

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

Department of Employment Services

MURIEL BOWSER  
MAYOR



DEBORAH A. CARROLL  
DIRECTOR

COMPENSATION REVIEW BOARD

**CRB No. 15-178, CRB No. 15-179,  
and CRB No. 16-035**

**JOSEPHINE BEMBRY,  
Claimant-Petitioner,**

v.

**GOOD HOPE INSTITUTE  
and AMGUARD INSURANCE COMPANY,  
Employer and Insurer-Respondents.**

DEPT. OF EMPLOYMENT  
SERVICES  
COMPENSATION REVIEW  
BOARD  
2016 APR 21 PM 1 44

CRB No. 15-178

Appeal from an October 21, 2015 Compensation Order on Remand by  
Administrative Law Judge Joan E. Knight  
AHD No. 08-377A, OWC No. 647887

CRB No. 15-179

Appeal from an October 29, 2015 Dismissal Order by  
Administrative Law Judge Gregory P. Lambert  
AHD No. 08-377D, OWC No. 647887

CRB No. 16-035

Appeal from a February 10, 2016 Order by  
Administrative Law Judge Gregory P. Lambert  
AHD No. 08-377E, OWC No. 647887

(Decided April 21, 2016)

Matthew J. Peffer for Claimant  
Todd S. Sapiro for Employer and Insurer

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

LAWRENCE D. TARR for the Compensation Review Board.

**DECISION AND REMAND ORDER - CRB No. 15-178**  
**DECISION AND ORDER - CRB No. 15-179**  
**DECISION AND ORDER - CRB No. 16-035**

**INTRODUCTION**

These three cases are before the Compensation Review Board (“CRB”) on their applications for review filed by the Claimant, Josephine Bemby.

In CRB No. 15-178, Claimant appeals the October 21, 2015 Compensation Order on Remand issued by an administrative law judge (“ALJ”) in the Administrative Hearings Division (“AHD”) of the Department of Employment Services (“DOES”). The ALJ found that Josephine Bemby’s workers’ compensation benefits should be suspended because Ms. Bemby failed to cooperate with vocational services offered by her employer, Good Hope Institute.

In CRB No. 15-179, Claimant appeals the October 29, 2015 order issued by an ALJ. The order, titled “Dismissal” granted Employer’s request to withdraw its Application for Formal Hearing (AFH), after a formal hearing but before the ALJ issued a decision.

In CRB No. 16-035, Claimant appeals an ALJ’s February 10, 2016 Order that dismissed her November 5, 2015, AFH.

Pursuant to 7 DCMR § 261.12, the CRB has consolidated the appeals in CRB No. 15-179 and CRB No. 16-035 with the appeal in CRB No. 15-178.<sup>1</sup>

**BACKGROUND**

Claimant worked for Employer as a full-time clinical supervisor and counselor at Employer’s outpatient methadone maintenance program. On March 19, 2008 she suffered multiple injuries when she fell down some stairs after catching her heel on a carpet.

She was treated at the Southern Maryland Hospital and then by orthopedic surgeon, Dr. John Byrne. Dr. Byrne is Claimant’s treating physician. Dr. Robert Reiderman, an orthopedic surgeon, examined Claimant at Employer’s request on April 30, 2008 and Dr. Gary London, a neurologist, examined Claimant for Employer on May 4, 2009.

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<sup>1</sup> 7 DCMR § 261.12 provides:

Cases may, in the sole discretion of the Board, be consolidated for purposes of an appeal upon the motion of any party or upon the Board’s own motion where there exist common parties, common questions of law or fact or both, or for such other circumstances as justice and the administration of the Acts requires.

On March 13, 2009, an administrative law judge (“ALJ”) issued a compensation order that granted Claimant’s claims for medical treatment, payment of causally related medical expenses and temporary total disability benefits beginning May 6, 2008. That compensation order was not appealed.

Thereafter, Employer filed an AFH seeking to modify the March 13, 2009 Compensation Order and terminate Claimant’s benefits. The ALJ issued a Compensation Order on February 16, 2010 in which she denied Employer’s claim. The ALJ held Claimant did not voluntarily limit her income and that Claimant did not fail to cooperate with Employer’s vocational rehabilitation efforts.

On review, the CRB affirmed the ALJ’s decision that Employer did not prove Claimant voluntarily limited her income. The CRB, however, disagreed with the ALJ’s finding regarding vocational rehabilitation. The CRB held:

Turning to the issue of failure to cooperate with vocational rehabilitation, the ALJ ruled Good Hope's vocational rehabilitation efforts were "premature as the Claimant was not an 'eligible employee.'" The ALJ did not define "eligible employee," and that phrase is not defined in the Act; however, given the findings that there was no Functional Capacity Evaluation performed to assess Ms. Bembry's work capacity and that there was no evidence Dr. John P. Byrne had released Ms. Bembry to return to work before September 1, 2009, it seems the ALJ determined that Ms. Bembry did not need to participate in vocational rehabilitation because she had not been released to work at the time vocational rehabilitation efforts were offered. This ruling reflects a misconception as to when vocational rehabilitation is appropriate - a physician's release is not required to compel participation in vocational rehabilitation if it does not require physical exertion.

CRB No. 10-083 Decision and Remand Order at 4 (April 13, 2012). (Footnotes omitted).

The CRB concluded it was “unable to determine the legal basis for Ms. Bembry’s not qualifying for participation in vocational rehabilitation” and vacated that portion of the Compensation Order relating to vocational rehabilitation and remanded the case.

Employer filed a Motion for Reconsideration that the CRB denied by Order on May 9, 2012. In the Order the CRB stated the following remand instructions for the ALJ:

On remand, the ALJ will make the appropriate factual determinations including the date Ms. Bembry was capable of participating in vocational rehabilitation, if ever, and whether or not Ms. Bembry failed to cooperate with vocational rehabilitation, if necessary; making such determinations is not within the scope of appeal to this tribunal.

While the remand was pending with the ALJ, Claimant filed these Applications for Hearing:

- AHD No. 08-377B - In 2011, Claimant filed a claim seeking an award authorizing pain management treatment. An ALJ granted the claim, the CRB affirmed the ALJ's decision (CRB No. 11-133), and the District of Columbia Court of Appeals ("DCCA") affirmed the CRB's decision on August 26, 2013 (*Good Hope Institute v DOES*, No. 12-AA-792 Mem. Op. & J.).
- AHD No. 08-377C - In 2012, Claimant filed a claim seeking authorization for shoulder surgery. An ALJ denied the claim. This decision was affirmed by the CRB (CRB No. 13-118) and the DCCA (*Bembry v DOES*, No. 14-AA-102 Mem. Op. & J. (D.C. June 8, 2015)).<sup>2</sup>

Also during the time in which the remand was pending before the ALJ, both parties filed these applications for formal hearing, the appeals of which have been consolidated herein:

- AHD No. 08-377D - In December 2013, Employer sought to modify the ALJ's 2009 award, asserting that Claimant failed to cooperate with vocational rehabilitation since July 6, 2012. An ALJ ultimately dismissed the case without prejudice on October 29, 2015. Claimant appealed this decision in CRB No. 15-179.
- AHD 08-377E - On November 5, 2015 Claimant filed an AFH alleging that she cured any failure to cooperate with vocational rehabilitation on February 1, 2016. The ALJ dismissed this case without prejudice. Claimant has appealed this decision in CRB No. 16-035.

On October 21, 2015, the ALJ issued a Compensation Order on Remand in response to the CRB's April 13, 2012 Decision and Remand Order. The ALJ held that Employer met its burden of showing that the potential jobs for which interviews had been scheduled and not kept by Claimant, were appropriate:

Herein, Employer showed that specific jobs were available and made known to Claimant. It appears, however, that the efforts by vocational counselors to meet with Claimant between January 2009 and August 2009 for an assessment never came to fruition. Employer met its burden of demonstrating that suitable, alternative employment was made available to Claimant. Employer has provided evidence that Claimant was to attend several interviews in July 2009 scheduled with Prince George's County, Kindness Animal Hospital, Servpro, and Personal Care Products Council. Claimant did not comply and attend the interviews scheduled on her behalf.

October 21, 2015 Compensation Order on Remand at 5-6.

The ALJ determined that Claimant unreasonably refused to accept vocational rehabilitation:

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<sup>2</sup> Claimant's brief in this case, submitted on November 19, 2015, incorrectly stated that the CRB's decision in CRB No. 13-118 "was appealed to the Court of Appeals, No. 14-AA-102, where a decision is pending." The DCCA's decision affirming the CRB and denying her claim was issued on June 8, 2015.

Claimant showed that on the occasion of one scheduled interview, Claimant reported she was unable to attend an interview because of pain and that she submitted some job applications in August 2009 by e-mail. Claimant did not provide any explanation why she did not attend Kindness Animal Hospital interview on July 24, 2009; the Servpro interview on July 27, 2009; or the Personal Care Products Council interview on July 30, 2009. It is determined Claimant has not provided a reasonable explanation for not attending several interviews. Claimant's actions and unwillingness to attend job interviews demonstrate she unreasonably refused to accept vocational rehabilitation within the meaning of §32-1507(d). Claimant has not provided evidence that she cured her failure to cooperate.

*Id.* at 6.

The ALJ found Claimant's unjustified refusal began on July 27, 2009 and was continuing because Claimant never cured her refusal. The ALJ suspended Claimant's indemnity benefits as of July 27, 2009 and granted Employer a credit for the benefits it paid "for the period Claimant has failed to cooperate." *Id.* at 7.

Claimant timely filed an Application for Review and supporting memorandum. Employer timely opposed and also filed a memorandum. Both parties have also timely filed supporting memoranda and oppositions in the two consolidated cases, CRB No. 15-179 and CRB No. 16-035.

#### DISCUSSION AND ANALYSIS

Because our decisions in the two combined cases depend on the decision in CRB No. 15-138, we shall discuss that case first.

Under the Act, an employer has an obligation to provide vocational rehabilitation services (D.C. Code § 32-1507 (a)), and an injured employee is required to participate in those services or risk having benefits suspended, unless the refusal to participate is justified (D.C. Code § 32-1507 (d)).

The determination as to whether a worker has refused to participate in vocational rehabilitation without justification 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.

*Johnson v. Epstein, Becker and Green*, Dir. Dkt. No. 01-11 (September 22, 2004).

The ALJ found that Claimant failed to cooperate with vocational rehabilitation services because she failed to attend four job interviews in July 2009. Claimant's primary argument justifying her failing to attend the job interviews is premised on her assertion that she had not been medically released to work.

Previous decisions have held that a medical release is not a mandatory requirement for a worker to participate in some forms of vocational rehabilitation. In *Black v. DOES*, 801 A. 2d 983 (D.C. 2002), the employer wanted the claimant to attend Job Club; a program that prepared injured workers to look for work. The Court affirmed the decision that a physician's release was not needed for the worker to take part in the Job Club because the Job Club did not require physical exertion. *Id.* at 985.

In *Winkler v. Washington Hilton Hotel*, CRB 10-093 (December 23, 2011), the CRB held the claimant was required to participate in vocational rehabilitation services although he wasn't released to work and was going to have additional surgery.

There are a number of vocational services that can be offered to a claimant that do not require a medical work release such as participating in vocational assessment or a functional capacity evaluation, attending instruction on learning job seeking skills, like resume writing or interviewing techniques.

If however, the vocational services involve physical exertion, then a medical release commensurate with the services' levels of exertion is required. Here, the vocational services offered Claimant were light duty job offers that required a medical release.<sup>3</sup>

The evidence does not support the ALJ's finding that Claimant was released to light duty work when the interviews were scheduled in July 2009. Therefore, her finding that the jobs were "suitable, alternative employment" is legally incorrect.

On May 5, 2009, Dr. Byrne wrote:

In the meantime, we discussed the fact that her job is a fairly high-stressed job and this involves a lot of stair-climbing, walking, those kinds of issue. She probably will be better served to maybe move out of this job and into something else, maybe getting some vocational rehabilitation in the junction.

This vague and indefinite statement is not a release to light duty nor is it affirmation that Claimant can participate in job search vocational rehabilitation.

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<sup>3</sup> We do not mean to suggest that in every instance where the vocational services involve physical exertion that a treating physician's release to work is required. For example, if, based on substantial evidence in the record, the ALJ is not persuaded that medical restrictions imposed by a treating physician accurately represent a claimant's work capacity, an ALJ could properly determine that a claimant has failed to cooperate with vocational rehabilitation services even in the absence of a treating physician's authorization.

Similarly, after the June 9, 2009 appointment, the last medical appointment before July, Dr. Byrne stated:

I will see her back here in 3-4 weeks if she continues to the therapy. We will continue her off work but plan on getting her back to work hopefully in her next visit.

Dr. Byrne did not release Claimant to work after the interviews were scheduled at the next examination on July 16, 2009. Instead, he stated:

I think to send her back to work at this vintage would be too early and probably just exacerbate things. We're to keep her out at least the next 4 weeks and see if she can at least get back to light duty.

Dr. Byrne did not release the claimant to any form of work until August 14, 2009 when he wrote:

I have given her a handicap permit the use to limit her walking especially she returned back to work.

Talk about return back to work in a light-duty fashion which would involve limiting walking and stair climbing but otherwise I think that she get back to her job which involves more counseling. She would need to avoid lifting and bending and twisting her back until she full gets his result.<sup>4</sup>

The ALJ's finding that the jobs for which Claimant failed to interview were suitable, alternate employment is not supported by substantial evidence because Dr. Byrne had not released Claimant to work in July 2009. Claimant was not under a legal duty to attend the interviews.

Stated another way, Claimant was justified in not attending the interviews because she had not been released to work. The ALJ's findings that Claimant failed to cooperate with vocational rehabilitation and that her benefits should be suspended are REVERSED.

#### **CRB No. 15-179 and CRB No. 16-035**

Almost three and one-half years after the CRB issued the April 13, 2012, Decision and Remand Order in CRB No.15-178, the ALJ issued her October 21, 2015, Compensation Order on Remand.<sup>5</sup>

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<sup>4</sup> This medical report was not part of Claimant's hearing exhibits. It became part of the record as an exhibit at Dr. Byrne's September 1, 2009, deposition, who acknowledged the typographical errors. We offer no opinion as to whether this is a full duty or a light duty release.

<sup>5</sup> In a footnote the ALJ explained the reason for the delay:

While the matter was pending on appeal, the case was assigned to Todd Sapiro, Esquire as counsel for Employer and a second formal evidentiary hearing was held before another ALJ on the reasonableness and necessity of medical treatment. *Josephine Bembry v. Good Hope Institute*, AHD No. 08-377B (October 28, 2011). The matter was also appealed to the CRB. On May 16, 2012, the CRB *affirmed*

While the ALJ was deciding the remand decision whether to suspend Claimant's benefits for failing to cooperate with vocational rehabilitation, Employer filed an AFH alleging Claimant failed to cooperate with vocational rehabilitation since July 6, 2012. After a second formal hearing was held on February 11, 2015 (the first formal hearing was held by an ALJ who retired before issuing a decision), the ALJ decided to hold his decision in abeyance pending the outcome of the remand decision.

After the October 21, 2015 remand decision that suspended Claimant's benefits for non-cooperation issued, Employer, having won what it now sought, moved the ALJ to dismiss the pending application. The ALJ dismissed the case by an order dated October 29, 2015:

In light of ALJ Knight's October 21, 2015 Compensation Order on Remand, Employer submitted to this Agency a request to withdraw its Application for Formal Hearing in this matter. It also requests that no order be issued as a result of the February 11, 2015 evidentiary hearing. After review of Employer's submission, the Application, ALJ Knight's Order, and the administrative file as a whole, this matter is DISMISSED WITHOUT PREJUDICE.

Claimant appealed this decision in CRB No. 15-179.

On November 5, 2015, after the ALJ determined she did not cooperate with vocational rehabilitation, Claimant filed an AFH seeking to modify the ALJ's October 21, 2015 Compensation Order on Remand, claiming temporary total benefits from April 19, 2012 to the present and continuing. On November 19, 2015 Claimant also appealed the ALJ's October 21, 2015 Compensation Order on Remand.

On February 16, 2016, an ALJ dismissed Claimant's November 5, 2015, application without prejudice. In pertinent part, the ALJ's Order stated:

After review of the papers, the relevant law, and the administrative file, I conclude that modification of ALJ Knight's Order would be premature because an appeal is pending with the CRB...Although Claimant argues that the issues to be litigated "involve a different time period of benefits" (that is, after February 1, 2016, which is when she argues she cured the finding that she unreasonably failed to cooperate), those benefits are suspended only if ALJ Knight's Order is affirmed. If her Order is remanded, there would be nothing for Claimant to dispute.

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*Josephine Bembry v. Good Hope Institute*, CRB No. 11-133; AHD No.08-377B. The Decision and Order was appealed to the DCCA. On August 13, 2013 [sic], the DCCA issued a Memorandum Opinion and Judgment on August 26, 2013 that affirmed the CRB. It appears the case citations were interchanged and recorded while the dual petitions were on appeal before the DCCA, which led to some confusion and delay in issuance of this Compensation Order on Remand addressing the Decision and Remand Order, *Josephine Bembry v. Good Hope Institute*, CRB No. 10-083, AHD No. 08-377A (April 13, 2012).

October 21, 2015, Compensation Order on Remand at 2, n.2.

Additionally, should Claimant prevail in AHD No. 08-377D [CRB No. 15-179], I would be obligated to issue a Compensation Order on Remand in that matter, which would be duplicative of the issues in the current proceeding.

Claimant appealed this decision in CRB No. 16-035.

We affirm the ALJ's order dismissing Employer's application in CRB No 15-179. At the time the ALJ issued his order, Employer had won what it sought in this application, i.e. suspension of Claimant's benefits, so an adjudication was unnecessary. The ALJ did not abuse his discretion by permitting Employer to withdraw its application after the evidentiary hearing.

We also agree with the ALJ's conclusion to dismiss without prejudice Claimant's AFH in CRB No 16-035. At the time the ALJ issued the Order, Claimant had appealed the Compensation Order on Remand suspending her benefits. The ALJ correctly held that although she sought benefits for a different period, "those benefits are suspended only if ALJ Knight's Order is affirmed. If her Order is remanded, there would be nothing for Claimant to dispute."

As held earlier in this Decision, the ALJ's suspension of Claimant's benefits is reversed. Therefore, there is nothing for Claimant to dispute as she prevailed on appeal in CRB No. 15-178 and obtained the relief sought in her November 5, 2015 application. The ALJ correctly dismissed that application.

#### **CONCLUSION AND ORDER**

The ALJ's Compensation Order on Remand is not supported by substantial evidence in the record nor is it in accordance with the law. The finding that Claimant failed to cooperate with vocational rehabilitation is **REVERSED** and this case remanded to the ALJ for entry of an Award reinstating benefits beginning July 27, 2009 and for a credit to Employer for benefits paid since then.

The ALJ's decisions dismissing without prejudice Employer's Application for Formal Hearing in CRB No. 15-179 and Claimant's Application for Formal Hearing in CRB 16-035 are **AFFIRMED**.

*So ordered.*