

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services



MURIEL BOWSER
MAYOR

DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 16-017

LESLIE V. WARD,
Claimant-Respondent,

v.

DEANWOOD REHABILITATION AND WELLNESS CENTER AND PMA INSURANCE GROUP,
Employer-Petitioner.

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DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD

Appeal from a January 13, 2016 Compensation Order
by Administrative Law Judge Joan E. Knight
AHD No. 13-004A, OWC No. 690689

(Decided July 12, 2016)

Douglas A. Datt for the Employer
David J. Kapson for the Claimant

Before **JEFFREY P. RUSSELL, LINDA F. JORY, and HEATHER C. LESLIE, Administrative Appeals Judges.**

JEFFREY P. RUSSELL, for the Compensation Review Board.

DECISION AND REMAND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

Deanwood Rehabilitation and Wellness Center (Employer) brings this appeal of a Compensation Order issued January 13, 2016 (CO) by an Administrative Law Judge (ALJ) in the Administrative Hearings Division (AHD) of the District of Columbia Department of Employment Services (DOES). In the CO the ALJ granted Leslie Ward's (Claimant's) claim for temporary total disability benefits from March 4, 2014 to the date of the hearing, November 18, 2014, and continuing, and causally related medical care, finding Claimant's claimed disability was causally related to a work-related injury stipulated by the parties to have been sustained on April 12, 2012.

Employer opposed the claim at the formal hearing, arguing that based upon an independent medical evaluation (IME) report and a series of addendums prepared by Dr. Louis Levitt, (1) Claimant's current back and shoulder problems are unrelated to the instant work-related injury,

and (2) Claimant is capable of returning to her pre-injury job as a van driver. Employer also asserted a third argument, that Claimant has voluntarily limited her income by failing to accept Employer's offer of modified duty in a position within the restrictions imposed by Claimant's treating physician.

In making the award, the ALJ found that the injuries to Claimant's head, left shoulder and back sustained on April 12, 2012, when a patient who was being transported fell backward into Claimant while being assisted out of a transport van, were causally related to her current disability and not to Claimant's pre-existing conditions from earlier work-related injuries. The ALJ further found that Claimant had not voluntarily limited her income because (1) Claimant is unable to return to her pre-injury job (2) has not reached maximum medical improvement (MMI) and (3) Employer has not offered suitable alternative employment within Claimant's capacity.

In the course of the litigation, Employer sought a medical release from Claimant in order to obtain certain psychiatric records which it contends may be relevant to the cause of Claimant's claimed inability to work, and filed a Motion to Compel Claimant to authorize such disclosure by her psychiatrist. The ALJ denied the motion, determining that the requested records were not relevant to any issue before the AHD in these proceedings.

Employer filed an Application for Review of the CO and a memorandum of points and authorities in support thereof (Employer's Brief) with the Compensation Review Board (CRB), to which Claimant filed an Opposition to Application for Review and memorandum of points and authorities in support thereof (Claimant's Brief).

In this appeal Employer argues that: (1) the ALJ erred in not finding that Claimant had voluntarily limited her income; and (2) the denial of the Motion to Compel is not in accordance the law and has hampered its ability to fully defend this claim.

Because there is no claim by Claimant that she has sustained a compensable and disabling psychological injury, and because Employer did not seek to have Claimant independently evaluated concerning her psychological status, the ALJ's denial of the Motion to Compel was not an abuse of discretion and will not be disturbed.

Because the evidence is uncontradicted that Employer conveyed its willingness to make work within Claimant's medically identified limitations available to Claimant through her attorneys, and Claimant failed to respond and accept the offer, the finding that Employer had not offered to make work within Claimant's capacity available is not supported by substantial evidence.

Because there is no requirement that a claimant attain MMI or be able to return to the pre-injury job in order to return to work in a suitably modified job. Therefore the ALJ's reliance upon Claimant's not having achieved MMI and not being able to return to the pre-injury job as the bases for finding there has not been a voluntary limitation of income is not in accordance with the law. We vacate the award and remand the matter to AHD with instructions that the ALJ further consider the issue of voluntary limitation of income.

ANALYSIS

With regard to the first ground for appeal, although Claimant arguably placed her psychiatric condition at issue by testifying that the work injury has caused her to seek psychiatric care, there is no claim in this case for any benefits or relief in connection with any such injury, and if Employer believes that something unconnected with the work injury of a psychological nature is responsible for Claimant's failure to return to work, it had the option of seeking to have Claimant evaluated for any such condition in an IME setting. This it did not seek to do, and we decline to find the denial of its motion to be an abuse of discretion.

Although the record contains numerous reports and disability slips from treating physician Drs. Mininberg and Fechter, none of them contain any discussion of Claimant's physical limitations. Rather, they contain a check mark next to a box with a pre-printed "Unable to Work-DISABLED". Although the narrative reports accompanying these disability slips are lengthy, they are also highly repetitive, and share one notable characteristic: they state that Claimant is to "limit activities", but are silent with respect what activities should be "limited", and to what degree.

The only medical evidence produced by Claimant concerning a treating physician's specific opinion concerning what limitations Claimant should impose upon her activities is the "Patient Work Status" form filled out by Dr. Ayana McIntosh on May 16, 2013. Dr. McIntosh is affiliated with the Advanced Pain Management Institute, to whom Claimant was referred by Dr. Mininberg. Claimant was seen and treated by Dr. McIntosh on March 5, 2013, April 16, 2013 and May 16, 2013. She received pain management treatments, including epidural injections. CE 2.

The May 16, 2013 work status form states that Claimant is not presently working due to "report of pain", but also states that Claimant's physical limitations are "No lifting over 10 pounds", "No Prolonged standing, sitting or walking" and "No bending, twisting or stretching." *Id.*

On November 7, 2013, Employer, through counsel, advised Claimant, through counsel, as follows:

I have been in contact with Winsome Davidson, who is Human Resources Director at Deanwood.

I am advised by Ms. Davidson that Deanwood has available modified and/or light duty employment for the Claimant, consistent with her medical status.

Please have your client contact Winsome Davis at Deanwood immediately to discuss a return to employment. Ms. Davidson can be reached at 202-399-7507 (direct number), 202-399-7504 (general number) or the Claimant can contact her in person.

Thank you for your anticipated cooperation and please contact me with any questions you may have in regard to the above.

EE 5.

Ms. Davidson also testified at the formal hearing concerning a job in the laundry that was available to Claimant, that was within the described limitations from Dr. McIntosh, and that she personally discussed the availability of that job with Claimant in December 2012 and on other occasions. Ms. Davidson testified that she offered the position to Claimant but Claimant objected to working in the laundry room because it was “too hot”. HT at 142 -143; 146 - 147.

The CO contains the following “Findings of Fact”:

In December 2012, Ms. Davidson had a telephone conversation with Claimant about the availability of a modified, full-time light duty position as a laundry room attendant washing and folding resident’s cloths. According to Ms. Davidson, the modified position was sedentary and did not involve standing or heavy lifting.³ Ms. Davidson did not discuss work hours, rate of pay or date of availability of the modified duty position. After her conversation with Claimant, Ms. Davidson contacted Employer’s corporate office regarding making modified duty laundry position available to Claimant. On November 7, 2013, Employer furnished a letter to Claimant’s counsel stating that a “light duty modified position was available [for Claimant], consistent with her medical restrictions”. Claimant was instructed to contact Ms. Davidson. EE 5. After December 2012, Ms. Davidson had no contact with Claimant. No offer of a light duty position was presented to Claimant by Employer. EE 6; HT pp. 132 – 133, 143 – 157.

³ Employer has three full-time laundry employees that perform the heavy lifting. HT pp. 143 – 151.

CO at 4 (footnote in original).

Nowhere in the CO does the ALJ suggest that she did not accept as factually accurate the testimony of Ms. Davidson, or that the November 7, 2013 letter was neither sent nor received.

In the “Discussion” portion of the CO, the ALJ wrote:

The record reflects that on April 18, 2012, Claimant was seen by Dr. Fechter who took her out of work and restricted her from lifting, twisting, bending, stretching sitting [sic]; standing or walking for prolonged periods. As of the date of the formal hearing, Claimant had not been cleared by her treating physicians to resume her pre-injury restricted duties or released to alternative modified duty. ... Based upon the facts of Claimant’s work injury and her testimony, that she could not perform her pre-injury duties as a result of her injuries she sustained after handling patients on April 12, 2012 [sic]. Claimant has satisfactorily established a *prima facie* case of temporary total disability. *Dunston, supra*.

* * *

Employer also argues it has made available other job duties Claimant could perform and alleges Claimant has voluntarily limited her income by failing to

accept modified-duty work she is able to perform. *Joyner, supra*. Employer avers Claimant was offered a laundry room position that falls within her physical restrictions of no heavy lifting, no prolonged walking, standing or sitting, bending, twisting or stretching. Employer asserts Ms. Davidson discussed and offered the laundry room position to Claimant in December 2012. At the formal hearing, Ms. Davidson testified after she had a discussion with Claimant in December 2012 the [sic] laundry room position, she referred the matter to the corporate office and had no further conversation with Claimant. Finally, Employer also maintained its letter of November 7, 2013, constituted an offer and Claimant had the responsibility to follow up and contact Employer as of November 7, 2013 and failure [sic] of her to do so is a voluntary limitation of income.

Notwithstanding that fact Claimant's treating physicians have not found her to be at maximum medical improvement or released her to work, there is no evidence that Ms. Davison [sic] in her capacity of human resource director extended an offer of modified [sic] job Claimant could perform within her restrictions or that Employer's November 7, 2013 letter constituted an offer of a position within her limitations.

CO at 10.

The above quotation is internally inconsistent inasmuch as it describes a verbal offer by Ms. Davidson in December 2012 and a written offer from Employer dated November 7, 2013, both of which are corroborated in the record by Ms. Davidson's testimony and Employer's exhibits, yet inexplicably also says that "there is no evidence" of any offer being extended. This is error, and we are unable to see how the conclusion rationally flows from the evidence the ALJ described.

Further, we cannot tell whether the ALJ found that the November 7, 2013 letter does not contain an offer, or that the fact that it was from counsel to counsel renders it inoperative, or both. We need to know why the ALJ does not find the letter to be an offer of modified employment in order to determine whether the finding is supported by substantial evidence and is in accordance with the law.

The CO portions quoted above also appear to suggest that the ALJ is of the mistaken impression that the law permits a claimant to refuse to perform any employment until he or she has attained MMI. The CO cites no authority for that position, and it runs counter to the entire concept of working in a modified position while "temporarily disabled" from one's pre-injury position. A worker is only "disabled" to the extent that that person is unable to perform gainful activity, whether at MMI or not.

D.C. Code § 32-1508 (3)(v)(iii) provides:

If the employee voluntarily limits his or her income or fails to accept employment commensurate with the employee's abilities, the employee's wages after the

employee becomes disabled shall be deemed to be the amount the employee would earn if the employee did not voluntarily limit his or her income or did accept employment commensurate with the employee's abilities.

There is nothing in this section that limits its application to cases in which MMI has been attained.

Related to this is that these passages from the CO also appear to evince a belief that whether a claimant can "work" is a medical question, despite a lack of knowledge of what the proffered employment physically entails. This is inconsistent with the oft-stated principle that disability (i.e., the inability to perform work for pay) is an economic concept which includes physical capacity considerations but is not a medical determination. *Washington Post v. DOES*, 853 A.2d 704, 707 (D.C. 2004); *Washington Post v. DOES*, 675 A.2d 37, 41 (D.C. 1996); *Harris v. DOES*, 746 A.2d 297, 301 (D.C. 2000); *Upchurch v. DOES*, 783 A.2d 623, 627 (D.C. 2001); *Negussie v. DOES*, 915 A.2d 391, 397 -398 (D.C. 2007). A physician is competent to issue restrictions upon physical activity, but is not competent to determine whether a person is disabled as that term is used in the workers' compensation system.

Where a compensation order evinces a misunderstanding of the law, we are not permitted to affirm. *See, District of Columbia Department of Mental Health v. DOES*, 15 A.3rd 692 (D.C. 2011); *Giles v. St. Phillips Episcopal Church*, CRB No. 15-184 (April 14, 2016).

Lastly, although the ALJ found that wages and hours were not discussed specifically in the conversations between Ms. Davidson and Claimant, Ms. Davidson did testify that it is Employer's policy generally that persons who are on modified duty work the same schedule and receive the same wages as the pre-injury schedule and pay, and there is no evidence that we have seen in the record that Claimant's case would have been handled any differently. HT 154.

CONCLUSION AND ORDER

The denial of the Motion to Compel was not an abuse of the ALJ's discretion, and is affirmed. The finding that Claimant has not voluntarily limited her income is based upon conflicting and contradictory findings of fact and misapplication of the law, does not flow rationally from the facts as found, and is vacated. The matter is remanded for further consideration of the issue of voluntary limitation of income in a manner consistent with the foregoing Decision and Remand Order.

So ordered.