

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
Department of Employment Services

VINCENT C. GRAY  
MAYOR



F. THOMAS LUPARELLO  
ACTING DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 14-014

GEORGE KOSTALAS,  
Claimant-Respondent,

v.

PEPCO,  
Self-Insured Employer-Petitioner.

Appeal from a January 17, 2014 Order of  
Administrative Law Judge Linda F. Jory  
AHD No.10-062B, OWC No. 618413

DEPT. OF EMPLOYMENT  
SERVICES  
COMPENSATION REVIEW  
BOARD  
2014 MAY 29 AM 11 59

Shawn M. Nolen for the Petitioner

Eric M. May for the Respondent

Before JEFFREY P. RUSSELL, MELISSA LIN JONES, and HENRY W. MCCOY, *Administrative Appeals Judges.*

JEFFREY P. RUSSELL for the Compensation Review Board.

**DECISION AND REMAND ORDER**

BACKGROUND<sup>1</sup>

Claimant-Respondent George Kostalas sustained work related injuries to his right leg and back on April 23, 2005. In a Compensation Order issued November 9, 2010, he was awarded 7% permanent

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<sup>1</sup> At the proceedings which led to the issuance of the Order under review, no testimony was taken and no exhibits were introduced formally. However, both parties had filed exhibits in anticipation of the proceeding, with PEPCO's being filed November 18, 2013, and Mr. Kostalas's being filed November 21, 2013.

In considering an appeal of an Order issued under circumstances in which there is no evidentiary record, the Compensation Review Board (CRB) must affirm said decision unless it is determined to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. *See*, 6 Stein, Mitchell & Mezines, Administrative Law § 51.03 (2001). However, we do take administrative notice of the contents of the Administrative Hearings Division's file, including the exhibits filed. While we do not make any findings of fact based upon those exhibits, we have reviewed and considered their contents in order to understand the posture of the case and the claims of the respective parties.

partial disability to his right leg under the schedule. Thereafter, on June 13, 2012, Employer-Petitioner PEPCO initiated a program of vocational rehabilitation.

Subsequently, Mr. Kostalas sought an award of permanent total disability at a hearing conducted July 10, 2012<sup>2</sup> before a different ALJ, which was granted in a Compensation Order issued September 27, 2012. PEPCO commenced payment of the award as ordered.

On September 5, 2014, PEPCO filed an AFH stating as the “Facts of this claim” that “Claimant has failed to cooperate with vocational rehabilitation” and identifying the issue for resolution as “Failure to cooperate”.

On December 11, 2013, the parties appeared pursuant to a formal hearing scheduling order issued by AHD.<sup>3</sup> No sworn testimony was taken, and no exhibits were made part of the formal record.

At the December 11, 2013 hearing, Mr. Kostalas argued that PEPCO was seeking a modification of the permanent total disability award, and that the AFH should be dismissed pursuant to *Snipes v. DOES*, 542 A.2d 832 (D.C. 1988). He asserted that nothing proffered by PEPCO demonstrated that Mr. Kostalas’s physical condition had changed since the date of the formal hearing at which he obtained his permanent total disability award, a showing which he argued would be required under *Snipes*.

PEPCO argued that it was not seeking a modification of the prior permanent total disability award, but rather was seeking suspension of benefits for failure to cooperate with vocational rehabilitation, pursuant to D.C. Code §32-1507-(d). Under those circumstances, PEPCO argued, no *Snipes* review was necessary.

On January 17, 2014, the ALJ issued an Order dismissing the AFH. PEPCO timely appealed the Order, to which appeal Mr. Kostalas filed a timely opposition.

We vacate the Order and remand for further consideration and the conduct of a formal hearing.

#### DISCUSSION AND ANALYSIS

The following discussion of “facts” is gleaned from the AHD administrative file, and these “facts” are not intended to be record based findings of fact in any conventional sense. Rather, they are referenced herein merely to permit an understandable recitation of the procedural posture of the case and the allegations of the parties.

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<sup>2</sup> Although the documents before us does not confirm it with certainty, in all likelihood these efforts were commenced after Mr. Kostalas had filed the Application for Formal Hearing (AFH) seeking an award of permanent total disability. This is because the formal hearing on that issue took place only a month after the vocational rehabilitation program was instituted, and in normal circumstances approximately 90 days passes between the filing of an AFH and the date scheduled for the hearing.

<sup>3</sup> Coincidentally, this proceeding was scheduled before the same ALJ who had made the initial award under the schedule.

The basis upon which PEPCO makes its allegation that Mr. Kostalas has refused to cooperate with vocational rehabilitation is found at Employer's Exhibit (EE) 2, identified as "Email correspondence from Claimant's counsel dated October 3, 2012". It reads:

In all my practice when a claimant is adjudicated to be permanently totally disabled, vocational rehabilitation concludes. I do not see any legal basis that the claimant can be failing to cooperate with vocational rehabilitation. Simply stated, permanent total disability is the end of the case. I do not know of any permanent total case that has been reopened to consider the *extent of disability* merely based on a more recent report from a vocational expert. In order to get a hearing on modification, one must show a change of condition. I don't see how this can be accomplished on a PTD case. To allow continuing V.R. would essentially be the equivalent of giving the employer/carrier a second bite of the apple after a hearing on *the same issue*. My argument will be that the employer/carrier should not be permitted to retry the case when they sat on their hands for years and sprang into action to get a vocational rehabilitation expert at the last possible minute. Unfortunately, you are put in the unenviable position of defending their inaction.

Based on the above, the claimant who has cooperated with your expert until the PTD order was issued, will no longer participate in V.R.

EE 2 (emphasis added).

This e-mail encapsulates Mr. Kostalas's arguments as presented to the ALJ at the hearing and in his opposition to this appeal. Essentially, they are three: first, that the request to suspend ongoing benefits is a request to relitigate the issue of nature and extent of disability, which it can not do in this case or in any permanent total disability case; second, there is no evidence in this case of any change in Mr. Kostalas's capacity for work, and thus PEPCO is not entitled to a hearing pursuant to *Snipes*; and third, PEPCO is equitably estopped in this case from seeking a suspension of benefits because of the circumstances surrounding the timing of the commencement of the vocational rehabilitation process.

PEPCO argues that it is not seeking to relitigate nature and extent, and conceded that at this time Mr. Kostalas's disability status remains unchanged. However, it argues that it is raising a new issue, not previously litigated in this case, that being whether Mr. Kostalas's refusal to participate in vocational rehabilitation warrants suspension<sup>4</sup> of his disability benefits. It asserts that permanent total disability status by itself does not relieve a claimant from the requirement of reasonably participating in a process designed to return the claimant to work at or as nearly close as possible to the pre-injury average weekly wage. Further, PEPCO asserts that such a suspension should be retroactive to the date of the refusal to cooperate, which in this case it alleges is the day following the award.

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<sup>4</sup> In its memorandum before the CRB, PEPCO erroneously characterizes the sanction contemplated in D.C. Code §32-1507 (d) as "termination" of benefits. In fact, the code provision contemplates only the suspension of benefits, not their termination.

In the Order, the ALJ, citing *Braswell v. Greyhound Lines, Inc.*, CRB No. 12-120, AHD No. 09-519A, OWC No. 603794 (November 13, 2012) accepts PEPCO's contention concerning an obligation of a claimant to continue to reasonably cooperate with vocational rehabilitation despite having been adjudicated "permanently totally disabled" under the Act. The ALJ also accepted that PEPCO must make a *Snipes* showing as to that status in order to obtain a hearing for the purpose of having those benefits suspended. It is here where the ALJ erred. Although recognizing the applicability of *Braswell*, the ALJ did not apply it, or explain why it was distinguishable from this case. It appears that the ALJ conflated nature and extent of disability with failure to cooperate with vocational rehabilitation.

Seeking suspension of benefits is not the same as seeking a modification of a claimant's disability status. It is true that if a vocational rehabilitation process is undertaken, and in that process a claimant is alleged to have been rehabilitated through obtaining new skills, or some change in the labor market has occurred rendering a previously unemployable person employable, and if an employer sought an order modifying the claimant's disability status, a *Snipes* showing that a claimant has become employable would be required in order to litigate that issue.

But that is not what PEPCO seeks in this case. Rather, PEPCO concedes the disability status, but argues that its ability to attempt to return Mr. Kostalas to the workforce at or near his pre-injury average weekly wage is thwarted by his refusal to participate.

As the CRB has indicated in *Braswell*:

"[P]ermanent total disability" is a statutory construct and in many senses, it is a term of art which has the meaning that the legislature and the D.C. Court of Appeals ascribe to it; as such the meaning may be somewhat at odds with the meaning the phrase would have if the words were understood in their vernacular sense. Thus, a person is permanently and totally disabled if (1) he or she has reached permanency in connection with the medical condition caused by the work injury, (2) he or she is unable to return to the pre-injury job because of the effects of that medical condition, and (3) there is no suitable alternative employment in the relevant labor market.

While a permanently and totally disabled person remains under an obligation to cooperate with an employer's efforts to return that person to the labor market and while that person's entitlement to ongoing permanent partial disability benefits is contingent upon that cooperation, that person is nonetheless permanently and totally disabled until such time as that person is employable. Then, the person's condition can be said to have changed, rendering him or her either only partially disabled or not disabled at all, depending upon the level of wage earning capacity that has been recovered.

*Id.*, at 4.

We point out that the suspension of a claimant's benefits is only to be imposed for "unreasonable" non-participation in the process. The type of vocational rehabilitation services being offered, the length of time the process has gone on without success and, the possible physical hardship that

participating in the process itself might cause, the age of a claimant relative to a normal and customary work life expectancy or in the claimant's general field of work are all factors that can be considered when assessing whether a failure to participate in a particular course of vocational rehabilitation efforts is unreasonable. However, reasonable participation is required.

As the court has written:

D.C. Code § 32-1507 imposes reciprocal obligations on an employer and an employee in respect to vocational rehabilitation. Sections 32-1507 (a) & (c) require the employer to furnish vocational rehabilitation services "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." Conversely, § 32-1507 (d) provides that "if at any time [while receiving worker's compensation] the employee unreasonably refuses to . . . accept vocational rehabilitation[,] the Mayor shall . . . suspend the payment of further compensation . . . during such period, unless the circumstances justified the refusal." An employer requesting suspension of payment on this ground does so by filing a motion under D.C. Code § 32-1524 to modify the compensation award based on "a change of conditions," which, in this case, would be the failure to cooperate. Any such motion, of course, must be accompanied by notice to the employee. See generally 7 DCMR § 210.2 et seq. (1986) ("Notice of Controversion").

*Epstein, Becker & Green v. DOES*, 850 A.2d 1140 (D.C. 2004), at 1142.

In this case, EE 2 certainly seems to at least meet the threshold that the court set for what constitutes a "reason to believe that a change of conditions has occurred" in this type of case: the failure to cooperate. Accordingly, *Snipes* has been satisfied. PEPSCO is entitled to the requested hearing.

Finally, we acknowledge Mr. Kostalas makes the additional equitable arguments described above, the ALJ did not reach them, and we decline to consider them in the first instance.

CONCLUSION AND ORDER

The dismissal of the Application for Formal Hearing is not in accordance with the law. The Order is vacated and the matter is remanded with instructions that the formal hearing be allowed.

FOR THE COMPENSATION REVIEW BOARD:

  
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JEFFREY P. RUSSELL  
*Administrative Appeals Judge*

\_\_\_\_\_  
May 29, 2014  
DATE