

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 15-195

**FAHAD N. AL-KHATAWI,
Claimant-Petitioner,**

v.

**HERSONS GLASS COMPANY and
CNA INSURANCE COMPANY,
Employer/Insurer-Respondent/Cross-Petitioner.**

Appeal from a November 10, 2015 Order
by Administrative Law Judge Douglas A. Seymour
AHD No. 11-231A, OWC No. 560167

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2016 MAY 11 PM 1 09

(Decided May 11, 2016)

David M. Snyder for Claimant
Joseph C. Veith, III for Employer

Before LINDA F. JORY, JEFFREY P. RUSSELL, *Administrative Appeals Judges* and LAWRENCE D. TARR, *Chief Administrative Appeals Judge*

LINDA F. JORY for the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

On October 5, 2000, Mr. Fahad N. Al-Khatawi (Claimant) injured his back while working for Hersons Glass Company (Employer). Claimant underwent back surgery in March 2001. Post-surgery conservative treatment did not alleviate his back pain, but Claimant declined a second surgery.

In a Compensation Order (CO) an Administrative Law Judge (ALJ) suspended Claimant's benefits from May 2011 to October 2011 for failure to cooperate with vocational rehabilitation but ruled Claimant had not limited his income. Both parties appealed the February 4, 2013 CO. *Al-Khatawi v. Hersons Glass Company*, AHD No. 11-231, OWC No. 560167 (February 4, 2013).

The Compensation Review Board (CRB) affirmed the ruling that Claimant failed to cooperate with vocational rehabilitation but vacated the portion of the CO suspending Mr. Al-Khatawi's benefits from May 2011 to October 2011 and remanded the case "for the limited purposes of specifically defining Mr. Al-Khatawi's period of non-cooperation and for a determination as to whether Mr. Al-Khatawi voluntarily limited his income by failing to follow-up on job leads provided by the vocational rehabilitation counselor including but not limited to whether or not those job leads qualify as suitable, alternative employment." *Al-Khatawi v. Hersons Glass Company*, CRB No. 13-023, (November 14, 2013) (DRO).

A Compensation Order on Remand (COR) issued on January 28, 2015 which found that Claimant failed to cooperate with vocational rehabilitation from its inception to the date of the formal hearing and continuing. The ALJ did not decide the issue of voluntary limitation of income. *Al-Khatawi v. Hersons Glass Co.*, AHD No. 11-231, OWC No. 560167 (January 29, 2015) COR). Both parties appealed the COR.

The CRB affirmed the COR concluding that the ALJ did not exceed the parameters of the CRB's instructions on remand as set forth in the November 14, 2013 DRO by ruling that Claimant had failed to cooperate with vocational rehabilitation since it was initiated on April 26, 2011. The CRB reinforced that the Act does not require notice of an alleged failure to cooperate as a prerequisite to imposing an ongoing suspension of benefits. The CRB agreed the ALJ's resolution of the issue of failure to cooperate rendered the issue of voluntary limitation of income not ripe for adjudication and affirmed the January 29, 2015 COR suspending Claimant's benefits as of April 26, 2011. *Al-Khatawi v. Hersons Glass Company*, CRB No. 15-032 (August 3, 2015).

Claimant filed a Petition for Review with the D.C. Court of Appeals (DCCA) of the August 3, 2015 Decision and Order.

Claimant filed an Application for Formal Hearing (AFH) on March 27, 2015, seeking modification of the February 4, 2013 CO and an award of temporary total disability benefits from the date of the AFH to the present and continuing as Claimant asserts he cured his failure to cooperate with vocational rehabilitation on that date.

Employer filed a Motion to Dismiss that AFH for lack of jurisdiction asserting the order Claimant sought to modify was on appeal to the DCCA and therefore was not yet a final order, citing *Georgetown University Hospital v. DOES*, (*Lloyd R. Francis, Intervenor*) 659 A.2d 832 (D.C. 1995)(*Francis*). Claimant responded asserting the issues are severable from the issues presented to the DCCA.

Pursuant to *Snipes v DOES*, 542 A.2d 832 (D.C. 1988) (*Snipes*), the ALJ scheduled a preliminary hearing to determine if Claimant had sufficient evidence to show there was a reason to believe a change in condition had occurred since the COR. According to the ALJ, Claimant presented a letter dated March 27, 2015 that his attorney sent to an adjuster stating he was "ready, effective immediately to meet with a counselor and engage in whatever activities are reasonably necessary to help secure suitable gainful employment". Claimant's testimony was also taken at the preliminary hearing.

The ALJ did not rule on the *Snipes* issue at the hearing but instead ordered the parties to submit written arguments addressing the issues raised by Employer's Motion to Dismiss for Lack of Jurisdiction, whether claimant has met his burden of proof under *Snipes* to establish a *prima facie* case for a change in condition, the total number of weeks of temporary total disability paid and the limitations on temporary total disability benefits as set forth in D.C Code§32-1505(b).

Thereafter, an Order issued on November 10, 2015 which initially found that the issue of whether Claimant established a *prima facie* case for a change in condition was severable from the appealed COR and therefore the Administrative Hearings Division (AHD) has jurisdiction to address Claimant's request for a modification. The Order concluded Claimant had not submitted sufficient evidence to establish a *prima facie* case of a change in condition which would make him eligible for a modification of the COR of January 28, 2015 and that Claimant's AFH should be dismissed without prejudice.

Claimant appealed, asserting that the determination that he has not presented a *prima facie* case of a change in condition is not supported by the law or substantial evidence. Employer responded with its opposition to Claimant's Application for Review (Employer's Opposition) and filed a Cross-Appeal and Memorandum of Points and Authorities in Support of its Cross-Appeal (Employer's Brief).

ANALYSIS

As an initial matter, we note that the ALJ held an "on-the-record" hearing to determine whether or not Claimant had sufficient evidence to proceed to a Formal Hearing in accordance with *Snipes, supra*. As exhibits were admitted into evidence and sworn testimony presented at the "Snipes" hearing, this Panel concludes that the scope of review to is to determine whether the factual findings of the Order on appeal are based upon substantial evidence in the record, and whether the legal conclusions flow rationally from those facts and are otherwise in accordance with applicable law. D.C. Code § 32-1521.01(d)(2)(A). *Marriott Int'l. v. DOES* 834 A.2d 882 (D.C. 2003) (*Marriott*).

Initially, we address the jurisdiction issue that Employer raised before AHD and in its cross-appeal. Employer asserts:

The AHD lacks jurisdiction over a request for modification of compensation order where the order to be modified is pending an appeal and, as a result is not yet final. *Georgetown University Hospital v. DOES*, 659 A.2d 832 (D.C. 1995). In *Georgetown University Hospital*, the D.C. Court of Appeals recognized that:

Once a party files a timely application for a review of a compensation order with the Director, the Hearings and Adjudication Section has no jurisdiction to proceed on an application for a modification of a compensation order *until a pending application for review has been decided...* The primary reason that a pending application for review should be resolved

before an application for modification is heard and ruled upon is that an application for modification presupposes the validity of the compensation order under review. The danger of acting upon an application for modification on prior to a decision on a pending application for review is that if the order under review or a remand for further proceedings, *then such a reversal or a remand could have an impact on the modification order.* Therefore, ‘judicial’ economy is best served by allowing the Director to resolve a pending application for review before the hearing examiner proceeds on an application for modification.

Id. at 835-836 (emphasis in original).

There is, however, an exception to this rule when the issue at the AHD is wholly severable and separate from the issues on appeal. The AHD appropriately exercises jurisdiction over a claim only where it is clear that the issue for which modification is sought is entirely severable from the issues pending on appeal.

Employer’s Brief at 7, 8.

With regard to the jurisdiction issue raised by Employer in its Motion to Dismiss, the ALJ stated:

Employer argues that AHD lacks jurisdiction over Claimant’s change in condition application because of Claimant’s pending appeal before the D.C. Court of Appeals of Judge Lambert’s Compensation Order on Remand. Claimant argues that because the present claim is for a new period of temporary total disability benefits, that issue is severable from the issues currently before the Court of Appeals.

On this issue, I find Claimant’s argument persuasive because the present claim for temporary total disability benefits begins after the period of time in controversy currently before the Court of Appeals. Therefore, I find the issues are severable thus granting jurisdiction upon AHD to hear Claimant’s change in condition application. Accordingly, Employer’s Motion to Dismiss for Lack of Jurisdiction is hereby **DENIED**.

Order at 3. (emphasis in original).

We acknowledge that a decision by DCCA that is adverse to the CRB’s August 2, 2015 Decision and Order may not have any impact on the instant modification order other than rendering it moot. For example, if the DCCA determines that the CRB erred in affirming the ALJ’s finding that Claimant unreasonably refused vocational rehabilitations, Claimant’s benefits could be reinstated, rendering a determination that there is a change in condition moot.

However, we are mindful that the Court of Appeals has held “the test is one of complete severability; it is not crucial to determine whether the request would technically amend the order

or not”. *Francis, supra*, 659 A.2d at 836, citing *Petrie v. Charles P. Young Co.*, Dir. Dkt. No. 91-40 (March 24, 1993). We further note that the modification request in *Francis* involved authorization for expenses for surgery and “temporary total disability benefits for an altogether different period of time” from the benefits that were denied in a CO which *Francis* appealed, yet the DCCA would not determine the modification request was “entirely severable”. *Francis, supra*, 659 A.2d at 840.

At the hearing, Claimant provided three exhibits, including a letter from Counsel for Claimant to CNA Insurance stating:

My client denies that there was any conduct which can reasonably be identified as a basis for this suspension of benefits. If this case proceeds to hearing, we will prove that whatever problems existed in the process were caused by and the responsibility of the vocational rehabilitation. Despite this ongoing dispute, my client is ready, effective immediately to meet with whatever counsel you assign to this case and engage in whatever activities are reasonably necessary to help secure suitable gainful employment.

Claimant’s Exhibit 2.

We determine that the request for reinstatement of benefits is not completely severable from the issue decided in the COR, on appeal before the DCCA, therefore AHD did not have jurisdiction to decide the modification request of March 27, 2015. We further determine that Claimant is precluded by the doctrine of *res judicata* from re-litigating the issue of Claimant’s conduct with respect to Employer’s vocational rehabilitation. *Walden v. DOES*, 759 A.2d 186, 189 (D.C. 2000).

As we hold AHD did not have jurisdiction over the modification request, we will not address the issues raised by Claimant with regard to his modification request or the ALJ’s conclusion that Claimant did not meet the initial *Snipes* burden of establishing that there is a reason to believe that there has been a change in conditions since the January 28, 2015 COR. As the ALJ ultimately dismissed the AFH without prejudice, we affirm the dismissal.

CONCLUSION

The Administrative Hearings Division lacked jurisdiction over Claimant’s March 27, 2015 modification request. The Order dismissing Claimant’s AFH without prejudice is AFFIRMED.

So ordered.