

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 15-028

**JEROME AUSTIN,
Claimant-Respondent,**

v.

**AGGREGATE INDUSTRIES and
GALLAGHER BASSETT SERVICES, INC.,
Employer and Carrier-Petitioners.**

Appeal from a January 21, 2015 Compensation Order by
Administrative Law Judge Joan E. Knight
AHD No. 08-343D, OWC No. 642778

DEPT. OF EMPLOYMENT
SERVICES
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Tony D. Villeral for the Employer
Charles Krikawa IV for the Claimant

Before HEATHER C. LESLIE, MELISSA LIN JONES, and JEFFREY P. RUSSELL, *Administrative Appeals Judges*.

HEATHER C. LESLIE *Administrative Appeals Judge*, for the Compensation Review Board.

DECISION AND REMAND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

The underlying facts of the injury and treatment are not in dispute and are sufficiently outlined in *Austin v. Aggregate Industries*, AHD No. 08-343B, OWC No. 642778 (May 26, 2011):

Claimant's cement truck operator duties include driving the cement truck but also lifting materials to add the cement mixer and attaching the chutes in order to "drop" the concrete. Adding the chutes requires climbing a ladder and lifting the chutes to attach them to the vehicle. The chutes weigh approximately 20 pounds. Further the cement materials must be carried up to the top of the truck.

On August 29, 2007, while working as a cement truck operator for employer, claimant slipped while exiting his work truck; lost his footing; and grabbed on to the truck door to prevent himself from falling. Claimant initially treated with Dr. J. Michael Joly who referred claimant to Dr. Steven Webber who recommended

an arthroscopic procedure to confirm the pathology and treatment plan. Pursuant to the adopted Findings of Fact, Claimant's MRI revealed a non-displaced labral tear anteriorly and posteriorly and a partial rotator cuff tear of the supraspinatus tendon.

On October 9, 2008, Dr. Webber performed an Anterior-inferior labral repair after he performed an examination under anesthesia. He determined claimant had not suffered a tear of the rotator cuff tendon but did suffer a tear of the anterior-inferior labrum which he repaired.

Dr. Webber followed claimant's recovery from the repair of the anterior and anterior-inferior labrum on October 15, 2008 and regularly thereafter. On November 19, 2008, Dr. Webber recommended physical therapy. Dr. Webber reported on December 17, 2008, that physical therapy had not been approved by Workers' Comp and claimant was doing exercises on his own. Dr. Webber reported that claimant was making good progress despite not having physical therapy. On January 28, 2009, Dr. Webber reported that the status of claimant's case is still pending so physical therapy has not been approved by Workman's Compensation. On March 9, 2009, Dr. Webber provided his opinion that he believed that his inability to go to physical therapy has had a significant negative impact on his progress.

Claimant was unable to seek further treatment from Dr. Webber again until his return on May 19, 2010 because his visits were not being paid for by the carrier. Dr. Webber at that time indicated that claimant's stiffness was partly related to claimant's inability to go to physical therapy because it was never approved. Dr. Webber noted claimant has made improvement in his range of motion over time but he still had a limitation in his motion and weakness. Once again, Dr. Webber provided claimant with a prescription for physical therapy two or three times a week for four weeks.

Claimant finally started physical therapy treatments in June 2010 but was having increased pain. As a result, Dr Webber recommended claimant continue physical therapy and provided claimant with a disability slip from work as a heavy equipment operator through July 2010. On August 4, 2010, Dr Webber noted the physical therapy helped claimant to improve the function of the shoulder and some range of motion but did not improve his pain. Dr. Webber did not release claimant to return to his pre-injury duties but instead asked for a functional capacity evaluation.

Dr. Webber reported on August 17, 2010, that the functional capacity evaluation he recommended was denied. Dr. Webber indicated that he would attempt to determine claimant's limitations based on claimant's symptoms as well as his physical examination and review of the physical therapy notes.

On August 17, 2010, Dr. Webber's found claimant unable to do repetitive overhead activity, only infrequent overhead activity. Claimant's lifting was limited to waist height and limited to 50 pounds. Lifting to shoulder height was limited to 25 pounds. Dr. Webber limited claimant's driving to four hours per work day.

I find that due to the lifting overhead and driving more than four hours a day, claimant was prevented from returning to his pre-injury duties as a result of the work injury; Employer has not provided any suitable alternative or modified duty commensurate with claimant's physical restrictions.

On December 1, 2010, claimant began working for a newspaper distribution, working three to four hours a day, seven days a week. His duties involve loading 20 newspapers into a bag and delivering them to apartments or homes. The bags of 20 papers weighs approximately five pounds.

Claimant was referred to a functional capacity evaluation (FCE) on October 21, 2011 by Dr. Webber. This appointment was facilitated by Ms. Leslie Rice, a vocational counselor. Claimant did not attend the FCE. Ms. Rice was informed by Claimant's counsel on September 21, 2011 that he was employed and not in need of vocational services.

A full evidentiary hearing was held on April 11, 2012. At that hearing, Employer sought to modify the May 26, 2011 Compensation Order, quoted above, and suspend Claimant's temporary partial disability benefits due to a failure to cooperate with vocational rehabilitation. A Compensation Order (CO) was issued on January 21, 2015 which denied Employer's request and further ordered Employer to reinstitute vocational rehabilitation.

Employer appealed. Employer argues the CO is not supported by the substantial evidence in the record, is not in accordance with the law, and that the ALJ abused her discretion when ordering the Employer to continue vocational rehabilitation.

Claimant opposes Employer's appeal, arguing the CO is supported by the substantial evidence in the record and is in accordance with the law.

STANDARD OF REVIEW

The scope of review by the CRB is generally limited to making a determination as to whether the factual findings of the Compensation Order are based upon substantial evidence in the record, and whether the legal conclusions drawn from those facts are in accordance with applicable law. *See*, D.C. Workers' Compensation Act of 1979, as amended, D.C. Code § 32-1501, *et seq.*, (the Act) at § 32-1521.01 (d)(2)(A), and *Marriott International v. DOES*, 834 A.2d 882 (D.C. 2003). Consistent with this standard of review, the CRB and this review panel must affirm a Compensation Order that is supported by substantial evidence, even if there is also contained within the record under review substantial evidence to support a contrary conclusion, and even where this panel might have reached a contrary conclusion. *Id.* at 885.

ANALYSIS

Employer argues the ALJ erred in determining Claimant did not cooperate with vocational rehabilitation, pointing to the findings of fact wherein the ALJ determined that Claimant's counsel had advised the vocational counselor that her services were not needed as Claimant had obtained a part time job. Further, the Employer argues the ALJ erred when she determined:

After review and consideration of Employer's claim, it determined Claimant has not unreasonably failed to cooperate with vocational rehabilitation services offered by Employer when his attorney declined vocational services on his behalf. The record is void of evidence that Claimant informed his attorney that he would not cooperate and attend the FCE or that he instructed his attorney to advise Employer that he was refusing vocational rehabilitation services offered. The circumstances surrounding his failure to attend the FCE appointment does not support Employer's position that Claimant unreasonably failed to cooperate, under the provisions of the Act.

CO at 7.

We agree with the Employer.

The District of Columbia Court of Appeals, in *Brown v. Pepco*, 83 A.3d 739, 749 (D.C. 2014) noted that:

The Workers' Compensation Act imposes reciprocal obligations on an employer and an employee in respect to vocational rehabilitation. D.C. Code § 32-1507 requires employers to furnish 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. In return, the statute provides that if 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, unless the circumstances justified the refusal. A suspension of benefits pursuant to D.C. Code § 32-1507(d) is only appropriate throughout the period that an injured employee unreasonably refuses to accept vocational rehabilitation and upon demonstration of a willingness to participate in the vocational rehabilitation which an employer is obliged to continue to provide, the suspension of benefits must end. Accordingly, the suspension of benefits continues until such time as the employee begins to cooperate or manifests a willingness to do so.

The ALJ stated,

Claimant has the burden of showing circumstances justified his refusal to comply with vocational services. See, *Darden v. District of Columbia Dept. of Employment Servs.*, 911 A.2d 410 (D.C. 2006); citing Black, *supra* at 986. Claimant testified credibly during the hearing the paper delivery job aggravates

his arm and he seeks suitable employment commensurate with his physical condition, education and experience.

CO at 6-7.

While we agree with the first sentence, the second sentence gives us pause. We are uncertain if the ALJ meant that Claimant's current condition and job as well as his desire to obtain other employment serves as a reasonable justification to refuse to comply with vocational rehabilitation. Certainly the desire to obtain suitable employment would be a reason to engage, not refuse, vocational rehabilitation.

We also cannot agree with the ALJ's conclusion that since the record is void of any evidence (presumably through testimony or a proffer by Claimant's attorney) that Claimant informed his attorney he would not cooperate with vocational rehabilitation or attend the FCE, it cannot be said Claimant unreasonably refused to cooperate with vocational rehabilitation. We agree with Employer that this logic is speculative at best and treads a slippery slope with the attorney-client privilege. At no time would this be discoverable to the Employer and more importantly this logic assumes Claimant or Claimant's counsel be willing to divulge attorney – client communications. Indeed, the hearing transcript fails to reflect any testimony relating to any communication between Claimant and Claimant's counsel.

It is undisputed that Claimant's counsel, as a representative for Claimant, indicated on September 21, 2011 that Claimant would not be participating in vocational rehabilitation as Claimant had obtained other employment. Having obtained other employment is not a reasonable reason to refuse vocational rehabilitation. As we stated in *DameGreene v. American Red Cross*, CRB No. 13-050, AHD No. 97-411F (August 6, 2014),

There is nothing in the statute that prohibits a claimant who has returned to work to still request vocational rehabilitation services, and if the request is reasonable, the employer must provide them. Conversely, there is nothing in the statute that eliminates the obligation to accept vocational rehabilitation services of a claimant who has returned to employment earning less than the pre-injury wage.

Employer's argument at 7-8.

We are forced to remand the case with instructions for the ALJ to grant Employer's request for modification of the prior Compensation Order as the Claimant, through Counsel, refused to participate in vocational rehabilitation on September 21, 2011, thereby voluntarily limiting his income.

Finally, Employer argues,

The issues for the hearing were filed by the Employer who requested the Claimant be Ordered to participate in vocational rehabilitation services. Instead, the Employer was erroneously Ordered to reinstitute vocational rehabilitation services

which is not supported by the substantial evidence, not in accordance with the law and a clear and obvious abuse of discretion.

As stated in *Brown, supra*, vocational rehabilitation services outlined in D.C. Code § 32-1507 impose reciprocal obligations upon both employers and claimants. While the Employer may not like the exact wording of the Order, the end result is the same. Employer is to provide vocational rehabilitation services to the Claimant and the Claimant is obligated to cooperate with these services or have his disability benefits suspended.

CONCLUSION AND ORDER

The January 21, 2015 Compensation Order is VACATED and REMANDED. Upon remand, the Administrative Law Judge is to enter an award granting Employer's request to modify the prior order and suspend disability benefits as the Claimant unreasonably refused to cooperate with vocational rehabilitation as of September 21, 2011.

FOR THE COMPENSATION REVIEW BOARD:



HEATHER C. LESLIE
Administrative Appeals Judge

June 24, 2015
DATE