

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

CRB No. 15-086

MARK BOPP,
Claimant–Petitioner,

v.

CLARK CONSTRUCTION GROUP L.L.C.,
and ZURICH NORTH AMERICA,
Employer/Carrier-Respondent

Appeal from a April 21, 2015 Compensation Order by
Administrative Law Judge Donna J. Henderson
AHD No. 12-527A, OWC No. 692370

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2015 OCT 16 AM 11 41

(Decided October 16, 2016)

Michael J. Kitzman for Claimant
Sarah M. Burton for Employer

Before HEATHER C. LESLIE, LINDA F. JORY and LAWRENCE D. TARR, *Chief Administrative Appeals Judge.*

HEATHER C. LESLIE for the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

The facts of record and procedural history were outlined first in *Bopp v. Clark Construction Group, L.L.C.*, CRB No. 13-040, AHD No. 12-527 (May 30, 2013).

Claimant worked for Employer as a concrete finisher with duties that required lifting, bending, extensive kneeling, stooping, and squatting. Sometime near the end of 2010, Claimant injured his right knee while riding a dirt bike. Claimant did not have the injury evaluated and it improved over a period of time. No finding was made that this injury interfered with Claimant’s work duties or that he missed any work due to the injury.

In and around January 2012, Claimant began to experience bilateral knee pain, with the pain worse in the right knee. When observed limping by a supervisor in April 2012 and asked whether he injured himself on the job, Claimant responded that it was due to a dirt bike injury. Claimant was allowed to leave work early and for the next few days was assigned less demanding work tasks.

Claimant first sought medical treatment for his right knee on May 2, 2012 with orthopedic specialist Dr. Robert Verklin, who noted that Claimant thought he had injured his knee riding a dirt bike. An MRI showed no meniscus tearing or patellofemoral injury. Dr. Verklin opined that surgery was not indicated, fitted Claimant for a knee brace, and ordered other palliative measures including exercises and medicinal supplements, with corticosteroid injections to be considered if symptoms persisted. Dr. Verklin at no time took Claimant off work but did recommend that he avoid kneeling, squatting and lunging.

It was found that Claimant lost no time from work related to his right knee condition and continued working while seeing Dr. Verklin. It was also found that as Claimant was not seen at work the week before Memorial Day 2012, his employment with Employer was terminated on or about May 21, 2012.

Claimant was seen by Dr. Harvey Mininberg, an orthopedic specialist, for an independent medical evaluation (IME) on August 17, 2012. With a specific notation that Claimant had no history of injury to this right knee, Dr. Mininberg diagnosed right knee contusion that was secondary to a work injury on May 3, 2012.

Employer had Claimant examined by Dr. John O'Donnell, also an orthopedic specialist, on December 13, 2012. Dr. O'Donnell diagnosed minimal chondromalacia patella that was not related to Claimant's work as a concrete finisher, but was more likely related to the dirt bike accident.

Claimant filed a claim for temporary total disability benefits from June 1, 2012 to the present and continuing and causally related medical expenses. Following a formal hearing, a February 28, 2013 Compensation Order (CO) issued denying Claimant's request for disability benefits but granting his claim for causally related medical expenses related to the right knee. Claimant timely appealed with Employer filing in opposition.¹

After review of the arguments and the Compensation Order, a Decision and Remand Order was issued which reversed and remanded the underlying Compensation Order, determining that the findings of fact and conclusions of law were inconsistent with each other, thus, the denial of temporary total disability benefits was not supported by the substantial evidence in the record nor in accordance with the law. *Id.*

¹ *Bopp v. Clark Concrete Contractors*, AHD No. 12-527, OWC No. 692370 (February 28, 2013).

On August 2, 2013, a Compensation Order on Remand (COR) was issued. The COR concluded Claimant was temporarily and totally disabled from June 1, 2012 to the present and continuing. That COR was not appealed.

Thereafter, Employer began vocational rehabilitation on October 31, 2013. On February 12, 2014, Employer filed for a Formal Hearing, seeking a suspend Claimant's benefits for unreasonably refusing to cooperate with vocational rehabilitation under D.C. Code 32-1507(d).²

A Compensation Order (CO) was issued on April 21, 2015 which granted Employer's request to suspend benefits in part. Specifically,

It is **ORDERED** Employer's claim for relief be, and hereby is, **GRANTED** in part and **DENIED in part**. Employer's claim for relief is **GRANTED** and Claimant's temporary total disability benefits are suspended from February 12, 2014 through and including April 13, 2014; from April 25, 2014 through and including May 19, 2014; and from May 24, 2014 until he cures his failure to cooperate with vocational rehabilitation and demonstrates that he is cooperating. Employer's claim for relief is **DENIED** for the periods from April 14, 2014 through April 24, 2014 (eleven days) and from May 20, 2014 through May 23, 2014 (four days). It is **FURTHER ORDERED** that the period for which benefits are suspended shall be taken as a credit against future payments of temporary total disability once the failure to cooperate has been cured and payments resumed. (Footnote omitted).

CO at 14.

Claimant timely appealed. Claimant argues 1) the CO's findings regarding the duration of the suspension are not in accordance with the law; 2) the CO's findings on credibility are not supported by the record evidence; 3) the CO's findings regarding the necessity of an Functional Capacity Evaluation (FCE) are not supported by the substantial evidence; and, 4) the CO's statement of the legal basis of vocational rehabilitation are not in accordance with the law.

Employer opposes the Application for Review, arguing the CO is not arbitrary or capricious, is supported by the substantial evidence in the record and in accordance with the law.

STANDARD OF REVIEW

The scope of review by the CRB, as established by the Act and as contained in the governing regulations, is 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 to 32-1545 (2005) (the Act), at § 32-1521.01(d)(2)(A). Consistent with this standard of review, the CRB and this Review Panel

² On May 20, 2014, a Formal Hearing was held before ALJ Leslie Meek. ALJ Meek left the agency prior to rendering a decision. ALJ Henderson was reassigned the case and a Formal Hearing was held on February 10, 2015.

are constrained to uphold a Compensation Order (CO) 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 the reviewing authority might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

ANALYSIS

Claimant first argues that the CO's requirement to submit job logs and verifiable information to substantiate his cooperation with vocational rehabilitation is not supported by the law and "beyond the Administrative Law Judge's authority under the Act." Claimant's argument at 4. We disagree.

The law is clear that vocational rehabilitation involves mutual obligations. Employers begin vocational rehabilitation in an effort to return claimants to employment at a wage as close as possible to the wage that the claimant earned at the time of the injury. D.C. Code 32-1507(c). Claimants, in turn, are tasked with cooperating with vocational rehabilitation. D.C. Code 32-1507(d) states:

If at any time during such period the employee unreasonably refuses to submit to medical or surgical treatment or to an examination by a physician selected by the employer, or 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.

We disagree with Claimant that obligating a Claimant to provide job logs is beyond the scope of the ALJ's authority. Supplying job logs requested by the Vocational Counselor, as found in the CO, is a reasonable request under the Act and shows a willingness to cooperate with vocational rehabilitation. As we have held previously,

The CRB rejects Mr. Al-Khatawi's fact-based argument. Not only is this argument, again, based upon a request for the CRB to reweigh the evidence, it ignores the basis for the ALJ's finding of failure to cooperate, namely Mr. Al-Khatawi "did not perform the periodic independent job searches or maintain a job log as instructed. I find that [h]e also did not follow up on the job leads identified by the vocational rehabilitation counselor." Failure to comply with a vocational rehabilitation counselor's reasonable requests to conduct a job search is an obligation under the Act as that request is "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." The ALJ's ruling that Mr. Al-Khatawi failed to comply with that request is supported by substantial evidence in the record as explained in more detail below. (Footnote omitted.)

Al-Khatawi v. Hersons Glass Company, CRB No. 13-023, AHD No. 11-231 (November 14, 2013).

Claimant argues that his testimony alone is sufficient to establish a willingness to cooperate with the job search. However, in light of past issues with Claimant's cooperation, the ALJ found the Claimant's testimony to be incredible. As the ALJ stated:

Employer has provided evidence that it is offering suitable vocational rehabilitation services. Its evidence has also demonstrated that Claimant has testified twice, once in his deposition and once in a Formal Hearing that he will cooperate, but he has failed to do so.

CO at 13.

The ALJ's requirement that Claimant submit job logs as reasonably requested by the vocational rehabilitation counselor is in accordance with the Act and supported by the substantial evidence in the record. We affirm the ALJ's analysis.

Claimant also argues the ALJ's credibility finding is not based on the evidence in the record including Claimant's testimony. As Claimant correctly notes, an ALJ's finding on credibility are given special weight, in light of an ALJ's ability to assess Claimant's demeanor and appearance. *WMATA v. DOES*, 683 A.2d 470 (D.C. 1996). Credibility determinations also take into account the rationality of the testimony, internal consistency, and the manner in which it hands together with the other evidence. *McAlister v. Flippo Construction*, CRB No. 08-045, AHD No. 03-314 (March 25, 2008). Claimant argues the CO's "wholesale rejections of the claimant's testimony, including on issues such as the health of his grandparents, fails to meet this minimal threshold standard." We reject this contention.

The ALJ reviewed the record as a whole, including prior sworn testimony to come to her credibility determination, listing several instances of statements made by the Claimant of a willingness to cooperate with vocational rehabilitation, but then not carried in his actions afterwards. For instance, the ALJ noted:

After the November 20, 2013 initial meeting, Claimant and his attorney agreed to schedule an appointment with an orthopedist and obtain a prescription for an FCE. EE1, p. 12 and 13. The report of the initial meeting dated December 2, 2013, set out their responsibility in obtaining an FCE outlining Claimant's current restrictions.

Claimant's deposition was scheduled for April 14, 2014. At the deposition, Claimant agreed to cooperate and a meeting was scheduled for April 24, 2014. EE 2, p. 54.

At the April 24, 2014 appointment, Claimant stated that he applied for only one position with a uniform company. Claimant informed the VC that he would not apply for any of the job leads that she provided him because he was either not interested or he felt they were beyond his physical capacity. HT1, p. 28 and EE 2, p. 54 - 55. Despite stating that he was willing to cooperate, Claimant did not cooperate by applying for jobs or by submitting job logs.

Neither Claimant nor his attorney contacted the VC between the November 20, 2013 initial meeting until the arrangements for the April 24, 2014 appointment. When the VC spoke to Claimant, she asked him to bring job logs but he did not have any. HT1, p. 27. The appointment with the doctor was not scheduled and the FCE was not obtained. Neither Claimant nor his attorney fulfilled their part of the agreement between these dates. Claimant's appointment was scheduled for June 2, 2014 with Dr. Wigle. HT1 at 44 and EC 1, p. 6.

The undersigned was not at the deposition and will not judge the credibility of his testimony at that hearing. However, Claimant's statements at the April 24, 2014 deposition clearly indicated that he was not willing to cooperate with vocational rehabilitation.

CO at 11.

This is but one example of several instances where the ALJ outlined Claimant's statements of a willingness to cooperate and then actions which indicated the contrary, including a lack of follow through with timely contacting the Vocational Counselor or submitting job applications. Claimant argues the CO "fails to express how Mr. Bopp's testimony that he did not apply for all the positions, that he did not have documentation, and that he had missed some meetings with the vocational counselor was in any way incredible when compared to the other evidence of the record." Claimant's argument at 5. We need not reiterate all of the ALJ's examples here. Suffice it to say, the ALJ's determination that Claimant's testimony that he was willing to cooperate with vocational rehabilitation was not credible based on her review of the evidence is in accordance with the law.

Claimant next argues the CO's findings regarding the necessity of a Functional Capacity Evaluation (FCE) is a medical opinion and further, the ALJ's reliance on the lack of an FCE for its rejection of the treating physicians opinion is not in accordance with the law. We disagree.

A review of the CO shows the ALJ's summary of the meetings between Claimant, the Vocational Counselor, and Claimant's attorney, including the need to determine Claimant's current work restrictions. The ALJ found,

Because Claimant had not had a medical examination for more than 10 months prior to the meeting on November 20, 2013, the VC recommended "updated physical restrictions to utilize as a basis for the job search activities." EE 2, pp. 12 and 13. In the conversation with Claimant's counsel prior to the meeting on November 20, 2013, the VC was advised that Claimant was attempting to schedule an appointment with Dr. Richard Schroeder, an orthopedist in Johnstown, Pennsylvania, to whom Claimant's counsel was sending all Claimant's medical records. EE 1, p. 4. The purpose of this appointment was to obtain a script for a functional capacity evaluation (FCE) or some medical opinion concerning his current physical limitations.

CO at 4-5.

Contrary to Claimant's argument, the Claimant informed the Vocational Rehabilitation Counselor of his aim of obtaining an FCE at his next appointment to ascertain his current physical limitations. The Claimant, in argument, does not contest this finding. The CO's recitation of the history of the meetings between Claimant and the Vocational Counselor shows Claimant's lack of follow through in timely obtaining an FCE or current restrictions to the Counselor. The ALJ at no point renders a medical opinion regarding the need of an FCE. Furthermore, the ALJ does not use the lack of an FCE to reject the opinion of the treating physician. To put it bluntly, Claimant in argument completely mischaracterizes the CO's handling of the FCE. We reject Claimant's argument.

Finally, Claimant argues that the ALJ's reference to the Act's language that vocational rehabilitation is designed to return the Claimant to employment with earnings as close as possible to his pre-injury job as "aspirational" is a contrary to D.C. Code § 32-1507(c). We reject this argument.

D.C. Code § 32-1507(c) notes vocational rehabilitation is "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." (Emphasis added.) The hope and purpose of vocational rehabilitation is to return the Claimant to employment as close to his pre-injury job. In order to achieve this goal, Claimant must cooperate with vocational rehabilitation through following up on job leads provided to him by the Vocational Counselor. Claimant is not bound to follow up on only the job leads provided by the Counselor, but can also look on his own for jobs potentially more satisfactory professionally and financially. The Act does not mandate Employer to find a job paying the same as his pre-injury job.

Moreover, depending upon the job salary claimants return to, disability benefits may still available to the injured worker to compensate for a job paying less. Such issues are not relevant until such time as Claimant begins to cooperate with vocational rehabilitation and return to some type of gainful employment.

CONCLUSION AND ORDER

The April 21, 2015 Compensation Order is supported by the substantial evidence in the record and is in accordance with the law. It is AFFIRMED.

So ordered.