

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



GERREN PRICE
INTERIM DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 14-089

SHAUN FULLER,
Claimant-Respondent,

v.

WASHINGTON METROPOLITAN TRANSIT AUTHORITY and
AS&G CLAIMS ADMINISTRATION, INC.,
Self-Insured Employer and Third Party Administrator.

Appeal from a June 17, 2014 Compensation Order by
Administrative Law Judge Leslie A. Meek
AHD No. 12-147A, OWC No. 636132

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
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David Snyder for the Claimant
Donna Henderson for the Employer

Before JEFFREY P. RUSSELL, *Administrative Appeals Judges*, MELISSA LIN JONES, and LAWRENCE
D. TARR, *Chief Administrative Appeals Judge*.

JEFFREY P. RUSSELL for the Compensation Review Board; MELISSA LIN JONES, *dissenting*.

DECISION AND ORDER

BACKGROUND

Shaun Fuller worked as a heavy overhaul mechanic for the Washington Metropolitan Area Transit Authority (WMATA). On January 13, 2007, Mr. Fuller injured his back at work. Despite several surgeries, his pain persists, and he is unable to return to his pre-injury employment.

While it was voluntarily paying Mr. Fuller temporary total disability benefits, WMATA instituted vocational rehabilitation in August 2013. Because Mr. Fuller allegedly failed to cooperate with vocational rehabilitation, WMATA stopped paying wage loss benefits. Without any income, Mr. Fuller became homeless.

At the formal hearing, the only issue for adjudication was whether Mr. Fuller failed to cooperate with vocational rehabilitation. In a Compensation Order dated June 17, 2014, an administrative law judge (ALJ) ruled Mr. Fuller had not unreasonably failed to cooperate with vocational rehabilitation to an extent warranting suspension of compensation benefits. WMATA appealed the Compensation Order to the Compensation Review Board (CRB).

On appeal, WMATA argues the ALJ failed to identify the burden of proof applied in this case; WMATA asserts “[t]he burden is on Claimant to prove by a preponderance of the evidence that he accepted vocational rehabilitation services and did not unreasonably refuse to cooperate with the vocational rehabilitation counselor.” WMATA’s Application for Review, p. 16.

WMATA also argues that the Compensation Order is not supported by substantial evidence because “[h]omelessness does not obviate the cooperation requirement in the Act.” *Id.* at p. 17. Finally, WMATA argues the Compensation Order denies it the opportunity to request modification in the future because it cannot prove a level of cooperation worse than it was at the time of the formal hearing. For these reasons, WMATA requests the CRB vacate the Compensation Order.

In opposition, Mr. Fuller contends the Compensation Order’s reasoning that his “circumstance posed a hardship on his ability to do what was required of him” is supported by substantial evidence. Claimant’s Opposition to the Employer’s Application for Review, p. 5.

Mr. Fuller also contends that because failure to cooperate is an affirmative defense, the burden of proof is on WMATA, and even though the Compensation Order does not state the appropriate burden-shifting scheme, that omission is harmless error because the Compensation Order reviewed the totality of the evidence to determine he had not unreasonably refused vocational services. Finally, Mr. Fuller argues that in order for WMATA’s modification argument to succeed the CRB would have to issue an advisory opinion or reweigh the evidence, which it cannot do. Mr. Fuller requests the CRB affirm the Compensation Order.

We affirm the Compensation Order.

ANALYSIS¹

WMATA relies on *Brown v. Pepco*, CRB No. 10-141(2), AHD No. 98-259D, OWC On. 525617 (March 8, 2012) *aff’d in part, vacated in part, and remanded* 83 A. 3d 739 (D.C. 2014), to support its argument that “[t]he burden is on Claimant to prove by a preponderance of the evidence that he accepted vocational rehabilitation services and did not unreasonably refuse to

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. 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).

cooperate with the vocational rehabilitation counselor.” However, *Brown* does not stand for that proposition.

In *Brown*, the claimant was awarded medical benefits in a Compensation Order. Thereafter, in a separate Compensation Order, an ALJ suspended Ms. Brown’s benefits for failure to cooperate with vocational rehabilitation and voluntary limitation of income. This Compensation Order was affirmed on appeal to the CRB. When Ms. Brown later requested permanent partial disability benefits, the CRB ultimately determined Ms. Brown was not entitled to permanent partial disability benefits because she had neither requested modification of the prior Compensation Order suspending her benefits nor demonstrated a change of condition since the issuance of that Compensation Order. *Brown, supra*.

In *Brown*, the claimant’s burden at the formal hearing was to prove her entitlement to permanent partial disability benefits by a preponderance of the evidence. Contrary to WMATA’s argument, the CRB did not rule it was her burden to prove by a preponderance of the evidence that she did not unreasonably refuse to cooperate with vocational rehabilitation.

However, the law is clear that vocational rehabilitation involves mutual obligations, and as with other workers’ compensation analyses, there is a shifting burden required to prove failure to cooperate with vocational rehabilitation:

While the Director agrees with employer that there are responsibilities and obligations placed on employees in the rehabilitation process, the initial burden rests with employers and their vocational specialists. Employers and their vocational counselors have contacts in the employment arena and experience in matching employees with the appropriate job openings.

Ms. Yano apparently identified several employers with appropriate opportunities for claimant. She indicated that she contacted claimant, but claimant indicated that he was not interested in pursuing the positions that she described to him. However, the record does not reveal that Ms. Yano actually communicated the details of specific jobs leads to claimant. In *Woodall v. Children’s Hospital*, Dir. Dkt. No. 86-25 (Decision of the Director, June 10, 1988), the Director noted that a labor market survey alone, identifying available jobs for an injured employee, is not enough for an employer to discharge its burden in vocational rehabilitation. In *Woodall*, the Director stated:

The fact that some of the employers contacted by employer’s vocational expert indicated that they would consider claimant for employment opportunities was properly not given a great deal of weight by the Hearing Examiner. The Director notes that both federal and local laws prohibit job discrimination because of age, race, or physical handicap/disability. The Director also notes that these laws would not be necessary if a significant number of employers did not discriminate against prospective

employees for the prohibited reasons. Given the prohibitions against discrimination based upon age, race, or physical handicap/disability, it is not unlikely that most employers would readily say that they would consider anyone for a job, irrespective of their actual feelings or practice.

In this case, instead of simply describing the job prospects that she had identified to claimant, employer's counselor should have given claimant specific names and numbers on these job leads and scheduled interviews for claimant with these employers who were apparently interested in hiring claimant. This would have placed the onus on claimant to follow-up on specific, identifiable job prospects. However, since there is no indication that employer's vocational expert did forward such concrete information to claimant, the Director does not feel that claimant failed to cooperate with vocational rehabilitation. Had employer given such specific information to claimant, employer would have met its initial burden in the vocational rehabilitation process, then, the focus and burden would have properly shifted to claimant. If claimant did not diligently respond to the leads and interviews, the argument could be made that claimant had failed to cooperate with vocational rehabilitation and voluntarily limited his income.

Scott v. Mushroom Transportation, Dir. Dkt. 88-77, H&AS No. 88-44, OWC No. 074869 (June 6, 1990).

Although we have cautioned in the past against relying upon *Woodall* and *Mushroom Transportation* for a certain proposition for which they do not in fact stand², the ALJ in this case did not cite them for that particular proposition. In this case, the ALJ relied on those cases to

² Where the issue presented is extent of a claimant's disability, we have cautioned against *Woodall* and *Scott* being cited for the proposition that unless the claimant has been apprised in advance of the specific jobs identified in the labor market survey (LMS) and given an opportunity to apply for them, LMS analysis standing alone is *per se* insufficient to assess whether a claimant is employable. This has sometimes been called "the *Woodall* doctrine". The logic was discussed and criticized at some length by the CRB, which wrote "This language, if it were the rationale behind *Woodall's* doctrine, is, at best, weak. We do not accept the logic that the existence of laws against discrimination in employment of persons with disabilities renders LMS [Labor Market Survey] evidence unreliable as a matter of law. Each LMS, like any other piece of expert opinion evidence, should be judged on its own merits for quality and relevance." *Sinclair v. Howard University Hospital*, CRB No. 12-043, AHD No. 07-353B, OWC No. 604720 (November 21, 2012), p. 5.

The CRB went on: "However, more importantly, *Woodall* contains a far lengthier and more illuminating discussion, making it apparent that *Scott's* short quote from *Woodall* does not give an accurate description of what the Director ruled. ... The language [contained in the Compensation Order under review in *Sinclair* ascribing to *Woodall* the above referenced "*Woodall* doctrine"], had it been used by the Director [in *Woodall*] might arguably support the existence of a *Woodall* doctrine (although such a reading would be stretched, in our view). However, this language is from the Hearing Examiner, and the Director immediately distanced himself from it, [writing] "the Director *essentially* concurs which [sic] the Hearing Examiner's approach and *ultimate result*. However, rather than concluding that employer failed to meet its burden of proof, *the Director would have concluded that employer failed to carry the burden of persuasion*. ... *While there clearly can be some instances where a simple labor market survey may be sufficient to defeat a claim of total disability*, the Director agrees that [in this case and on these facts] *the employer's proof was not very persuasive*." *Sinclair, supra*, p. 6, citing and quoting from *Woodall*, p. 8 (emphasis, elisions, and bracketed material added).

make the point that to prove failure to cooperate with vocational rehabilitation, a claimant must have knowledge of the specific jobs or activities expected of him or her to be applied for, or undertaken.

In the Compensation Order, the ALJ wrote:

It is the undersigned's determination that Claimant's homeless circumstance posed a hardship on Claimant's ability to meet with his vocational rehabilitation counselor, and presented a hardship on his ability to perform the duties that were required of him. The evidence shows Claimant met with Ms. Highcove when his circumstances allowed him to do so. The evidence also shows Claimant attempted to maintain the employment he had when he began counseling and he attempted to secure employment on his own during the time he was being counseled. Claimant did not unreasonably fail to cooperate with Ms. Highcove's vocational efforts.

Compensation Order, at unnumbered page 4 -5.

While the Compensation Order was not structured in such a way that the formalism of the burden shifting schema was explicitly evident, our review of the Compensation Order satisfies us that the evidence was fully reviewed and considered using the proper analysis.

Although claimants are under an obligation to co-operate with vocational rehabilitation when offered, the ALJ in this case credited Claimant's testimony and determined that he cooperated as best he could when his circumstances allowed.

If, as here, a fact finder determines that a claimant's lack of a fixed address interferes with his ability to communicate with, receive from, and report to a counselor concerning job search, these factors are certainly within the realm of conditions that render as reasonable cooperation what might in other claimants with different circumstances appear to be unreasonable non-cooperation.

This is what this ALJ did. She concluded that Claimant's failure to communicate with the vocational rehabilitation provider was a function of Claimant's insecure living arrangements, and was not a function of his avoiding or obstruction rehabilitation efforts.

The ALJ further noted that the counselor admitted to doing nothing to assist or remedy the circumstances that impeded Claimant from fully cooperating³ or to ameliorate the impediments created by the homelessness.

It is useful to remember that the failure to cooperate provisions incorporate a standard of "reasonableness", thereby imbuing an ALJ with a greater degree of discretion and judgment than might otherwise be the case. We find the ALJ properly considered the evidence and her finding

³ For example, it is not apparent from this record that WMATA provided the statutory weekly stipend permitted to facilitate participation in job searches.

that Claimant did not fail to cooperate is supported by substantial evidence.

We do not interpret the ALJ's opinion as saying that homelessness is a legal pass (to use Employer's term) when it comes to vocational rehabilitation. We think the ALJ used an appropriate standard, that is, she considered the circumstances of the claimant's condition (i.e. homelessness and poverty) and determined that he did the best he could in cooperating in light of his limited resources.

The ALJ believed that Mr. Fuller didn't use his homelessness as an excuse for his limited participation in the process. It is settled that the CRB shouldn't supplant an ALJ's credibility determinations.

Accordingly, we affirm the Compensation Order.

CONCLUSION AND ORDER

The determination that the claimant's level of cooperation did not warrant a finding of unreasonable failure to accept vocational rehabilitation services is supported by substantial evidence. Therefore the ALJ's decision to reinstate compensation benefits is in accordance with the law.

FOR THE COMPENSATION REVIEW BOARD:



JEFFREY P. RUSSELL
Administrative Appeals Judge

January 27, 2015

DATE

MELISSA LIN JONES dissenting:

I agree with the majority that the initial burden is on the employer to prove it offered reasonable and appropriate vocational rehabilitation and that if the employer satisfies its burden, the burden shifts to the claimant to prove the vocational rehabilitation was not appropriate or reasonable *Scott, supra*; however, it is unclear whether the ALJ applied the proper burden-shifting analysis in this case. What is clear is that the ALJ resolved this case not by assessing the totality of the evidence including the claimant's medical condition, the claimant's conduct, the vocational rehabilitation counselor's conduct, and the employer's conduct to ascertain a pattern "evinced an unwillingness to cooperate with vocational rehabilitation" *Ford v. All Glass Systems, Inc.*, CRB No. 11-069, AHD No. 08-342A, OWC No. 615181 (February 9, 2012) but by relying solely on Mr. Fuller's homelessness:

It is the undersigned's determination that Claimant's homeless circumstance posed a hardship on Claimant's ability to meet with his vocational rehabilitation counselor, and presented a hardship on his ability to perform the duties that were required of him. The evidence shows Claimant met with Ms. Highcove when his circumstances allowed him to do so.

Fuller v. WMATA, AHD No. 12-147A, OWC No. 636132 (June 17, 2014), unnumbered p. 4.⁴

The ALJ ruled that Mr. Fuller's homelessness "presented a hardship on his ability to perform the duties that were required of him." *Id.* Being in pain poses a hardship on a claimant's ability to meet with a vocational rehabilitation counselor, but being in pain alone does not absolve a claimant of the requirement to cooperate with vocational rehabilitation. Reliance on public transportation poses a hardship on a claimant's ability to meet with a vocational rehabilitation counselor, but reliance on public transportation alone does not absolve a claimant of the requirement to cooperate with vocational rehabilitation. Childcare needs pose a hardship on a claimant's ability to meet with a vocational rehabilitation counselor, but childcare needs alone do not absolve a claimant of the requirement to cooperate with vocational rehabilitation. If we took homelessness out of this scenario and inserted any of these other criteria would the claimant be in compliance? The short answer is that each case is analyzed on a case-by-case basis, but if the ALJ omitted that analysis and simply said "the claimant was in pain (or dependent on public transportation or needed childcare) so he participated in vocational rehabilitation when his circumstances allowed him to do so" that result would not withstand scrutiny. Similarly, neither does this one. The test isn't that a claimant can participate "when his circumstances allow[] him to do so," *Id.* and the ALJ has not provided enough legal analysis to withstand scrutiny.

Mr. Fuller's homelessness is but one factor for consideration when assessing his level of cooperation and the reasonableness of that level of cooperation; it is not dispositive of the issue of failure to cooperate with vocational rehabilitation. That the ALJ took a singular approach is evidenced by the fact that Mr. Fuller was not homeless during the entire period of the alleged failure to cooperate, yet there is no separate analysis of those periods, just a blanket statement.

The majority has not reviewed the Compensation Order as written. The majority has taken it upon itself to interpret the evidence to justify a particular result. By a plain reading of the Compensation Order, the ALJ relied solely upon Mr. Fuller's homelessness to determine his residential status is a hardship that vitiates his need to reasonably participate in vocational rehabilitation. Consequently, the law requires the CRB vacate the June 17, 2014 Compensation

⁴ The ALJ also wrote, "The evidence also shows Claimant attempted to maintain the employment he had when he began counseling and he attempted to secure employment on his own during the time he was being counseled. Claimant did not unreasonably fail to cooperate with Ms. Highcove's vocational efforts." *Fuller, supra*, at pp. 4-5. However, this additional information is directly linked to the ALJ's assessment of Mr. Fuller's homelessness, and homeless or not, that Mr. Fuller attempted to maintain the employment he had when he began counseling and that he attempted to secure employment on his own does not satisfy reasonable requirements of meeting with the vocational rehabilitation counselor or of keeping job logs.

Order, and I cannot agree with the majority. This matter should be remanded to the ALJ for an analysis of the totality of the evidence, not just Mr. Fuller's homelessness.

/s/ Melissa Lin Jones
MELISSA LIN JONES
Administrative Appeals Judge