

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

Department of Employment Services

MURIEL BOWSER  
MAYOR



DEBORAH A. CARROLL  
DIRECTOR

COMPENSATION REVIEW BOARD

**CRB No. 15-189**

**SHIRLEY G. LATTIMORE,**  
**Claimant–Petitioner,**

v.

**CVS PHARMACY and**  
**GALLAGHER BASSETT SERVICES,**  
**Self-Insured Employer/Third-Party Administrator-Petitioner.**

Appeal from an October 30, 2015 Compensation Order on Remand  
by Administrative Law Judge Gregory P. Lambert  
AHD No. 09-243F, OWC No. 641909

DEPT. OF EMPLOYMENT  
SERVICES  
COMPENSATION REVIEW  
BOARD  
2016 MAY 9 PM 1 26

(Decided May 9, 2016)

Shirley G. Lattimore, *pro se* Claimant  
Joel E. Ogden for the Employer

Before: LINDA F. JORY, HEATHER C. LESLIE AND JEFFREY P. RUSSELL, *Administrative Appeals Judges.*

LINDA F. JORY for the Compensation Review Board.

**DECISION AND 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 and found to have permanent restrictions that prevented her from returning to her pre-injury job in 2010.

The procedural history of this matter before the Administrative Hearings Division (AHD) is extensive and has been succinctly summarized in the Compensation Order on Remand (COR) that is presently before us:

The first Application for Formal Hearing (AFH), which contested Ms. Lattimore's entitlement to temporary total disability and further medical care, was filed by

CVS on March 20, 2009. Administrative Law Judge (ALJ) Knight dismissed the case on the day of the hearing, July 14, 2009, because the parties settled.

A second AFH was filed on June 25, 2010 by CVS, creating AHD No. 09-243A. Following an evidentiary hearing, ALJ Leslie issued a Compensation Order, which concluded that there was a medical-causal relationship between Ms. Lattimore's back condition and the August 23, 2007 accident; she was entitled to temporary total disability from March 16, 2010 and continuing; and her request for epidural injections were reasonable. The Order was not appealed.

CVS filed a third Application, leading to AHD No. 09-243B, for Formal Hearing on December 13, 2010, but withdrew its Application days before the hearing.

Months later, CVS filed another Application for Formal Hearing, initiating AHD No. 09-243C, which was withdrawn after Anand Verma denied a Consent Motion for Continuance.

AHD No. 09-243D was based on another Application for Formal Hearing by CVS filed on October 11, 2011. Anand Verma issued a Compensation Order in spring 2012, which concluded that "Employer has not offered substantial evidence warranting a modification. . . . Further, the evidence of record does not establish that Claimant unreasonably failed to cooperate with the vocational rehabilitation (VR). . . ." April 27, 2012 CO at 8. The Order permitted ongoing temporary total disability benefits and "authorization for recommended epidural steroid injections." *Id.* at 9.

CVS's subsequent appeal led to the CRB's September 10, 2012 Decision and Remand Order, which identified a variety of errors. Eleven days later, Anand Verma issued a Compensation Order on Remand, also appealed by CVS. A second Decision and Remand Order, this time dated April 13, 2013, was issued by the CRB. Before another Compensation Order on Remand could be issued, the parties indicated that they had reached a settlement and requested that the matter be remanded to OWC for further action. The matter was dismissed without prejudice and remanded to OWC by Anand Verma on June 27, 2013. Soon after, the parties filed a Joint Motion to Reinstate Case because settlement talks had broken down. In response, Anand Verma issued a Compensation Order on Remand, dated September 5, 2013. CVS appealed again, but no Decision and Remand Order was issued because Anand Verma's status as a disbarred attorney became apparent in the interim, which led to his departure from this Agency. His last Compensation Order on Remand was vacated by the CRB without substantive discussion. *See Order Vacating Compensation Order on Remand and Remanding Case (April 30, 2014).*

AHD No. 09-243D was reassigned to ALJ Boddie by Chief ALJ Sullivan in the spring of 2014. After holding a Status Conference on June 19, 2014, ALJ Boddie retired. The case was then reassigned to ALJ Calmeise. Although her subsequent

Compensation Order on Remand is undated, the accompanying Certificate of Service is dated October 9, 2014. The Order, which found that Ms. Lattimore's request for epidural injections was not reasonable or necessary, was not appealed.

AHD No. 09-243E was going forward before ALJ Jory at roughly the same time as the appeals in AHD No. 09-243D were litigated. In mid-April, Ms. Lattimore did not appear for a scheduled deposition, resulting in various discovery-related motions. Subsequently indicating that they had reached a settlement (presumably the same as the one in AHD No. 09-243D), the parties requested a remand to OWC. When the settlement fell through, ALJ Jory denied on August 6, 2013 a Motion to Reschedule Formal Hearing that was filed by CVS, dismissing the matter instead.

CVS filed its latest Application for Formal Hearing on August 22, 2013, creating AHD No. 09-243F. ALJ Calmeise set the matter for a hearing on November 12, 2013. Ms. Lattimore's counsel moved to strike his appearance on September 24, 2013. Following a conference call between ALJ Calmeise and the parties, the Hearing was rescheduled for December 12, 2013. It went forward on the issues of unreasonable failure to cooperate with vocational counseling, voluntary limitation of income, and whether there was a change in condition based upon the argument that Ms. Lattimore had reached maximum medical improvement.

Approximately a year later, a Compensation Order was issued by ALJ Calmeise in AHD No. 09-243F. She found that Ms. Lattimore unreasonably failed to cooperate with vocational rehabilitation, but had not voluntarily limited her income. The CRB issued a Decision and Remand Order on March 24, 2015, which instructed the ALJ to provide further discussion of whether Ms. Lattimore voluntarily limited her income and "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." March 24, 2015 DRO at 8. Ms. Lattimore appealed to the District of Columbia Court of Appeals, which issued a dismissal because there was not a final order. *Lattimore v. District of Columbia Dep't of Employment Servs.*, No. 15-AA-382 (July 24, 2015).

ALJ Calmeise has since left the Agency. The matter was reassigned to me by CALJ McCoy and the parties were duly notified. During a conference call, it became clear that an order could not issue while the Court of Appeals considered Ms. Lattimore's case. Once the Court's dismissal was issued, this Agency regained jurisdiction. A lengthy Status Conference was held on September 21, 2015. The remaining issues were clarified, Anand Verma's role was addressed, consolidation of the D and F cases was discussed, and the record was reopened so that the parties could submit supplemental briefs, which were due by close of business on October 7, 2015. Following that date, the record closed again.

As noted at the Status Conference, evidence that was admitted in either the D or F cases was considered in the preparation of this Order. In 09-243D, two exhibits were admitted for Ms. Lattimore (“CED”) and six were admitted for CVS (“EED”). In the F case, ALJ Calmeise admitted Ms. Lattimore’s exhibits 1-12 and 14 (“CEF”) as well as CVS’s exhibits 1-5 (“EEF”). The transcripts for these two cases were both considered, which are identified by the date of the hearings.

*Lattimore v. CVS Pharmacy*, AHD No. 09-243F (October 30, 2015).

The COR issued on October 30, 2015, and presently before us, concluded Claimant voluntarily limited her income beginning on March 4, 2013 and that the limitation equals the entire amount that Claimant would be entitled to under Act following the August 23, 2007 work injury. The COR also found prescriptions for Mobic, Soma and Trumicin cream are not reasonable or necessary. The ALJ reached this conclusion pursuant to the March 24, 2015 DRO’s determination that Claimant’s request for these three medications were not addressed in AHD No. 09-243D. On remand the ALJ consolidated the D and F case into the F case.

Claimant filed a timely Application for Review (AFR). Employer filed Employer/Administrator Opposition of Claimant’s Application for Review (Employer’s Brief).

#### ISSUE ON APPEAL

Is the October 30, 2015 COR supported by substantial evidence and in accordance with the law?

#### ANALYSIS

The scope of review by the CRB as established by the District of Columbia Workers’ Compensation Act (the Act) and as contained in the governing regulations is limited to making a determination whether the factual findings of a Compensation Order on appeal are based upon substantial evidence in the record, and whether the legal conclusions drawn from those facts flow rationally from those facts and are otherwise in accordance with applicable law. D.C. Code § 32-1521.01(d)(2)(A). “Substantial evidence” as defined by the District of Columbia Court of Appeals (DCCA), is such evidence as a reasonable person might accept to support a particular conclusion. *Marriott Int’l. v. DOES* 834 A.2d 882 (D.C. 2003) (*Marriott*). Consistent with this scope of review, the CRB is bound to uphold 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 the members of the CRB review panel considering the appeal might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

Claimant’s 32 page Application for Review (Claimant’s Brief) contains accusations of impropriety at every level of the District of Columbia Workers Compensation process administered by the Department of Employment Services, the third party administrator Gallagher Bassett Services and the vocational rehabilitation (VR) vendor “MHayes”. This Panel addresses only those errors Claimant asserts the instant ALJ has committed as it is only the COR that is

presently on appeal to the CRB. References to Anand Verma shall not be repeated herein as we find ALJ Lambert addressed Anand Verma's involvement fairly and adequately and he considered Employer's modification request without input from the orders issued by Mr. Verma that the ALJ noted were favorable to Claimant. In addition, Claimant's references to the September 2013 termination of her attorney's representation shall not be addressed as we conclude, as the ALJ has, the matter is irrelevant to the matter on appeal. COR at 3, n 1.

The March 24, 2015 DRO specifically affirmed AHD's conclusion that Claimant unreasonably refused Employer's vocational rehabilitation efforts warranting a suspension of Claimant's benefits but remanded the matter to the AHD with instructions to the ALJ to provide further discussion of whether Ms. Lattimore voluntarily limited her income in that specific job offers could not be made because of her passive or negative attitude.

With regard to the COR's conclusion that Employer has proven by a preponderance of the evidence that Claimant voluntarily limited her income beginning on March 4, 2013, Claimant asserts the following which we enumerate:

1. Claimant was given job leads not suitable for her disability, because claimant was not released to work. However, claimant complied with VRS to the best of her ability.
2. Claimant was given job leads requiring her to lift 50, 30, 20 and 15 pounds.
3. Mr. Wiltison listed many job leads in his monthly VRS reports that were not given to Claimant.
4. Claimant's computer was compromised after receiving the first emails from Mr. Wiltison.
5. Mr. Wiltison had Claimant drive 35 minutes for meetings at Oxon Hill library in Oxon Hill, Maryland when the Anacostia Library is 5 minutes from her home.
6. On October 12, 2012, Claimant met with Mr. Wiltison at the Oxon Hill Library. When Claimant gave job leads to Mr. Wiltison, he refused to accept them and said they were not necessary. Claimant addressed this issue in several emails to Mr. Wiltison.
7. Claimant was injured in Virginia while applying for a job lead at Concurrent Technologies. When Claimant informed Mr. Wiltison she was injured, Mr. Wiltison created and fabricated the August 13, 2013 report to have it appear claimant was not being cooperative with VRS.
8. Claimant's treating doctor Dr. Reza Ghorbani recommended Claimant not participate in vocational rehabilitation.
9. Claimant met with a new vocational counselor, Ms. Gardiner at her attorney's office on February 12, 2013. Claimant was given a job lead to apply for a job at Marriott at the American Job Center and advised to attend a job fair in Rosslyn, Virginia.
10. Claimant went to the American Job Center to apply for a job and was told by an employee of the center that her email account was hacked. Claimant went to the Job Fair in Rosslyn, Virginia and found the only jobs that were being offered were that of manual labor. Claimant called Ms. Gardner to inform her what was being offered. Claimant retrieved a flyer for verification to show Ms. Gardner. Claimant suddenly needed medical attention and drove herself to Georgetown University Hospital emergency room. Claimant was diagnosed with anxiety and referred to psychiatry.

11. ALJ Gregory Lambert states Claimant made a statement that she wanted to kill the vocational counselors on March 4, 2013. On March 4, 2013, Claimant did have an appointment at Georgetown Hospital with her primary care physician Dr. Eric Farris and that report does not state Claimant threatened to kill anyone.
12. Vocational Counselor Jason Alexander illegally obtained Claimant's medical records from Dr. Farris by providing them with fraudulent documents for claimant.

Claimant's Brief at 16 -21.

With regard to the COR's ruling on the prescriptions Mobic, Soma and Trumicin cream, Claimant states "Claimant has no issues regarding Soma, Trumicin, Mobic. Claimant's condition has worsened since the issue of above medication and is on a regiment of different medications". Claimant's Brief at 31.

Employer asserts:

Administrative Law Judge Lambert employed the correct legal standard in evaluating the voluntary limitation of income defense. In reviewing the Claimant's emails which were in evidence Judge Lambert found a 'negative attitude toward vocational rehabilitation'. Furthermore, he noted that 'many suitable jobs were identified for Ms. Lattimore.' (See Compensation Order on Remand of 10/30/15 at p. 7). Judge Lambert observed that the Claimant had declined to utilize her computer or email to search for a job, and this 'greatly reduced the likelihood of re-employment'. (See Compensation Order at p.8).

Most significantly, Judge Lambert concluded that the Claimant had 'made threatening comments about individuals associated with this case, including one or more of her vocational counselors'. The following finding of fact was made:

By early 2013, Ms. Lattimore had seen caregivers at Washington Hospital Center in DC for mental healthcare. During those sessions, she exhibited perseverating homicidal ideation toward the vocational counselor in this case. One or more of her health care professionals exercise their ethical obligation to inform others of possible imminent harm, choosing to notify Mr. Alexander [vocational counsel] of statements made by Ms. Lattimore. Mr. Alexander contacted Ms. Gardiner [vocational counselor] on 03/27/13 to advise her that Ms. Lattimore's health care professionals had contacted him. He relayed that Ms. Lattimore had told her doctor earlier that day that she wanted to "kill Jason Alexander, Donna Westervelt [claims adjuster] and MHayes [vocational rehabilitation company].' Ms. Gardiner notified CVS's attorney and cancelled a scheduled appointment with Ms. Lattimore.

(See Compensation Order, p.5)

In response to the threats, CVS choose [sic] to discontinue ongoing direct vocational placement efforts and instead secure a Labor Market Survey. The presiding administrative law judge found that 'no persuasive evidence indicates that Ms. Lattimore applied to any of the identified position in the Labor Market Survey'. He ruled that the Claimant's threatening statements would be dispositive of the issue in and of themselves. When the additional other evidence was considered, Judge Lambert found the conclusion that the Claimant had voluntarily limited her income became 'inescapable'. He went on to find that the Claimant had voluntarily limited her income beginning 03/04/13, concluding that the Claimant was capable of finding a sedentary job on a part-time or even full time basis that would exceed her pre-injury average weekly wage of \$167.02.

The administrative law judge below included painstaking reference to the record in making factual determinations. Moreover, he concluded that, under the correct standard enunciated in *Joyner, supra*, the Claimant had taken a 'passive or negative attitude about pursuing re-employment.' The correct legal standard having been employed and the ultimate conclusion being supported by substantial evidence, there was no error.

Employer's Brief at 4, 5.

To Claimant's assertions enumerated as 1, 2 and 8, notwithstanding Claimant's failure to identify a job that would require her to lift 50 pounds or a note from Dr. Ghorbani that she should not participate in vocational rehabilitation, we remind Claimant that the CRB has already affirmed the determination that Claimant unreasonably refused to cooperate with Employer's vocational rehabilitation services and that the issue now is whether there was a passive attitude that stood in the way of an employer offering her employment. *Cf. Bemby v. Good Hope Insititute*, CRB Nos. 15-178, 15-179, 16-035 (April 21, 2015).

Similarly, in point no. 3, Claimant failed to identify the job leads in Mr. Wiltison's monthly VRS reports that she alleges were not given to Claimant.

With regard to point no. 6, it appears Claimant has construed Mr. Wiltison's decision to not accept store receipts for goods purchased as proof she applied for a job at the store as a refusal of Mr. Williston to accept the job logs which Claimant was required to keep to document job search results. We agree with the ALJ that a receipt for an item purchased in a store is not probative as to whether Claimant actively inquired about a job lead at that store.

To point no. 5, the record confirms that Claimant advised Mr. Wiltison that the Oxon Hill library is thirty minutes from her home but the Anacostia library is 5 minutes away in an email dated November 5, 2012 and that Mr. Williston attempted to call Claimant after receipt on November 7, 2012 and November 8, 2012 and contacted her attorney on both days. Claimant conceded she received the calls and did not return them in subsequent emails she wrote to Mr. Wiltison on November 16 and 19, 2012, however no further discussions took place with regard to library

meetings and no additional meetings were scheduled as Mr. Wiltison was waiting to schedule a meeting with Claimant's attorney with regard to her insistence on recording future meetings.

The record reveals Claimant's case was assigned to another vocational counselor Aisha Gardiner, and as Claimant asserts in points 9 and 10, Claimant did attempt to follow up on the suggestions Ms. Gardiner made at their initial conference. Ms. Gardiner's reports confirm that Claimant did call her and advise her that her computer was hacked into which is why she did not complete the online application for a Guest Service Representative with the Marriott. Claimant's Exhibit 11 is a flyer from the February 14, 2013 job fair and is not consistent with Claimant's allegations that all jobs posted at the fair involved manual labor. We further note that on February 14 2013 Claimant was treated for anxiety at the Georgetown University Hospital Emergency Room.

We reject Claimant's point 11 that the ALJ found Claimant stated on March 4, 2013 that she wanted to kill the vocational counselors and there is no evidence in the record that Claimant's records were obtained using fraudulent documents as alleged in point 12. Based upon his review of the record, the ALJ found:

By early 2013, Ms. Lattimore had seen caregivers at Washington Hospital Center in DC for mental healthcare. During those sessions, she exhibited perseverating homicidal ideation toward the vocational counselors in this case. One or more of her healthcare professionals exercised their ethical obligation to inform others of possible imminent harm, choosing to notify Mr. Alexander of statements made by Ms. Lattimore. Mr. Alexander contacted Ms. Gardiner on March 27, 2013 to advise her that Ms. Lattimore's healthcare professionals had contacted him. He relayed that Ms. Lattimore had told her doctor earlier that day that she wanted to 'kill Jason Alexander, Donna Westervelt, and M. Hayes'. Ms. Gardiner notified CVS's attorney and cancelled a scheduled appointment with Ms. Lattimore.

COR at 5.

Based on these findings the ALJ concluded:

Ms. Lattimore made threatening comments about individuals associated with this case, including one or more of her vocational counselors. EEF 4 at 72, 74, 78. As difficult as Ms. Lattimore's situation might be, I am bound by the law, which does not allow her to threaten – or be reasonably perceived to threaten – her vocational counselors. Her counselors ceased rehabilitation services after being contacted by Ms. Lattimore's caregivers, which was a reasonable response. EEF 1 at 4.

\* \* \*

Momentarily assuming that Ms. Lattimore's other actions did not amount to a passive negative outlook on returning to work, her threatening statements are, alone, dispositive. After adding the weight of the other evidence in the record, the

conclusion that Ms. Lattimore voluntarily limited her income becomes inescapable.

When her counselor first received notice of Ms. Lattimore's statements is a reasonable date upon which to base the beginning of her voluntary limitation of income. December 12, 2013 HT at 172. CVS has proven by a preponderance of the evidence that Ms. Lattimore voluntarily limited her income beginning on March 4, 2013, which is the first date that her vocational counselors learned of the threatening statement that she made.

COR at 8, 9.

Without repeating all of the suitable job leads provided to Claimant and her many excuses for not following up on the leads, i.e., not reading entire job descriptions, inability to locate employer, the need for parking, her computer being hacked and that driving long distances is detrimental to her health, substantial evidence supports the ALJ's conclusions that "No persuasive evidence indicates that Ms. Lattimore applied to any of identified positions" and "Having declined to use her computer or email to search for a job, Ms. Lattimore greatly reduced the likelihood of re-employment". COR at 8. We also agree with the ALJ's determination that "The evidence shows a series of instances where Ms. Lattimore created self-imposed limitations on her ability to generate an income". Id. Thus we determine the ALJ's conclusion that these activities alone demonstrate a passive and negative attitude that would prevent any offer of employment and that Claimant has voluntarily limited her income by these actions, notwithstanding any error made by the ALJ with regard to the threatening statements.

We do not, however, agree that the evidence supports March 4, 2013 as the date the vocational counselors who were handling this matter learned that Claimant was threatening harm if she was required to attend any more meetings<sup>1</sup>. We note, at the formal hearing, counsel for Employer stated on March 4, 2013 "there is some indication that Ms. Devineni contacted your vocational counselor to discuss the situation regarding your statements about harming somebody?" HT at 149. Ms. Devineni was described as a social worker. However, Employer did not corroborate this assertion under cross examination with any supporting evidence nor did Employer call Ms. Gardiner, the vocational counselor who was handling the VR in March 2013, who allegedly received this advice as a witness. Similarly, Employer did not present as a witness, Jason Alexander, who allegedly was contacted by a Georgetown University psychiatrist, that advised him specifically that Claimant "wants to kill Jason Alexander, Donna Westervelt, and M Hayes", nor was the psychiatrist who contacted Alexander ever identified. See EE 1 at 1.

While we certainly agree that a counselor who felt physically threatened should not be expected to continue provide VR services, there is no evidence that threats were in fact made about or to

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<sup>1</sup> We remind the ALJ that he is restricted to consideration of the evidence in the record and caution that reliance on the APA Ethical Principles of Psychologists and Code of Conduct to make a finding that Claimant's healthcare professional exercised their ethical obligation to inform others of possible imminent harm, choosing to notify Mr. Alexander of statements made by Claimant may have exceeded the bounds of the record. COR at 5. As we have determined the ALJ's conclusion that Claimant presented a negative attitude that precluded offers of employment without the threats of harm, we conclude this is harmless error.

Ms. Gardiner. We acknowledge that the first reference in the record with regard to Claimant's "feelings towards the vocational meetings" began on March 6, 2013 and that the first (and last) vocational status report that refers to the threats, dated March 29, 2013 indicates that Ms. Gardiner was contacted by Jason Alexander on March 27, 2013. Subsequent meetings with Claimant were then cancelled.

As the March 29, 2013 report lists numerous instances of Claimant's failure to cooperate with Employer's VR efforts consistent with the pattern that Claimant has followed throughout the VR process, we find March 29, 2013 a more relevant date to find Claimant's actions and attitude culminated in a voluntary limitation of income. We conclude the ALJ's determination is supported by substantial evidence and in accordance with the law. Given the authority provided the CRB under § 32-1521.01, we amend the COR to reflect March 29, 2013 as the effective date of Claimant's voluntary limitation of income.

#### **CONCLUSION AND ORDER**

We affirm the conclusion of law that Claimant voluntarily limited her income as a result of her passive or negative outlook on returning to work is in accordance with the law and supported by substantial evidence. We amend the COR to reflect that Claimant's voluntary limitation of income is effective March 29, 2013.

*So ordered.*