

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR



F. THOMAS LUPARELLO
ACTING DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 14-017

ROBERT S. BRUNO,
Claimant-Respondent,

v.

PROVIDENCE HOSPITAL and SEDGWICK CMS,
Employer/Third Party Administrator-Petitioners.

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2014 JUN 24 PM 12 38

Appeal from a January 28, 2014 Compensation Order by
Administrative Law Judge Karen R. Calmeise
AHD No. 11-054B, OWC No. 659159

Eric M. May for the Respondent
Todd S. Sapiro, for the Petitioners

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

HENRY W. MCCOY for the Compensation Review Board.
JEFFREY P. RUSSELL, dissenting.

ORDER DENYING CLAIMANT'S MOTION FOR RECONSIDERATION

FACTS OF RECORD AND PROCEDURAL HISTORY

In a Compensation Order (CO) issued on January 28, 2014, an Administrative Law Judge (ALJ) determined that Claimant's right knee condition was medically causally related to his March 2009 work injury and that he did not unreasonably fail to participate in vocational rehabilitation for the period May 2012 to February 2013. Accordingly, the ALJ denied

Employer's request to suspend the payment of wage loss benefits and granted Claimant's claim for temporary total disability benefits from May 4, 2012 to the present and continuing. Employer filed a timely appeal. On May 30, 2014, the CRB, in a majority decision, issued a Decision and Remand Order (DRO) vacating in part the CO and remanded the matter for further consideration.

On June 4, 2014, Claimant filed a Motion for Reconsideration. In support of his motion, Claimant asserts that contrary to the statement in the DRO that he did not file an opposition to Employer's appeal; he in fact did so, albeit in the wrong office. In addition, Claimant argues for the issuance of a new decision that takes into consideration the arguments presented in his opposition brief.

In the DRO issued on May 30, 2014, it was stated that "While Employer filed a timely appeal, there is *no record* of Claimant filing an opposition." (Emphasis added.) It is important to note that during the course of the CRB's consideration of Employer's appeal and at the time the DRO was issued, an exhaustive examination of the case file determined there was no record of Claimant having filed a memorandum in opposition to Employer's appeal.

Upon receipt of his copy of the DRO, Claimant's counsel contacted the CRB to state that an opposition had in fact been filed, albeit in the wrong office. On June 3, 2014, counsel retrieved from the Office of Hearings and Adjudications (OHA), Administrative Hearings Division (AHD) three copies of Claimant's Memorandum of Points and Authorities in Opposition to Employer's Application for Review bearing an OHA date-stamp showing that it was filed on March 5, 2014.

The March 5, 2014 date-stamp on Claimant's brief in opposition to Employer's appeal shows that it was filed timely, albeit at OHA instead of the CRB. The CRB has consistently held that a party filing that has been filed with AHD, instead of the CRB, would be accepted as timely filed with the CRB as long as it was filed timely with AHD.¹ Such is the case here. Accordingly, the DRO shall be amended to state that Claimant filed an opposition to Employer's appeal.

Claimant's next argument on reconsideration is that the decision made in the May 30, 2014 DRO was made without the consideration of Claimant's arguments and therefore prevented him from having the opportunity to be heard. In that posture, Claimant seeks to have a new decision issued that gives full consideration to his arguments as presented in his misfiled memorandum of points and authorities in opposition. As Claimant's arguments were taken into consideration, as evidenced especially in the dissent, we deny the relief sought.

With Claimant's brief in opposition to Employer's appeal now available, it is clear that the arguments contained therein were given due and careful consideration. Claimant's arguments to affirm the CO focus on Dr. Ammerman's assessment that Claimant, with the onset of an exacerbation of his symptoms, could no longer participate in job search activities such as driving long distances, walking around and standing for prolonged periods of time. Claimant quotes extensively from Dr. Ammerman's deposition to support the contention that it was reasonable for

¹ See *Covington v. Metro Pets Pals, LLC*, CRB No. 03-97, OHA No. 02-448A, OWC No. 583242 (March 18, 2005).

him to cease participation in vocational rehabilitation. However, as the majority noted in the DRO:

The ALJ's conclusion is at odds with the facts. By her own finding, Claimant's ability to participate in job search activities "became more limited" because his condition deteriorated. Claimant's changed physical condition, as assessed by his treating physician, did not prevent him from participating in all job search activities. However, Claimant ceased all such participation.

In addition, it is a misstatement of the treating physician's opinion to say he recommended that Claimant "refrain from vocational rehabilitation" because of Claimant's changed condition, when a specific exception was made that Claimant was able to do computer job searches. There is also record evidence, elicited by the ALJ (Hearing Transcript at 54), that Claimant's physical condition was the same at the time he resumed participating in vocational rehabilitation as when he ceased.

The ALJ's determination that Claimant's decision to stop participating in vocational rehabilitation was not unreasonable is not supported by substantial evidence in the record as it is premised on two erroneous factual findings: an incorrect reading and interpretation of the treating physician's opinion, and the evidence elicited on the record that Claimant's condition was the same when he resumed participation as when he stopped participating in all vocational rehabilitation activities.²

There is no dispute that Claimant ceased participation in vocational rehabilitation in May 2012 when his symptoms increased. Claimant also acknowledges in his opposition brief as we did in our DRO that he resumed participation in February 2013 with no change in those symptoms. As Claimant states in his brief, "Although Claimant's condition still has not improved, he voluntarily resumed vocational rehabilitation with Scott Sevant on February 4, 2013."³ If Claimant's condition has not changed and he is still experiencing the same level of discomfort as when he ceased participation, it calls into question the reasonableness of his decision to do so.

Claimant would seek to have us equate Dr. Ammerman's opinion that Claimant is unable to return to work as an opinion that he is unable to participate in any and all vocational rehabilitation activities. As this is an incorrect interpretation of Dr. Ammerman's opinion, we are not persuaded, as we initially determined in the DRO as issued, and reiterate here. Dr. Ammerman's restrictions speak not only to physically demanding job search activities, but also focus on what Claimant would not be capable of doing on an actual job. However, as the majority pointed, Dr. Ammerman did opine that Claimant could undertake computer job search

² DRO, p. 5.

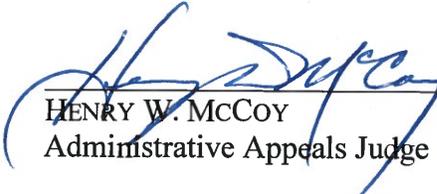
³ Claimant's Memorandum of Points and Authorities in Opposition to Employer's Application for Review, p. 6.

activities, which would allow him to get up and move around as necessary to alleviate his symptoms.

Claimant ceased participating in all vocational rehabilitation services ostensibly due to an exacerbation in his symptoms, but decided a year later to voluntarily resume participation, with no change in his symptoms. With no change in his condition and with his treating physician stating that he could perform computer job searches, it calls into question whether these circumstances justified the refusal to participate in vocational rehabilitation in accordance with D.C. Code § 32-1507 (d). After reviewing Claimant's arguments as contained in his brief in opposition, the majority finds no basis to change its decision to return the CO for further consideration.

Accordingly, Claimant's motion for reconsideration is GRANTED IN PART and DENIED IN PART.

FOR THE COMPENSATION REVIEW BOARD:



HENRY W. MCCOY
Administrative Appeals Judge

June 24, 2014
DATE

Jeffrey P. Russell, *dissenting*:

I will not repeat here what I set forth in the original Decision and Remand Order, beyond stating that I continue to respectfully disagree with the outcome of this case, for the reasons previously set forth.



JEFFREY P. RUSSELL
Administrative Appeals Judge