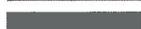


GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services



MURIEL BOWSER
MAYOR

DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 16-105

**LESLIE V. WARD,
Claimant-Petitioner,**

v.

**DEANWOOD REHABILITATION AND WELLNESS CENTER
and PMA INSURANCE GROUP,
Employer-Respondent.**

Appeal from an August 1, 2016 Compensation Order on Remand
by Administrative Law Judge Joan E. Knight
AHD No. 13-004A, OWC No. 690689

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2016 DEC 9 AM 11 40

(Decided December 9, 2016)

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

Before HEATHER C. LESLIE, GENNET PURCELL, and JEFFREY P. RUSSELL, *Administrative Appeals Judges.*

HEATHER C. LESLIE for the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

In a prior Decision and Order, the Compensation Review Board (“CRB”) outlined Claimant’s injury, treatment, and the procedural history of Claimant’s claim as such:

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.

Ward v. Deanwood Rehabilitation Center, CRB No. 16-017 (July 12, 2016) ("DRO").

The CRB concluded:

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.

DRO at 6.

A Compensation Order on Remand ("COR") was issued on August 1, 2016. The ALJ determined Claimant had voluntarily limited her income on August 28, 2014. Thus, the ALJ awarded temporary total disability benefits from March 4, 2014 to August 28, 2014 and denied benefits thereafter.

Claimant appealed. Claimant argues:

The ALJ's finding in the Compensation Order on Remand, that Ms. Ward voluntarily limited her income by not accepting the job offered on November 17, 2013, is erroneous because the finding of fact was found in the first instance by the Compensation Review Board. See *Lattimore, supra*. [*v. CVS Pharmacy*, CRB No. 15-189, (June 3, 2016) 2016 DC Wrk. Comp LEXIS 393] at *5. The findings that Ms. Ward was offered a position commiserate with her restrictions is not supported by the substantial evidence, as Ms. Davidson specifically stated that the December, 2012 position that Ms. Davidson said was not within Ms. Ward's restrictions. Furthermore, the Compensation Order on Remand failed to consider Ms. Ward's testimony when discussing whether or not the November 17, 2013 position offered to Ms. Ward was within her restrictions. See *Lantion, supra* [*v. Eagle Maintenance Services*, CRB No 13-038 2013 DC Wrk. Comp LEXIS 149], at *16-17. Therefore, reversal of the July 12, 2016 Decision and Remand Order and the August 1, 2016 Compensation Order on Remand is required.

Claimant's brief at 5-6.

Employer opposes the appeal. Employer argues the COR is supported by the substantial evidence in the record and should be affirmed.

ANALYSIS¹

In arguing that the COR erred in concluding Claimant was offered a position within her restrictions, thus negating any entitlement to disability benefits, Claimant first argues the CRB, made impermissible findings of fact in the DRO which constrained the ALJ on remand, and second, the job offered by the Employer was not within Claimant's restrictions. Claimant further argues, even if Employer met its burden in showing suitable employment, Claimant sustained her burden in proving she is temporarily and totally disabled.

Regarding Claimant's contention that the CRB engaged in impermissible fact finding in the prior DRO, we disagree. The prior DRO pointed out that the finding of facts (some which were outlined in the discussion section), outlining an offer of employment to Claimant was inconsistent with the conclusion that "there was no evidence" of an offer of employment. *See* DRO at 5. The CRB did not make any findings of fact as Claimant alleges in argument, but rather remanded the case for the ALJ to reconcile the findings of fact as found in the Compensation Order, with the conclusion that Employer did not offer employment as it did not rationally flow from the evidence described. We reject Claimant's argument.

Claimant also argues the CRB also made impermissible findings of fact regarding Claimant's restrictions, and that the CRB "directed" the ALJ to adopt the restrictions of Dr. Ayana McIntosh who outlined specific restrictions Claimant could work under. Again we disagree. The CRB noted that the treating physicians the ALJ relied in part on did not elaborate on what "limited activities" the Claimant was in actuality under, all except for Dr. McIntosh. The CRB also expressed concern that the ALJ was mistaken in certain assumptions, including that Claimant can refuse employment until she has reached MMI or until a claimant can perform her pre-injury employment, regardless if modified employment was offered. *See* DRO at 5-6. The CRB remanded the case for further analysis. Specifically, we stated:

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

¹ The scope of review by the CRB is limited to making a determination as to whether the factual findings of the appealed 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. Section 32-1521.01(d)(2)(A) of the District of Columbia Workers' Compensation Act, as amended, D.C. Code § 32-1501 to 32-1545, ("Act"). Consistent with this standard of review, the CRB is constrained to uphold a Compensation Order that is supported by substantial evidence, even if there also is contained within the record under review substantial evidence to support a contrary conclusion and even if the CRB might have reached a contrary conclusion. *Marriott International v. DOES*, 834 A.2d 882, 885 (D.C. 2003).

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.3d 692 (D.C. 2011); *Giles v. St. Phillips Episcopal Church*, CRB No. 15-184 (April 14, 2016).

DRO at 6.

This the ALJ did upon remand.

We also reject Claimant's next argument, that the evidence shows that Claimant was not offered a position within her restrictions, pursuant to the testimony of Ms. Davidson. In support, Claimant refers to select testimony from Ms. Davidson elicited on cross-examination. After acknowledging statutory and case precedent specific to the issue of voluntary limitation of income,² the ALJ took all of Ms. Davidson's testimony in consideration, including direct and cross-examination, as well as the record evidence when determining:

With regard to Employer's argument that Claimant has voluntarily limited her income by refusing its offer of modified, light-duty work as a laundry attendant that she is capable of performing. The record reflects Employer, in a November 7, 2013 letter to Claimant's counsel provided an OFFER OF MODIFIED AND/OR LIGHT DUTY EMPLOYMENT. At the formal hearing, Ms. Davidson provided un rebutted testimony on behalf of Employer, that she had a telephone conversation with Claimant in December 2012 regarding the availability of a light-duty laundry room position for Claimant and discussed the modified duties of that position. Ms. Davidson also testified that she relayed her conversation with Claimant to the corporate office for processing. It is determined that letter constituted an employment offer, as it indicated Employer has made "available modified and/or light duty employment for the Claimant, consistent with her medical status". Claimant's Counsel was to instruct Claimant to "immediately contact Winsome Davidson" to discuss a return to employment.

² 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.

To overcome Employer's rebuttal evidence, Claimant testified that she has not been released to return to work by her treating physicians and presented treatment records that contain diagnosis and disability slips in the record evidence slips restricting Claimant from returning to work following her April 12, 2012 work injury. Claimant's reasons for not complying with Employer's instructions to contact Ms. Davidson, was that because of her work injuries, she would not have been capable of working that light-duty laundry position.

The record reflects that following her April 12, 2012, work injury Claimant was treated by Drs. Fechter and Mininberg who issued a series of disability slips from April 18, 2012 through June 16, 2014, placing Claimant in an out of work status and advised her to "limited activities". In May 2013, pain management physician Dr. McIntosh specifically restricted Claimant from lifting, twisting, bending, stretching sitting; standing or walking for prolonged periods.

It is determined the modified laundry room position Employer made available to Claimant was within her medical restricted that she was capable of performing, following her work injury. The undisputed evidence of record established that Claimant was not made aware of the Employer's letter until August 28, 2014. Nonetheless, Claimant affirmed that she did not contact Ms. Winsome or return to work after August 28, 2014.

Based upon the record evidence, Employer made suitable light-duty employment available to Claimant within her restrictions and within a category of jobs that the claimant is reasonably capable of performing. It is determined Claimant has voluntarily limited her income as of August 28, 2014, when she failed to contact Winsome Davidson to discuss her return to light-duty employment in the laundry department and failure to report to the light duty job at her same wages and schedule as her pre-injury position.

COR at 6-7.

A review of the evidence supports the above. In reviewing Ms. Davidson's testimony, we are aware that she did review the letter and position offered to Claimant, and indicated said position would be a light duty position suitable for the Claimant as the Claimant would only be expected to fold wash cloths, working the same hours at the same pay as her pre-injury job. Hearing transcript at 154-156. Moreover, contrary to Claimant's assertion that Claimant was not formally offered the position during her December 2012 conversation with Ms. Davidson, this is directly contradicted by Ms. Davidson's testimony at the Formal Hearing. Hearing transcript at 157. In pointing to select testimony and evidence, what Claimant is asking this panel to do is to reweigh the evidence in her favor, a task we cannot do. The substantial evidence in the record supports the ALJ's conclusion that Claimant voluntarily limited her income.

Finally, Claimant refers this panel to several findings of facts and conclusions of law in the original Compensation Order in support of her argument that she remains temporarily and totally disabled. We direct Claimant to our DRO, which we need not revisit. .

CONCLUSION AND ORDER

The August 1, 2016 Compensation Order on Remand is supported by the substantial evidence in the record and in accordance with the law. It is **AFFIRMED**.

So ordered.