

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
ACTING DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 14-127

SHIRLEY G. LATTIMORE,
Claimant-Respondent and Cross-Petitioner,

v.

CVS PHARMACY
Self-Insured Employer-Petitioner and Cross-Respondent.

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2015 MAR 24 PM 1 56

Appeal from an October 16, 2014 Compensation Order by
Administrative Law Judge Karen R. Calmeise
AHD No. 09-243F, OWC No. 641909

Shirley G. Lattimore, *Pro Se* Claimant
Joel Ogden for Employer

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

JEFFREY P. RUSSELL for the Compensation Review Board.

DECISION AND REMAND ORDER
FACTS OF RECORD AND PROCEDURAL HISTORY

On August 23, 2007, Claimant was employed by Employer as a pharmacy technician, when she tripped on an uneven floor, sustaining injuries to her low back, neck and right side. She was awarded compensation benefits in a Compensation Order issued October 22, 2010 (CO 1). In CO 1, Claimant was found to have permanent restrictions that prevented her from returning to her pre-injury job, she was awarded temporary total disability benefits and granted causally related medical care.

Following the issuance of CO 1, Employer commenced a program of vocational rehabilitation (VR). Employer also sought to have Claimant examined by Dr. Robert Gordon for the purposes of an independent medical evaluation (IME). Thereafter, Employer sought a modification of CO

I, alleging that Claimant had failed to appear at the IME, that Claimant had failed to co-operate with VR, that Claimant was no longer disabled from her pre-injury employment, and that any continuing disability she may have is not causally related to the work injury.

Following a formal hearing conducted on March 15, 2012 before Anand K. Verma, then engaged by the Department of Employment Services (DOES) as an Administrative Law Judge (ALJ), Mr. Verma¹ issued a Compensation Order on April 27, 2012 (CO 2) in which he denied the modification requests and ordered that Claimant continue to receive temporary total disability benefits and that Employer provide epidural steroid injections as recommended by her physician.²

Employer appealed CO 2 to the Compensation Review Board (CRB). On September 10, 2012, the CRB issued a Decision and Remand Order (CRB Decision 1, or CRBD 1), which read as follows:

Because the Compensation Order is silent on the question of the ongoing provision of Soma, Mobic and Trumicin cream, it does not dispose of all the issues in dispute, and thus is not in this regard supported by substantial evidence. The matter is remanded to the ALJ for further consideration of the reasonableness and necessity of these recommended treatment modalities.

The award authorizing the provision of epidural steroid injections is vacated as not being supported by substantial evidence, as being overly broad inasmuch as it appears to grant a claim for future procedures on a speculative basis as to what Ms. Lattimore's condition might be in the future, and because the ALJ failed to adequately explain why the recommendations of the UR [utilization review] report were rejected.

The matter is remanded to the ALJ for further consideration. On remand, the ALJ must accurately assess and fully consider the contents of the relevant parts of the record and explain why he finds the recommended medical care reasonable and necessary, or not, as the case may be, including in his explanation why either the UR or Dr. Ghorbani's [Claimant's treating physician] opinions are accepted and rejected as the case may be. The ALJ should state explicitly what care is being

¹ It was subsequently learned, as will be discussed more fully in the body of this Decision and Remand Order, that Mr. Verma had been disbarred from one jurisdiction in which he was once admitted, and therefore did not meet the regulatory requirement of being an attorney admitted to practice in any state or territory of the United States of America, including the District of Columbia.

² Claimant was represented by Matthew Peffer at this hearing.

authorized, if any, and what care is being denied, if any, and state the reasons for the award or denial.

Further the matter is remanded so that, if after further consideration an award is made authorizing epidural injections, the award must be described in sufficient detail so that it is possible to discern what has been awarded. Any such award must be limited in scope such that it does not constitute an overly broad order to provide a series of treatments indefinitely into the future. The entitlement to medical care may only be premised upon the condition of Ms. Lattimore at the present time, and any award of disputed medical care must be limited to address conditions as they currently exist.

Because the conclusion that Ms. Lattimore cooperated with VR does not flow rationally from the facts that were found by the ALJ, we vacate that conclusion, and remand for further consideration of the issue and of CVS's request that Ms. Lattimore's benefits be suspended for the duration of her non-cooperation.

CRBD 1, pp. 9 – 10.

On September 21, 2012, Mr. Verma issued a Compensation Order on Remand (CO 3), in which he again ordered the continuing payment of temporary total disability and awarded "recommended epidural steroid injections for her lumbar and cervical spines." CO 3, p.10.

Employer again appealed the compensation order to the CRB, which issued a Decision and Remand Order on April 24, 2013 (CRBD 2). In it, the CRB ordered as follows:

The ALJ's conclusion that Ms. Lattimore cooperated with vocational rehabilitation flows reasonably from his findings of fact which are supported by substantial evidence; this ruling is AFFIRMED. The ALJ did not address the extent of the award of epidural injections; the award of epidural injections is based upon a misapplication of the law; and the Compensation Order on Remand fails to adequately address the directives in the September 10, 2012 Decision and Remand Order regarding Mobic, Trumicin cream, and Soma. The September 21, 2012 Compensation Order on Remand is AFFIRMED IN PART, is VACATED IN PART and is REMANDED for a thorough review of the evidence consistent with this Decision and Remand Order.

CRBD 2, p. 10.

On September 5, 2013, Mr. Verma issued another Compensation Order on Remand (CO 4) in which he wrote “Inasmuch as the requested medical treatment is not compensation subject to modification under §32-1524, the reasonableness and necessity of its continuance is moot and need not be addressed” and “Employer’s claim for modification of the October 22, 2010 Compensation Order is DENIED.” CO 4, p. 6.

CO 4 was appealed by Employer to the CRB. While the appeal was pending, the facts surrounding Mr. Verma’s failure to satisfy the regulatory requirements of bar membership came to light. Mr. Verma left the employ of DOES, and on April 30, 2014, the CRB issued an “Order Vacating Compensation Order on Remand and Remanding Case” (the CRB Order), stating as follows:

Because there may be a legal problem with the September 5, 2013 Compensation Order on Remand issued by Anand K. Verma, that is vacated and this case remanded to the Administrative Hearings Division [AHD] of the Department of Employment Services for further consideration.

CRB Order, p. 1.

Considering the above history of this case, including the combined effects of the CRB’s affirmance in CRBD 2 of the denial of Employer’s request to suspend benefits for non-cooperation with VR in CO 3, it is currently the law of the case that as of the date of the original formal hearing, March 15, 2012, Claimant’s cooperation level with the VR process was not such that suspension of her benefits was warranted.

The matter was reassigned to ALJ Karen R. Calmeise by AHD. A formal hearing was scheduled and occurred December 12, 2013 before the new ALJ. By this time, Claimant was no longer represented by counsel, and she proceeded *pro se*.

On October 16, 2015, ALJ Calmeise issued a Compensation Order (CO 5, and not titled “Compensation Order on Remand”). In it, the ALJ identified the issues as:

1. Did Claimant unreasonably failed [sic] to cooperate with Employer’s vocational rehabilitation efforts pursuant to section 32-1507(d)?
2. Did Claimant voluntarily limit her income?

CO 5, p. 2.

In CO 5, the ALJ found that Claimant has failed to cooperate with VR and suspended her benefits as of June 4, 2013, and further found that Claimant had not voluntarily limited her income.

Employer appealed CO 5 to the CRB by filing an “Application for Review” and “Memorandum of Points and Authorities in Support of Application for Review” (Employer’s Brief), arguing that the finding that Claimant had not voluntarily limited her income is not in accordance with the law, because the ALJ based the ruling on the fact that Employer had failed to demonstrate that a job offer had been made which Claimant had declined, while under *Logan v. DOES*, 805 A.2d 237 (D.C. 2002), and *Joyner v. DOES*, 502 A.2d 1027,1031 (D.C. 1986) a Claimant can be found to have a lesser disability or no disability at all even in the absence of a specific job offer, where, as in this case, Employer adduces other evidence of wage earning capacity. Employer further contests the June 4, 2013 suspension date, arguing that the evidence requires a suspension as early as August 10, 2012, and that the June 4, 2013 date, selected by the ALJ because that is the date the VR provider “closed its file”, is unsupported by substantial evidence.

Claimant filed an opposition to the appeal, titled “Claimant’s Opposition to Application For Review” (Claimant’s Brief). The arguments presented in the brief include Claimant’s assertion that Employer’s evidence was fabricated, its witness lied, and the ALJ ignored Claimant’s testimony and evidence. Further, she asserts that, although she still is seeking an award of medical care, the ALJ advised her to file a new Application for Formal Hearing if she wishes to present claims for medical benefits.

Because the most recent substantive remand from the CRB directed that the issue of certain specific medical benefits be addressed (i.e., Mobic, Soma and Trumicin cream), the failure of the ALJ to do so in this case requires a remand for consideration of those claims for medical care.

Although the ALJ did not evaluate the VR claims as a modification request, review of the Compensation Order and the exhibits proffered by Employer (EE 1) demonstrate that the ALJ’s consideration of the issue was limited to events that occurred subsequent to the prior formal hearing and hence the ALJ’s consideration of the issue was not improper, and the signed Joint Prehearing Statement includes non-cooperation and suspension as an issue to be addressed. Because the ALJ’s determination that Claimant failed unreasonably to cooperate with VR is supported by substantial evidence, the suspension of benefits is affirmed. Because the ALJ employed the wrong standard when considering the issue of voluntary limitation of income, we remand the matter for further consideration of that issue.

ANALYSIS

In CO 5, the ALJ makes no reference to CRBD 2, the most recent substantive CRB remand to AHD, in which the denial of Employer's request for suspension of benefits was affirmed and the issues regarding certain specific medical care were remanded for further consideration.

Thus, to the extent that non-cooperation is an issue decided in the compensation order under review, it was not before the ALJ as a result of any remand by the CRB.

Rather, the only manner in which the issue could have been (and was) before the ALJ was if it was raised anew by Employer in a modification request, seeking modification of CO 3's denial of the suspension request. Further, (1) it would be Employer's burden to prove that there has been some change in circumstances since the date of the formal hearing where the issue was presented initially, being March 15, 2012, warranting the modification, and (2) the ALJ's consideration of the modification request would be limited to consideration of Employer's efforts and Claimant's conduct since that date.

The ALJ never acknowledges in CO 5 that she was presented with a modification request. There is no discussion of or reference to any preliminary review of the evidence to see if there is reason to believe any such change has occurred as contemplated by *Snipes v. DOES*, 542 A.2d 832 (D.C. 1988). While we recognize that the failure to conduct a *Snipes* type review is not necessarily fatal to the validity of a compensation order where modification is at issue, the lack of a reference to *Snipes* is indicative of the ALJ's misperception of what the posture of the case was as it regarded the VR issue. Thus, we must review what the ALJ considered, to ascertain whether the issue was properly evaluated.

Review of the compensation order indicates that the only references to specific failures on Claimant's part all post-date the prior formal hearing, and the supporting documentation for the alleged failures, being the VR reports contained in Employer's EE 1 all post-date that hearing as well. Thus, the ALJ did not impermissibly reconsider that which has previously been decided. The failure to conduct a *Snipes* review, to the extent it constitutes error, was harmless.

Further, review of the Joint Prehearing Statement and Stipulation Form confirms that failure to cooperate with VR was an issue raised by Employer and contested by Claimant.

Claimant asserts that she fully co-operated with the VR counselor, that his reports are fabrications, and that she is the victim of a conspiracy by Employer to unjustly deny her benefits. Her evidence consist largely of her own testimony, which the ALJ rejected as being non-credible and being unsupported by the documents she submitted in support of her claim. As

an example, the ALJ pointed out that a sales receipt from a department store in no way corroborates the claim that Claimant applied for a job at the store.

On the other hand, the ALJ credited the testimony of the VR counselor, in large part because his testimony was consistent with the contents of the VR reports themselves.

Credibility determinations are uniquely the province of the fact finder. What Claimant asks is for us to substitute our judgment for that of the ALJ. This we are neither empowered nor inclined to do.

Employer complains that the date assigned as the commencement of benefits suspension is arbitrary and capricious, and otherwise unsupported by substantial evidence. Although Employer posits three other potential dates, it does not argue that any of them are the one or only true and proper date, merely that the date chosen is not early enough.

Single instances of non-cooperation would rarely, if ever, be sufficient to justify the sanction of benefits suspension. There must be a demonstrable pattern of unreasonable conduct, and there is not always (in fact, almost never) a clear bright line that separates cooperation from non-cooperation on a timeline. Some judgment and discretion are needed when questions of law, such as failing to “accept” VR services that are couched in terms of “reasonableness”, are at issue.

In this case, the ALJ chose to use the date that Employer officially stopped trying to provide VR services. While that is not the only possible date that could have been selected, it is not irrational for the ALJ to decide that the date that the Employer stopped spinning its wheels was a reasonable date to commence the suspension. We will not substitute our judgment for hers.

Since suspension of benefits includes suspension of medical benefits, any medical claims beyond those at issue subsequent to the commencement of the suspension are at this time moot. Further, the record contains no evidence presented by Claimant seeking any specific medical care at this time beyond that which is the subject of the prior remands. Failure to make an award for such subsequent care is therefore not error.

Lastly, employer argues that the ALJ referenced an incorrect legal standard in determining whether Claimant voluntarily limited her income. The ALJ rejected Employer’s claim because it did not prove “that an offer of hire for a specific job was made by anyone at anytime [sic] to the Claimant.”

While proof that a claimant rejected a specific job offer is one way of proving voluntary limitation of income, it is not the only way. *Joyner v. DOES*, 502 A.2d 1027,1031 (D.C. 1986).

Here the ALJ failed to consider whether Claimant's actions resulted in her failing to be offered any of the jobs identified on the Labor Market Survey that were appropriate for her.

Therefore, on remand, the ALJ also shall consider whether Claimant voluntarily limited her income in that specific job offers were not made because of her passive or negative attitude.

CONCLUSION AND ORDER

The findings that Claimant unreasonably failed to cooperate with vocational rehabilitation services offered by Employer are supported by substantial evidence and the suspension of benefits is affirmed. The failure to consider Employer's claim that Claimant voluntarily limited her income solely because there is no evidence that Claimant declined to accept a specific offer of employment is not in accordance with the law, and the matter is remanded for further consideration in a manner consistent with the foregoing Decision and Remand Order. The failure to address the issue of the claims for medical benefits that were the subject of the prior compensation orders where the claims for specific medical treatment is not in conformance with the prior orders of the Compensation Review Board. The matter is remanded to the Administrative Hearings Division for further consideration of those claims.

FOR THE COMPENSATION REVIEW BOARD:

/s/ Jeffrey P. Russell
Jeffrey P. Russell
Administrative Appeals Judge

March 24, 2015
DATE