GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services
Office of the Director

Gregory P. Irish
Director

(202) 671-1900-Voice
(202) 673-6976-Fax

ETHEL JOHNSON,	)	
Claimant,	)	
v.	)	Dir. Dkt. No. 01-11
	)	OHA No. 98-273B
EPSTEIN, BECKER AND GREEN,	)	OWC No. 519621
and	)	(Private Sector)
PACIFIC INDEMNITY COMPANY,	)	
Employer/Carrier.	)	

Appeal of the Compensation Order of Jeffrey P. Russell
Administrative Law Judge, Department of Employment Services

George E. Swegman, Esquire, for the Claimant

Bonnie J. Brownell, Esquire, for the Employer/Carrier

DECISION OF THE DIRECTOR ON REMAND

Jurisdiction

The Claimant files this appeal from the Compensation Order of Administrative Law Judge Jeffrey P. Russell denying her claim for workers' compensation benefits, pursuant to the provisions of the District of Columbia Workers' Compensation Act of 1979, as amended, D.C. Law 3-77, D.C. Official Code §§ 32-1501-1545 (2001) (Act).

Background

In a Compensation Order dated December 18, 2000, ALJ Russell found that the Claimant unreasonably failed to co-operate with the vocational rehabilitation of the Employer. On appeal, the Director reversed on the basis that the Claimant did not fail to

co-operate because the vocational rehabilitation counselor had closed her file. The Employer then filed an appeal to the D.C. Court of Appeals. The court reversed and remanded, holding that there was a lack of substantial evidence to support the Director's decision. However, the court directed that two arguments raised by the Claimant be addressed: (1) that she did not unreasonable 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). *See Epstein, Becker and Green v. D.C. Department of Employment Services*, 812 A.2d 901 (D.C. 2002).

On remand from the court, the Director agreed with the Claimant's second argument. The Director reasoned that without notice and an opportunity to correct her behavior before vocational rehabilitation was terminated, the Claimant was punished without knowing that she had been perceived as being defiant. *See 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 D.C. Court of Appeals. The court again reversed and remanded. The court stated 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 in this case deprived the Employer of basic procedural due process. The court remanded for a determination of whether the Claimant cooperated with vocational rehabilitation. *See Epstein, Becker and Green v. D.C. Department of Employment Services*, 850 A.2d 1140 (D.C. 2004).

Analysis

The sole issue on remand is whether the December 18, 2000 decision that the Claimant unreasonably refused to accept vocational rehabilitation is supported by substantial evidence and is in accordance with the law.

The Director of the Department of Employment Services (Director) must affirm the Compensation Order under review if the findings of fact contained therein are supported by substantial evidence in the record considered as a whole and if the law has been properly applied. *See* D.C. Official Code § 32-1522 (2001); 7 DCMR § 230 (1986). Substantial evidence is such relevant evidence as a reasonable mind might find as adequate to support a conclusion. *George Hyman Construction Company v. D.C. Department of Employment Services*, 498 A.2d 563, 566 (D.C. 1985).

As stated in D.C. Official Code § 32-1507 (c), vocational rehabilitation is "designed, within reason, to return the employee to employment at a wage as close as possible to the wage that the employee earned at the time of injury." To assure that the employee participates in the vocational rehabilitation process, D.C. Official Code § 32-1507 (d) provides "if at any time . . . 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 [of refusal], unless the circumstances justified the refusal."

The conclusion that an employee has violated D.C. Official Code § 32-1507 (d) by refusing to accept vocational rehabilitation 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. *See Joyner v. D.C. Department of Employment Services*, 502 A.2d 1027 (D.C. 1986); *Soriano v. Barnes, Morris, Pardoe & Foster*, Dir. Dkt. No. 02-24, OHA No. 98-187B, OWC No. 521626 (February 11, 2003). Thus, an employee who states that he will not participate in vocational rehabilitation activities, who fails to undergo vocational rehabilitation assessment although cleared by his treating physician to participate and who evades a vocational rehabilitation counselor using lies and deception for a four month period is unreasonably refusing to accept vocational rehabilitation. *See Black v. The Washington Post,* Dir. Dkt. No. 00-04, H&AS No. 96-222B, OWC No. 296939 (July 27, 2000), *aff'd Black v. D.C. Department of Employment Services*, 801 A.2d 983 (D.C. 2002). However, if the employee's actions or conduct are either unreasonable or justified under the circumstances, a finding of refusal to accept vocational rehabilitation will not stand. *See Romero v. Marriott Corporation*, Dir. Dkt. No. 01-77, OHA No. 00-418A, OWC No. 543807 (September 26, 2002).

A review of the evidence in the instant case reveals that the December 18, 2000 decision is not based upon substantial evidence in the record. The ALJ stated:

> Regarding the alleged failure to co-operate with vocational rehabilitation, the evidence is uncontradicted that (1) a medical authorization was requested to permit employer's counselor to obtain information essential to an effective job search, (2) an unsatisfactory draft of such an authorization was provided to claimant through her attorney on October 12, 1999, (3) a revised authorization was given claimant, through her attorney, within a week of that date, (4) when requested on December 3, 1999, to provide the long awaited document, claimant, through her attorney, refused to provide it for

> reasons having nothing to do with the release itself, and (5) no offer to provide the release has been made by the claimant since that date. The record is devoid of any explanation for the claimant's refusal to provide the document as of December 3, 1999. The record is uncontradicted that the document was necessary if employer was going to be able to find out from claimant's treating physician precisely what types of work activities claimant could safely perform. Requesting the document was reasonable, and refusing to provide it, absent a reason, seems perforce unreasonable. D.C. Code § 36-307 provides for the suspension of compensation benefits where a claimant unreasonably refuses to co-operate with vocational rehabilitation efforts. On this record, claimant's refusal, although effected through her attorney, is nonetheless unreasonable. The refusal commenced on December 3, 1999 and continues to the present, there being no evidence of a change of heart on claimant or her counsel's part.

Compensation Order at pp. 4-5.

The ALJ failed to address the evidence that Mr. Robinson, the vocational rehabilitation counselor, did not have the Claimant's entire file with him during his testimony as it was archived in Philadelphia (TR at p. 95); that Mr. Robinson used a working file which contained fragmented notes of the case (TR at pp. 96-97); that the Claimant's counsel stated that she would not provide the medical authorization until the erroneous information, based upon Mr. Robinson's assumptions, about the Claimant's job duties with the Employer in the vocational rehabilitation report was corrected (TR at pp. 64, 85-88); that although Mr. Robinson called twice to follow-up on the return of the medical authorization, he did not speak to the counsel on either occasion and left a message only once (TR at pp. 89-90, 111); that although Mr. Robinson testified that he sent a letter to the Claimant's counsel requesting a return of the authorization, he was unable to give a date the letter was sent or to produce a copy of the letter and time spent writing the letter was not shown in his vocational rehabilitation reports (TR at 102; Employer Exhibit No. 5); that in a letter dated November 16, 1999, the Claimant's counsel directed Mr. Robinson to obtain medical records and necessary information from the carrier, and enclosed recent reports from the Claimant's treating physician (Employer Exhibit No. 5); that Mr. Robinson was instructed by the Employer to "diary" the file, *i.e.*, take no action on the file, from December 4, 1999 to January 6, 2000 (TR at p. 119); and that Mr. Robinson testified that the Claimant never refused to do anything without giving an explanation and that none of her explanations were unreasonable. (TR at p. 126).

The ALJ also failed to address evidence showing that the Claimant worked and was seeking employment and training on her own (TR at p. 141-142, 144-145). Surely such actions demonstrate a willingness of an individual to return to gainful employment and do not suggest an attempt to avoid vocational rehabilitation. The Director notes that the ALJ stated on the record that he believed the Claimant sought employment. (TR at p. 136-137).

On remand, the ALJ shall apply the test enunciated above which requires an examination of the totality of the circumstances for indicia of a pattern of conduct evincing an unwillingness to cooperate with vocational rehabilitation. The ALJ shall also make findings of fact and conclusions of law on the evidence delineated above which he did not address earlier. Finally, the ALJ shall be mindful of the humanitarian purposes of the Act and axiom applicable to cases under the Act that "doubts are to be resolved in favor of the claimant." *Baker v. D.C. Department of Employment Services*, 611 A.2d 548, 550 (D.C. 1992).

Accordingly, the December 18, 2000 decision suspending the Claimant's temporary total disability benefits is not supported by substantial evidence, and is not in accordance with the law.

Conclusion

The December 18, 2000 decision that the Claimant unreasonably refused to accept vocational rehabilitation is not supported by substantial evidence and is not in accordance with the law.

Decision

The December 18, 2000 Compensation Order denying the Claimant's claim for benefits pursuant is set aside and remanded. On remand, the ALJ is to issue a new decision, consistent with the above discussion and directives, on the issue of whether the Claimant unreasonably refused to accept vocational rehabilitation.

Gregory P. Irish
Director

September 22, 2004
Date

Appeal Rights

Any party aggrieved by this Order may petition the D.C. Court of Appeals for its review. D.C. App. 15 (a) requires that the Petition for Review be filed within 30 days of notice of a final order. The Court is located at 500 Indiana Avenue, N.W., Washington, D.C. 20001.

In addition to service upon opposing counsel in this proceeding, copies of the Petition for Review and all motions, briefs or other documents filed in connection with such appeal shall be served upon:

Edward E. Schwab, Esquire
Acting Deputy Corporation Counsel
Appellate Division
One Judiciary Square
441 4th Street, N.W., 6th Floor
Washington, D.C. 20001

Eugene E. Irvin, Esquire
General Counsel
Office of the General Counsel
Department of Employment Services
64 New York Avenue, N.E., 3rd Floor
Washington, D.C. 20002

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of Sept. 2004 a copy of the foregoing **DECISION OF THE DIRECTOR ON REMAND** by certified mail to the following:

George E. Swegman, Esquire
Ashcraft & Gerel
2000 L Street, N.W.
Suite 400
Washington, D.C. 20036
Certified No. 7003 1680 0001 2466 8769

Bonnie J. Brownell, Esquire
2031 Florida Avenue, N.W.
Washington, D.C. 20009-1200
Certified No. 7003 1680 0001 2433 8776

Reginald H. Berry, Assistant Director
Department of Employment Services
Labor Standards Bureau
64 New York Avenue N.E., Third Floor
Washington, D.C. 20002
Hand-Delivered

Alberta M. Bennett
Authorized Clerk
Office of the General Counsel

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

Gregory P. Irish
Office of the Director

ETHEL JOHNSON,	)	
Claimant,	)	
v.	)	Dir. Dkt. No. 01-11
	)	OHA No. 98-273B
EPSTEIN, BECKER, AND GREEN,	)	OWC No. 519621
and	)	
PACIFIC INDEMINITY COMPANY,	)	
Employer/Carrier.	)	

Appeal from the Compensation Order of
Jeffrey P. Russell, Hearings and Appeals Examiner

George E. Swegman, Esquire
for the Claimant

William T. Kennard, Esquire
for the Employer/Carrier

DECISION AND REMAND ORDER OF THE DIRECTOR

I. Preliminary Statement

This proceeding arises out of a claim for workers' compensation benefits filed pursuant to the provisions of the District of Columbia Workers' Compensation Act of 1979, as amended, D.C. Law 3-77, D.C. Code §§ 36-301 - 345 (1981) ("Act").

The Hearing Examiner issued a Compensation Order in this matter on December 18, 2000 that granted Employer's request for relief in part and denied Employer's request

for relief in part. Specifically, the Hearing Examiner suspended Claimant's temporary total disability benefits from December 3, 1999 to the present and continuing.

Claimant filed an Application for Review with this Office on January 17, 2001. Employer filed its response on February 2, 2001.

II. Background

Claimant had sustained an accidental work injury while working for Employer. On September 10, 1998, a formal hearing was held and Claimant was awarded compensation benefits in a February 17, 1999 order. In the instant proceeding, Employer sought to modify the latter order and argued that there had been a change in Claimant's condition and that Claimant had failed to cooperate with vocational rehabilitation.

The Hearing Examiner found that there had been no change in Claimant's condition since the September 1998 formal hearing. Claimant, as found by the Hearing Examiner, continued to suffer from the hand and arm pain and this prevented her from returning to her pre-injury employment.

The Hearing Examiner found that Employer had engaged the services of a vocational rehabilitation counselor, Mr. Edward Robinson with Intracorp, to assist Claimant in returning to suitable work within her restrictions. Mr. Robinson, on December 3, 1999, closed the file out on Claimant after several months and various unsuccessful attempts to obtain a signed medical release.

III. Discussion

Claimant, on appeal, argues that the Hearing Examiner erred in determining that she failed to cooperate with vocational rehabilitation. Claimant contends that the record does not establish that she failed to cooperate with Mr. Robinson. Moreover, Claimant states that she was not given notice that she was failing to cooperate with vocational rehabilitation.

Employer counters and states that the Hearing Examiner's decision is supported by substantial evidence in the record. Employer argues that the Hearing Examiner's findings regarding the lengthy time involved, the many attempts made by Mr. Robinson to get a signed medical release, and the fact that he never obtained a signed release, even after revising it several times at the request of the Claimant's attorney, support the determination made. Lastly, Employer argues that it was not necessary to alert or warn Claimant that she was not cooperating as her attorney should have known an unreasonable refusal could result in a suspension of benefits.

The Director of the Department of Employment Services must affirm the Compensation Order under review if the findings of fact contained therein are supported by substantial evidence in the record considered as a whole and if the law has been properly applied. *See* D.C. Code § 36-322 (1981); 7 DCMR § 230 (1986). Substantial evidence is such relevant evidence as a reasonable mind might find as adequate to support a conclusion. *George Hyman Construction Company v. District of Columbia Department of Employment Services*, 498 A.2d 563, 566 (D.C. 1985).

The sole issue in this case is whether Claimant unreasonably failed to cooperate with vocational rehabilitation when Employer no longer offered a vocational rehabilitation program.

After a thorough review of the Hearing Examiner's decision, as well as the arguments made by the parties on appeal, this matter must be reversed. The Hearing Examiner erred as a matter of law in concluding that Claimant unreasonably failed to cooperate with vocational rehabilitation. In light of the fact that the case has been disposed of on other grounds, there is no need to reach any other non-dispositive issues.

It has been generally held that once an employer closes the vocational rehabilitation file on a claimant, the claimant could not fail or refuse to cooperate with such vocational rehabilitation because there was no rehabilitation taking place. *Massey v. Sterling Textile Service and CNA Insurance Company*, Dir. Dkt. 98-72

(January 14, 1999). Herein, the record contains the testimony of Mr. Robinson wherein he stated that he closed Claimant's rehabilitation file. According to the holding in *Massey*, Claimant could not fail to cooperate with the vocational rehabilitation program offered by Employer because the program was no longer being offered.

Accordingly, the Hearing Examiner's suspension of benefits from December 3, 1999 and ongoing is not in accordance with the law and must be reversed. Claimant is entitled to benefits for the period beginning December 3, 1999 and continuing.

IV. Disposition

The Hearing Examiner's December 18, 2000 decision is **REVERSED** and this matter **REMANDED** for payment of compensation.

Gregory P. Irish
Director

Date JUL 25 2001

APPEAL RIGHTS

Any party aggrieved by this Order may petition the D.C. Court of Appeals for its review. D.C. App. 15(a) requires that the Petition for Review be filed within 30 days of notice of a final order. The Court is located at 500 Indiana Avenue, N.W., Washington, D.C. 20001.

In addition to service upon opposing counsel in this proceeding, copies of the Petition for Review and all motions, briefs, or other documents in connection with such appeals must be served upon:

Charles L. Reischel, Esquire
Deputy Corporation Counsel
Appellate Division
One Judiciary Square
441 4th Street, N.W.. 6th Floor
Washington, D.C. 20001

Pastell Vann, Esquire
General Counsel
Department of Employment Services
Employment Services Building
500 C Street, N.W. Suite 601
Washington, D.C. 20001

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of August 2001, a copy of the foregoing **Decision and Remand Order of the Director** was mailed by certified mail to the following:

George Swegman, Esquire
Ashcraft and Gerel
2000 L Street, N.W.
Suite 400
Washington, D.C. 20036
Cert. No. 7099-3400-0011-8606-8761

William T. Kennard, Esquire
Mell, Brownell and Baker
2031 Florida Avenue, N.W.
First Floor
Washington, D.C. 20009-1200
Cert. No. 7099-3400-0011-8606-8778

Authorized Clerk
Office of the General Counsel