COMPENSATION REVIEW BOARD

CRB No. 12-188

SUSAN BROWNER,
Claimant–Respondent,

v.

DISTRICT OF COLUMBIA METROPOLITAN POLICE DEPARTMENT,
Self-Insured Employer—Petitioner

Appeal of an October 31, 2012 Compensation Order by
Administrative Law Judge Anand K. Verma
AHD No. PBL 06-023D, DCP No. 7610048-0001-2004-0001

Lauren E. Pisano, Esquire, for the Claimant/Respondent
Kevin J. Turner, Esquire, for the Employer/Petitioner

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

HENRY W. MCCOY, *Administrative Appeals Judge*, for the Compensation Review Board.

DECISION AND REMAND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

Claimant worked for Employer as a computer analyst and sustained a work-related injury to her left arm on September 22, 2004. The Public Sector Workers' Compensation Program (PSWCP) accepted and paid a claim for workers' compensation benefits. Claimant was directed in 2011 to participate in vocational rehabilitation.

On January 13, 2012, Claimant was issued a Notice of Determination from PSWCP informing her that her temporary total disability (TTD) benefits were "suspended due to non-participation in vocational rehabilitation" pursuant to D.C. Code § 1-623.24(d)(3)(E). This notice

also informed Claimant that upon a showing of consistent compliance with the current vocational plan, her benefits would be reinstated. Claimant filed for a formal hearing seeking the restoration of her disability benefits.

On October 31, 2012, a Compensation Order (CO) was issued granting Claimant TTD benefits from March 1, 2012 to June 20, 2012.[1] Employer filed a timely appeal with Claimant filing in opposition.

On appeal, Employer argues that the Administrative Law Judge (ALJ) decided this case by applying a regulation applicable to private sector workers' compensation cases and in relying on the wrong regulatory provision, the Compensation Order (CO) is not in accordance with the Act and must be vacated. In opposition, Claimant argues the ALJ decided the case on the evidence presented and only referenced the private sector regulation in the posture of an alternative argument.

ANALYSIS

The scope of review by the CRB is limited to making a determination as to whether the factual findings of the Order are based upon substantial evidence in the record and whether the legal conclusions drawn from those facts are in accordance with the applicable law.[2] Section 1-623.28(a) of the District of Columbia Government Merit Personnel Act of 1978, as amended, D.C. Code § 1-623.1 *et seq*. ("Act").

From the record developed below, it is undisputed that Claimant sustained a workplace injury and her claim for disability benefits was accepted and TTD benefits were paid. On or about July 27, 2011, Claimant was directed to participate in vocational rehabilitation.[3] Under these circumstances, it is generally accepted that once a claim for disability compensation has been accepted and benefits paid, in order to prevail at a formal hearing, the employer must adduce persuasive evidence sufficient to substantiate the modification or termination of an award of benefits.[4] As the instant matter involved the suspension of benefits for a claim that had been accepted as compensable, Employer had the burden of proof.

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[1] *Browner v. D.C. Metropolitan Police Dept*., AHD No. PBL 06-023D, DCP No. 761048-0001-2004-0001 (October 31, 2012).

[2] "Substantial evidence," as defined by the District of Columbia Court of Appeals, is such evidence as a reasonable person might accept to support a particular conclusion. *Marriott International v. District of Columbia Department of Employment Services*, 834 A.2d 882 (D.C. 2003).

[3] D.C. Code § 1-623.04(a) states in pertinent part: "The Mayor shall direct an individual with a permanent or temporary disability whose disability is compensable under this subchapter to undergo vocational rehabilitation. The Mayor shall provide for furnishing the vocational rehabilitation services…."

[4] *Jones v. D.C. Superior Court*, CRB No. 10-003, AHD No. PBL 09-026, DCP. No. 7610460001199-0002 (March 11, 2011) citing *Lightfoot v. D.C. Dept. of Consumer and Regulatory Affairs*, ECAB No. 94-25 (July 30, 1996); *Ashton v. DMV*, CRB No. 10-193, AHD No. PBL 10-065, DCP No. 30100438785-0001 (July 7, 2011).

On January 13, 2012, Claimant was notified that due to non-participation in vocational rehabilitation, her TTD benefits were being suspended. Specifically, the Notice of Determination stated

> Your public sector workers' compensation claim for continuing Temporary Total Disability (TTD) benefits is hereby **SUSPENDED**.
>
> Your TTD benefits have been **SUSPENDED** due to non-participation in vocational rehabilitation which began on July 27, 2011, as scheduled by the Public Sector Workers' Compensation Program. Your benefits are now SUSPENDED pursuant to D.C. Official Code § 1-623.24(d)(3)(E) (2001).
>
> When you comply with the current vocational plan and show consistent compliance with the plan, we will reinstate your benefits from the time of compliance.[5]

Although Employer modified Claimant's award of benefits being received by suspending those benefits for non-participation in vocational rehabilitation and had the burden of proof to show that it was justified in taking such action, there is no indication in the Hearing Transcript (HT) that the ALJ specifically assigned that burden. It is also the case that in the CO the ALJ does not seem to evaluate the record evidence from that perspective until the very end when he states that Employer has not sustained it burden because it has not complied with the requirements under 7 DCMR § 210.2. As this provision is part of the regulations governing private sector workers' compensation cases, Employer argues that this constitutes a misapplication of the law and regulations that requires that this matter be returned. We agree.

Employer submitted for the record vocational progress reports for December 20, 18, and 5, 2011, and argued at the hearing that the vocational case manager (VCM) determined that Claimant's cooperation was not sufficient and that is why Claimant's benefits were suspended. However, the ALJ made no such finding.

In his findings, the ALJ conducted a review of the vocational reports introduced by Claimant and Employer. The ALJ noted the dates Claimant attended scheduled meetings with the VCM and the dates she missed along with the reasons. Specifically, the ALJ found

> Although claimant had difficulty initially participating in the vocational meetings, she subsequently improved her participation therein. Likewise, claimant had difficulty in the beginning to complete the VCM's assignment with respect to the job search, but she later completed it to the VCM's satisfaction. On April 10, 2012, the vocational rehabilitation which had been suspended as of March 21, 2012, was restarted.
>
> The adduced evidence demonstrate [sic] no specific incident of claimant's unreasonable refusal to accept or cooperate with employer's

[5] EE #1.

> vocational rehabilitation. Claimant's lapse or inertia to actively meet her obligations under the vocational rehabilitation plan was caused by the considerable amount of pain and swelling in her hand.[6]

In his discussion of the evidence, the ALJ reasoned:

> Employer in the instant case acknowledged claimant suffers from some disability, however, it contends that "her cooperation [with the vocational rehabilitation] wasn't sufficient" and that is why her benefits were suspended. (HT 108). Employer's contention is primarily predicated on claimant's isolated lapse because of her confusion with the date in attending one vocational meeting with the VCM. Employer also argues that claimant in the beginning of the vocational rehabilitation did not complete the VCM's assignments. (HT 63). Nonetheless, the VCM, although admitted on direct examination that claimant's performance was not "up to par" during the initial period, but later, she "really brought it up to par." (HT 63, 65, 66).
>
> The VCM's testimony further revealed that when she inquired of the reason why claimant had not completed the initial job search assignments, she responded that she had been agonized with so much pain in her hands. (HT 66). Indeed, the adduced evidence fails to demonstrate claimant unreasonably refused to … [sic] accept the vocational rehabilitation. The evidence of record only points to claimant's infirmity in her hands which somehow caused her inertia in applying for the given employment opportunities; it specifies no incident where claimant deliberately and without a compelling physical limitation failed to complete the VCM's assignments.

We agree with Claimant that this alone provides a sufficient basis for the ALJ to conclude that the evidence does not support the suspension of Claimant's benefits. However, the ALJ did not stop here. He proceeded with dispositive reasoning:

> Notwithstanding the foregoing, assuming, *arguendo*, that claimant did unreasonably fail to cooperate with employer's vocational efforts, the Act requires employer requesting suspension of payment on this ground to file a motion to modify the compensation award based on a "change of conditions," which, in this case, would be the failure to cooperate. Any such motion, of course, must be accompanied by notice to the employee. See generally 7 DCMR § 210.2 et seq. [sic] (1986); See [sic] also *Epstein, supra*. There is no showing in the record that employer has sustained its requisite burden and, therefore, the suspension of benefits under 7 DCMR § 210.2 et seq. [sic] (1986) cannot be sustained.[7]

[6] CO at 3.

[7] CO at 5.

The CRB has consistently taken the position that "[w]e cannot affirm an administrative determination that 'reflects a misconception of the relevant law or a faulty application of the law."[8] The instant matter is a public sector workers' compensation case and as such its resolution must be based upon the public sector Act[9] and implementing regulations[10].

In commencing his analysis in this case, the ALJ quotes D.C. Code § 1-623.04(a)[11] of the public sector Act, which requires that the Mayor order an injured public employee to undergo vocational rehabilitation. The ALJ then proceeds to a comparative analysis of the public sector Act and cases citing §§ 32-1507(a) and (c) requiring the employer to provide vocational rehabilitation; § 32-1507(d) that allows for the suspension of benefits for failure to cooperate with vocational rehabilitation; § 32-1524 supposedly for the employer wanting to suspend benefits by filing a motion for modification for failure to cooperate, with a copy of the motion to claimant as notice of the impending action. The ALJ then cites 7 DCMR § 210.2 et seq. [sic] (1986) and *Epstein v. DOES*, 850 A.2d 1140 (D.C. 2004) for support.

Apart from his quoting of D.C. Code § 1-623.04(a) requiring the Mayor to provide and the injured employee to cooperate with vocational rehabilitation, the rest of the ALJ's authoritative references with regard to vocational rehabilitation are to the private sector Act, its implementing regulations, and interpretive case law. This reliance upon the private sector law and regulations, especially a 1986 regulation that is no longer in effect, to decide a public sector case which has its own separate and distinct statute and regulations clearly constitutes "a misconception of the relevant law" not to mention "a faulty application of the law". We have no other recourse but to vacate and remand.

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[8] *WMATA v. DOES*, 992 A.2d 1276, 1280 (D.C. 2010) (quoting *Georgetown Univ. v. DOES*, 971 A.2d 909, 915 (D.C. 2009).

[9] The District of Columbia Government Merit Personnel Act of 1978, as amended, D.C. Code § 1-623.1 *et seq*. ("Act").

[10] See enactment of new Chapter 1 to Title 7 of the District of Columbia Municipal Regulations (DCMR), 59 D.C. Reg.8766 (July 27, 2012).

[11] D.C. Code § 1-623.04(a) states in pertinent part: "The Mayor shall direct an individual with a permanent or temporary disability whose disability is compensable under this subchapter to undergo vocational rehabilitation. The Mayor shall provide for furnishing the vocational rehabilitation services…."

CONCLUSION AND ORDER

The Compensation Order granting Claimant's claim for reinstatement of disability benefits for a fixed period after a determination that Employer failed to sustain its burden to justify the suspension of benefits is not in accordance with the law. Accordingly, the October 31, 2012 Compensation Order is VACATED AND REMANDED for further consideration in keeping with this Decision and Remand Order.

FOR THE COMPENSATION REVIEW BOARD:

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HENRY W. MCCOY
Administrative Appeals Judge

February 28, 2013
DATE