

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

Department of Employment Services

VINCENT C. GRAY  
MAYOR



F. THOMAS LUPARELLO  
INTERIM DIRECTOR

**CRB No. 13-158**

**ROBERT A. FORD,**  
**Claimant-Respondent,**

v.

**ALLGLASS SYSTEMS, INC. and LIBERTY MUTUAL**  
**Employer/Insurer – Petitioners.**

DEPT. OF EMPLOYMENT  
SERVICES  
COMPENSATION REVIEW  
BOARD  
2014 MAR 18 PM 12 02

Appeal from a November 14, 2013 Compensation Order by  
Administrative Law Judge Joan E. Knight

Matthew Peffer, for the Respondent  
Richard W. Souther, for the Petitioners

Before HEATHER C. LESLIE, JEFFREY P. RUSSELL and HENRY W. MCCOY, *Administrative Appeals Judges.*

HEATHER C. LESLIE, for the Compensation Review Board.

**DECISION AND ORDER**

**OVERVIEW**

This case is before the Compensation Review Board (CRB) on the request of the Petitioner-Employer (Employer) for review of a November 14, 2013, Compensation Order (CO), issued by an Administrative Law Judge (ALJ) in the Administrative Hearings Division (AHD) of the District of Columbia’s Department of Employment Services (DOES). In that CO, the ALJ granted the Claimant’s request for reinstatement of temporary total disability benefits from January 10, 2012 through the present and continuing, finding that the Claimant did not voluntarily limit his income by unreasonably failing to cooperate with vocational rehabilitation services. We affirm.

**BACKGROUND FACTS OF RECORD**

The Claimant injured his left ankle on March 7, 2005 while working for the Employer. The Claimant sought treatment for his left ankle with Dr. Abdul Razaq. Dr. Razaq recommended conservative treatment for his left ankle, which did not provide relief. The Claimant was referred to Dr. Lloyd Cox who ultimately performed two surgical procedures on his left ankle.

The Claimant underwent vocational rehabilitation after it was determined that he was limited to light duty work beginning in 2010. Mr. Blake Clark was the initial vocational counselor who

was assigned to assist the Claimant to obtain work within his restrictions. Job leads were forwarded to the Claimant. Subsequently, the Employer alleged the Claimant was not cooperating with vocational rehabilitation.

After a full evidentiary hearing, a Compensation Order was issued wherein the ALJ concluded the Claimant had unreasonably failed to cooperate with vocational rehabilitation and suspended the Claimant's benefits effective July 15, 2010. *Ford v. Allglass Systems*, AHD No. 08-342A, OWC No. 15181 (June 29, 2011). The Claimant appealed this finding to the CRB which affirmed the CO. *Ford v. Allglass Systems*, CRB No. 11-069, AHD No. 08-342A (February 9, 2012). The District of Columbia Court of Appeals (DCCA) affirmed the CRB's decision and order on June 28, 2013. *Ford v. DOES*, No. 12-AA-0231 Mem, Op & J, (D.C. June 28, 2013).

In September 2011, the Claimant resumed vocational rehabilitation with Ms. Kathy Stone and the Employer reinstated temporary total disability benefits. The Employer terminated benefits on or about January 9, 2012 for alleged non cooperation with vocational rehabilitation.

A Formal Hearing occurred on October 1, 2012. At that hearing, the Claimant sought temporary total disability from January 10, 2012 through the present and continuing. The Employer raised the defense of voluntary limitation of income, alleging the Claimant unreasonably failed to cooperate with vocational rehabilitation. A CO was issued on November 14, 2013 which granted the Claimant's claim for relief. The CO found the Claimant to be credible and that he did not unreasonably refuse to cooperate with vocational rehabilitation.

The Employer timely appealed. The Employer argues that there was not substantial evidence in the record to support the conclusion that the Claimant did not unreasonably refuse to cooperate with vocational rehabilitation, directing our attention to various documents and testimony. The Claimant opposes the Application for Review, arguing that the CO is supported by the substantial evidence in the record and should be affirmed.

#### **THE STANDARD OF REVIEW**

The scope of review by the CRB 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* District of Columbia Workers' Compensation Act of 1979, D.C. Code, as amended, §32-1501 *et seq.* at §32-1521.01(d) (2) (A) of the ("Act") and *Marriott International v. DOES*, 834 A.2d 882 (D.C. 2003).

Consistent with this standard of review, the CRB must uphold a Compensation Order that is supported by substantial evidence, even if there is substantial evidence in the record to support a contrary conclusion, and even where the CRB might have reached a contrary conclusion. *Id.* at 885.

#### **ANALYSIS**

On review, the Employer argues that the testimony of the Claimant and Ms. Stone, as well as the documentary evidence do not support the CO's determination that the Claimant did not unreasonably refuse to participate in vocational rehabilitation. The Employer urges that the totality of the evidence should include not only the evidence before the ALJ during the Formal Hearing in 2013, but also should include the actions of the Claimant covered by the prior CO. The Employer argues the Claimant's refusal to follow up on a job lead based solely upon the

Claimant's determination that the job exceeds his physical demands is contrary to the purposes of vocational rehabilitation, pursuant to D.C. Code § 32-1507(c). The Claimant counters that the ALJ's conclusion that the Claimant's lack of follow through on job leads was reasonable is supported by the substantial evidence in the record.

A review of the CO reveals the ALJ recited the applicable statute, D.C. Code § 32-1507, and noted,

In short, the goal of vocational rehabilitation is to return an injured worker to gainful employment. Therein, the burden is on the employer to show work for which the injured worker is qualified, is in fact, available. The D.C. Court of Appeals has held disability benefits may be suspended if the "injured worker unreasonably fails to take the steps usually necessary to procure offers or adopts a passive, negative or uncooperative attitude about pursuing reemployment". See *Joyner v. District of Columbia Department of Employment Services*, 502 A 2d 1027 (D.C. 1986).

CO at 4.

The DCCA has noted that the Workers' Compensation Act imposes reciprocal obligations on an employer and an employee in respect to vocational rehabilitation. D.C. Code § 32-1507 requires employers to furnish rehabilitation services 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. *Brown v. DOES*, No. 12-AA-418 (D.C. January 23, 2014). In return, the statute provides that if the employee unreasonably refuses 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. *Id.*

As we stated in our prior decision and order, there is no one test for failure to cooperate; the determination is made on a case-by-case basis. The totality of the circumstances, including but not limited to, the medical status of the employee, the conduct of the employee, the conduct of the vocational rehabilitation service, and the conduct of the employer are examined and weighed for indicia of a pattern of conduct evincing an unwillingness to cooperate with vocational rehabilitation. See, *Johnson v. Epstein, Becker and Green*, Dir. Dkt. No. 01-11, OHA No. 98-273B, OWC No. 519621 (September 22, 2004).

Taking the case law in mind, we turn to the Employer's argument. The Employer points to instances in the Claimant's testimony as well as the vocational counselor's reports in support of its argument that the Claimant unreasonably refused to cooperate with vocational rehabilitation. The CO, in addressing the Employer's argument, noted,

To support the argument that Claimant failed to cooperate with vocational rehabilitation, Employer offered the testimony and vocational reports of Kathy Stone, vocational services specialist. Ms. Stone testified at the hearing, that she met with Claimant on two occasions in the fall of 2011, to conduct a vocational diagnostic assessment and identify alternative occupations based upon his physical limitations and transferable skills. She testified Claimant attended

scheduled meetings, attended a basic computer class, attended job skills classes, attended mock interviews and met regularly with job counselors. She also testified Claimant communicated with her on a regular basis. Ms. Stone testified that she provided Claimant multiple job leads for security positions, telecommunication sales, retail sales and retail management. She testified Claimant did not submit job lead forms, as instructed. She also testified she did not ask Claimant whether or not he was having difficulty applying for any of the jobs online. Ms. Stone testified her *modus operandi* was that once the application is made by Claimant; she would discuss and negotiate any waivers, accommodations and/or medical restrictions with the prospective employer. She acknowledged the physical demands of the most of the job leads exceeded Claimant's medical restrictions. However, on cross-examination, Ms. Stone testified she was not aware Claimant was restricted by his treating physician to sedentary desk work only and to limit standing and walking to 20 minute cycles. She testified she was instructed by the Employer to close Claimant's file as of January 8, 2012 based upon Claimant's failure to follow-up on job leads provided.

The record does not establish Claimant demonstrated an unreasonable refusal to cooperate with vocational rehabilitation nor does it constitute a "lack of cooperation" to the extent that Employer could justify abdication of its responsibility under the Act. The record shows Claimant was cooperative and did not display an unwillingness to secure suitable, alternative employment. His actions show he regularly communicated with the vocational specialist, attended meetings with counselors and completed job skills classes and mock interviews. Employer's job search efforts were suspended based upon Claimant not submitting job lead forms and following up on job leads that clearly exceeded his physical limitations and work experience. Claimant testified credibly that he voiced his concerns about the type of job leads identified by Ms. Stone.

The vocational process requires injured workers to not only communicate with the vocational counselor but to cooperate and follow up on job leads. Claimant, who is not computer literate, did follow up on a two on-line job leads on-line with the assistance of his wife. Based upon the titles and requirements of the positions identified, Claimant's background and limitations, it can be reasonably found the positions would not have constituted suitable employment opportunities. Claimant's failure to follow up on job leads identified by Ms. Stone in telecommunications sales, security work, retail management that clearly exceeded his physical capabilities, education and experience, was not unreasonable under the circumstances. *Joyner, supra.*

Therefore, Claimant did not unreasonably fail to cooperate with vocational services offered by the Employer. The record is void of substantial evidence to support the Employer's decision to suspend vocational services and disability compensation.

We find no fault in the CO's analysis. As pointed out by the Claimant in opposition, the ALJ found the Claimant to be a credible witness, a finding not appealed by the Employer. The ALJ credited the testimony of the Claimant and noted the vocational counselor was not aware of the Claimant's restrictions, and that indeed, based upon the background of the Claimant and the physical restrictions the Claimant was under, none of the jobs identified would constitute suitable alternative employment opportunities under *Joyner, supra*.

As pointed out above, a determination of whether or not a Claimant unreasonably refuses to cooperate with vocational rehabilitation is made on a case by case basis. In a prior hearing, the Claimant was found to have unreasonably refused to cooperate, a conclusion supported by the substantial evidence in that record. In the case put forth before us, the same Claimant was found not to have unreasonably refused to cooperate with vocational rehabilitation, a conclusion that is supported by the substantial evidence in the record. As we stated in our prior decision and order in the Claimant's case,

As stated above, the CRB and this Review Panel are constrained to uphold a 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 International, supra*. Here the ALJ's decision is supported by the substantial evidence in the record.

*Ford v. Allglass Systems, supra* at 5-6.

Such is the case before us. What the Employer is asking us to do is to reweigh the evidence in its favor, a task we cannot do.

#### CONCLUSION AND ORDER

The November 14, 2013 Compensation Order is supported substantial evidence and is in accordance with the law. It is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:



HEATHER C. LESLIE

*Administrative Appeals Judge*

March 18, 2014

DATE