supported by substantial evidence, and the conclusion that the ALJ had the authority to award temporary total disability benefits is in accordance with the law. The Compensation Order of March 22, 2016 is affirmed.

So ordered.