

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 15-147

MICHAEL VALLEZ,
Claimant-Respondent

v.

PROGRESSIVE NURSING STAFFERS
and PROPERTY & CASUALTY INSURANCE GUARANTY CORP.,
Employer/Carrier-Petitioners.

Appeal from an August 17, 2015 Compensation Order on Remand
by Administrative Law Judge Donna J. Henderson
AHD No. 98-531K, OWC No. 526392

(Decided February 17, 2016)

W. John Vernon for Employer
Frank Kearney for Claimant

Before HEATHER C. LESLIE, JEFFREY P. RUSSELL, *Administrative Appeals Judges* and LAWRENCE D. TARR, *Chief Administrative Appeals Judge*.

HEATHER C. LESLIE for the Compensation Review Board.

DECISION AND REMAND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

The facts and procedural history are set out in *Vallez v. Progressive Nursing Staffers*, CRB No. 13-051 (December 2, 2013) (DRO):

The Claimant worked as a certified emergency room nurse for the Employer. On February 22, 1998, the Claimant was assaulted by a patient and sustained multiple injuries, notably to his left ankle and left wrist. The work injury ultimately led to several surgeries to his left ankle and left wrist.

The Claimant's case proceeded to several formal hearings resulting in CO's. Pertinent to the appeal before the CRB, on June 1, 1999, a CO was issued which found that the Claimant's left ankle injury was medically causally related to his February 22, 1998 work injury. The parties stipulated to an average weekly wage

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(AWW) of \$1,400.00. The ALJ authorized the requested medical treatment and awarded temporary total disability benefits beginning on October 2, 1998. The Employer subsequently sought a modification of this order in 2001, alleging that the Claimant voluntarily limited his income. In a CO issued March 30, 2001, the ALJ determined that the Claimant had voluntarily limited his income and reduced his wage loss benefits from temporary total disability benefits to permanent partial disability based on wage loss, with a credit retroactively granted to the Employer. The ALJ found that the Claimant could perform the alternative employment presented by the Employer and reduced the Claimant's entitlement to benefits accordingly. The Claimant was also awarded permanent partial disability of 10% to each the left lower extremity and left upper extremity.

On June 14, 2007, a CO was issued after the Claimant requested a modification of the 2001 order. The Claimant sought an increase in the amount of permanent partial disability awarded to the left lower and left upper extremity. After a full evidentiary hearing, the ALJ awarded a 35% permanent partial disability to his left upper extremity and 27% permanent partial disability to his left lower extremity.

The Employer and Claimant agreed that the Employer had overpaid the Claimant \$63,921.30 as of November 6, 2009. To recoup this credit, the Employer stopped paying disability benefits until the credit was recovered in full. The Claimant alleges the credit was satisfied on September 1, 2012. The Employer maintained the credit was not satisfied.

The Claimant continued to seek treatment since his injury. After moving away from Washington, D.C, the Claimant came under the care and treatment of Dr. Faustino Bernadett, a pain management specialist. Dr. Bernadett has recommended epidural injections and medication. The Employer has not authorized this treatment.

On February 19, 2013 a full evidentiary hearing was held. The Claimant sought an award of permanent partial disability benefits from September 1, 2012 to the present and continuing and authorization for medical treatment. The issues presented for resolution were whether the current medical treatment requested was causally related to the work injury and whether the Employer had received the full credit for the agreed upon overpayment. A Compensation Order issued on April 4, 2013 which granted the Claimant's claim for relief in its entirety.

The Employer appealed the April 4, 2013 Compensation Order. In the DRO, the CRB affirmed the Compensation Order's conclusion that the back condition was medically causally related to the work injury and that Employer was not entitled to an additional credit for an alleged overpayment of a prior order. The CRB vacated the Compensation Order's conclusion that Employer had recouped an overpayment credit, finding that the ALJ had erroneously used an average weekly wage of \$1,400.00 and not the reduced AWW of \$1,120.00 as reflected in a 2001 Compensation Order. The CRB remanded the case, concluding:

Thus, until such time as either party seeks to modify the AWW, the Claimant's continuing wage loss benefits is controlled by the AWW of the 2001 Order which is the law of the case. As such, we are forced to remand the case with instructions to determine whether or not, based upon the AWW as found in the 2001 Order, the Employer has recouped the credit owed, thus entitling the Claimant to continuing wage loss benefits

DRO at 6-7.

In a subsequent Compensation Order, the ALJ, utilizing the reduced average weekly wage, determined Employer was still owed a credit. That Compensation Order was not appealed.

On February 2, 2015, Claimant filed an application for a Formal Hearing, seeking a modification of the Compensation Order issued on March 30, 2001. A *Snipes* hearing convened where both parties stipulated a change of condition had occurred, warranting a Formal Hearing.¹

A full evidentiary hearing occurred on June 22, 2015. Claimant sought to modify his reduced average weekly wage of \$1,120.00 to \$1,400.00, his original average weekly wage, increasing his permanent partial disability based on wage loss benefits awarded in the April 4, 2013 Compensation Order (hereinafter CO). The issues to be adjudicated were:

1. Is Claimant's request for a modification of the March 30, 2001 Compensation Order an issue covered under D.C. Code § 32-1524(a)(1)?
2. Is Claimant's request for modification of the March 30, 2001 Compensation Order timely?
3. Has Claimant had a change of condition entitling him to a modification of the Compensation Order issued on March 30, 2001?

The CO concluded jurisdiction was proper and that Claimant's request for modification was proper. The CO concluded that Claimant had proven a change of condition warranting a reinstatement of Claimant's average weekly wage of \$1,400.00.

Employer timely appealed.² Employer argues the conclusion that Claimant cured his prior voluntary limitation of income is not supported by the substantial evidence nor in accordance with the law. Employer argues that the ALJ's rejection of the labor market survey and subsequent conclusion that Employer failed to show a voluntary limitation of income is not supported by the substantial evidence in the record. Finally, Employer argues the ALJ failed to consider all the evidence in the record, notably the current physical restrictions, or lack thereof, on Claimant's ability to work.

¹ *Snipes v. DOES*, 542 A.2d 832 (D.C. 1988).

² Employer did not appeal the first two issues listed in the CO, namely whether AHD had jurisdiction and whether the request for a modification was timely. Claimant did not appeal the ALJ's conclusion that the date of modification of the prior order would only be effective on February 2, 2015. We will not address these un-appealed issues.

The Claimant opposes the Application for Review arguing the CO is supported by the substantial evidence in the record and is in accordance with the law.

ANALYSIS³

We note that where voluntary limitation of income is at issue, it is analyzed within the context of nature and extent, and generally centers on whether an offer of employment or alternative job is suitable, and whether it is within a claimant's physical and vocational capacity. *Washington Post v. DOES*, 675 A.2d 37 (D.C. 1996).

We also must point out that when a modification of a prior CO is sought, the right to an evidentiary hearing is triggered only where there has been a threshold showing that there is "reason to believe that a change of conditions has occurred". See *Washington Metropolitan Transit Authority v. DOES*, 703 A.2d 1225 (D.C. App. 1997) (*Anderson*,) (citing *Sylvia Snipes v. DOES*, 542 A.2d 832 (D.C. 1988) (*Snipes*). In order to prevail, the moving party must present sufficient evidence to prove that a change of condition has occurred. This change of condition must be either a function of claimant's physical condition, or a change in his disability which has occurred since the date of the previous Formal Hearing. See *Snipes, supra*; D.C. Code § 32-1524.⁴

As the Court of Appeals has instructed this agency in *Anderson*, consideration of the prior determination is necessarily taken into account in deciding whether, for modification purposes, a change has occurred.

With the above case law in mind, we turn to the case *sub judice*. In the case before us, Claimant has been found, by a prior order, to have voluntarily limited his income and thus his average weekly wage was reduced to reflect this finding. The prior order concluded that Claimant voluntarily limited his income by declining a job within his restrictions, thus turning his status from a temporary and total disability to a temporary and partial disability. Thus, to modify the prior order, the declined job becomes a baseline that the parties and ALJ must refer to when determining whether a change in condition warranting a modification of the prior order has occurred.

In determining whether Claimant had proved a modification was warranted, the ALJ noted:

³ 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.

⁴ A change of circumstances warranting modification of workers' compensation award pursuant to statute is not restricted to medical conditions. See *Anderson, supra* wherein the Court of Appeals found the lack of availability of employment suitable to Claimant's condition as basis for change of circumstances warranting modification.

Claimant has the burden to demonstrate that he cured his voluntary limitation of income. In support of his claim that he cured his voluntary limitation of income, Claimant submitted evidence of his academic achievements and his employment since the 2001 Compensation Order. At the time of his injury, Claimant had a two-year degree which enabled him to be a clinical nurse. In July 2001, Claimant received his bachelor's degree. After receiving his bachelor's degree, he worked part-time as supervisor in a hospital while working on his master's degree. HT at 37. Claimant received his master's degree from the University of Maryland in December 2002. Claimant passed the national boards to become a certified nurse practitioner in the spring of 2003. HT at 38. In the fall of 2003 Claimant began working for the University of Maryland Hospital, Department of Hematology, as a certified nurse practitioner. HT at 39. In 2005, Claimant began having back pain and headaches and took additional coursework to become a certified teacher. He began teaching at the University of Maine in the fall of 2006. HT at 41 -43. Claimant remained at the University of Maine for two years before he left to take a higher paying position at Boise State University. HT at 47. Claimant worked at Boise State University for two more years, leaving in the spring of 2010, before he left because his position had become more clinical and he felt he could no longer perform the clinical aspect of the job because of the pain resulting from his work-related injuries sustained on February 22, 1998. HT at 48 and 51. Subsequently, Claimant secured part-time employment with Kaplan, preparing nurses for their national boards. HT at 52 and 86. Since teaching at Kaplan, Claimant has been unable to maintain the continuing practice requirements for his nursing certificate. HT at 56 - 57.

Claimant continues to work as an instructor with Kaplan. If Kaplan offered full-time employment, Claimant would seek full-time employment but it does not. HT at 88 - 89. Claimant's earnings as a university instructor were not admitted into evidence but Claimant's earnings for 2013 and 2014 were \$ 32,000 and 41,000.00 respectively.

CO at 6.

The ALJ rejected the testimony of Employer's vocational expert, Scott Severt, finding the jobs outlined in the labor market survey to be outside of Claimant's physical restrictions, relying solely on Claimant's testimony of his current physical condition.

We find the above analysis in error. The ALJ analyzed what is a nature and extent/voluntary limitation of income case using a derivation of the "cure" concept applicable in non-cooperation with vocational rehabilitation cases. Reducing a claimant's compensation rate because the claimant declines a suitable alternative position is not a punitive action (as opposed to suspension of benefits) and there is nothing to "cure". A claimant's compensation rate is established by assessing what the claimant is capable of earning as compared to what the claimant was earning pre-injury.

We are forced to vacate the CO and remand the case for the correct analysis, determining whether a change in conditions has occurred, using the declined job noted in the prior CO as a baseline. The ALJ needs to determine first if the Claimant is still capable of performing the declined job, addressing Claimant's current restrictions. In *Logan v. DOES*, 805 A.2d 237 (D.C. 2002)(*Logan*),

the District of Columbia Court of Appeals (DCCA) remanded the case for further analysis, in part because the ALJ failed to address the treating physician's opinion regarding the Claimant's physical abilities. The DCCA stated:

The additional reason why we remand is that the examiner's decision failed to address -- or even to mention -- the conclusion of petitioner's current treating physician, Dr. Ignacio, that petitioner would be unable to perform even sedentary duties in the future, and so was permanently totally disabled. Most recently, the court stated in this regard:

In evaluating the evidence of record . . . [DOES] must take into account the testimony of a treating physician, which is ordinarily preferred over that of a physician retained solely for litigation purposes Though a hearing examiner may reject the testimony of a treating physician and decide to credit the testimony of another physician when there is conflicting medical evidence, . . . the agency must give reasons for such a rejection.

White v. District of Columbia Dep't of Employment Servs., 793 A.2d 1255, 1258 (D.C. 2002) (internal citations omitted). As the premise of his opinion that work was reasonably available for petitioner, Fed Ex's vocational expert took it as given that petitioner could perform at least sedentary duties. Dr. Ignacio's opinion clashes sharply with that premise. While other medical evidence of record presents a distinctly different picture of the extent of petitioner's disability than does Dr. Ignacio, the examiner must consider that evidence in juxtaposition to Dr. Ignacio's opinion, and if the examiner chooses to reject the latter, he must explain why.

Id.

In the case before us, the ALJ makes no findings of facts regarding Claimant's current medical condition or physical restrictions on his ability to perform the job Claimant refused. The ALJ does not analyze the opinion of Dr. Faustino Bernadett or the Employer's IME physician, Dr. Jason Brokaw. We also must note at this juncture that the CO refers to Employer's exhibit 1-5 being admitted into the record, without reference to the additional exhibits and referenced in the hearing transcript at pages 16-18, sent post hearing by Employer on June 24, 2015, described as exhibit 6. It is unclear whether exhibit 6 was taken into consideration.

After determining Claimant's current restrictions, if the Claimant is capable of performing the declined job, a modification is not warranted and Claimant's claim for relief must be denied. If the Claimant is not capable of performing the declined position, meaning his restrictions are greater than those imposed upon him in 2001, the Claimant reverts to total disability status, and the burden shifts to the Employer to refute that finding or demonstrate some level of employment.

Assuming the Employer is capable of proving some level of employability, which will indeed occur as Claimant is working part time presently, the compensation rate is adjusted to reflect that level of

employability, meaning Claimant would then be entitled to temporary partial disability.⁵ If the level of employability is lower than the declined position, the compensation rate goes up accordingly; if Employer demonstrates employability above the declined position rate but below the pre-injury wage, the compensation rate goes down accordingly. If the employer demonstrates employability at or above the pre-injury rate, the compensation rate goes to zero. In other words, the question is the following: Has there been a change in conditions affecting Claimant's capacity to perform the proffered but declined job from years ago? If he demonstrates that he has deteriorated to the point where he cannot do that job, he would have made a prima facie case for modification from partial to total disability, thereby shifting to Employer the burden under *Logan*.

In an effort to avoid further remands, we also note that in addressing employability, we do find some errors in the current CO's analysis of the jobs outlined in the Employer's vocational report. The ALJ stated the Claimant could not perform the jobs in the labor market survey because they involve direct patient care or a valid nurse practitioner's license that Claimant does not have. While a few of the jobs required the nurse practitioner's license, we note that several of the job descriptions do not say anything about direct patient care. Similarly, the ALJ seems to have disqualified one job based on the job description saying community health prevention was preferred, not mandatory.

We are not finding that the Claimant is able to perform these jobs. We are saying that on remand the ALJ should state why each job was suitable or not and not dismiss them all with the conclusory finding "Employer's case rested on Mr. Severt's opinion that Claimant was capable of the positions included in the Labor Market Survey and his opinion is rejected. Employer has not demonstrated that Claimant has voluntarily limited his income by refusing to apply for positions such as listed in the labor market survey and has not offered vocational rehabilitation services to locate other suitable employment." COR at 7.

Until such time as the ALJ makes findings of facts and conclusions of law in line with the discussion above, we cannot say the CO is supported by the substantial evidence in the record or in accordance with the law. Until such time, Employer's other arguments are rendered moot.

CONCLUSION AND ORDER

The August 17, 2015 Compensation Order is VACATED and REMANDED further findings of facts and conclusions of law consistent with this opinion.

So ordered.

⁵ Several times in the CO, the ALJ refers to the AWW increasing or decreasing. We believe the ALJ meant to say compensation rate. As we are remanding the case, the ALJ will be able to clarify this confusion.