GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR

LISA M. MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 11-101

ABDULAH AL-NORI,

Claimant–Petitioner,

v.

FOUR POINTS SHERATON HOTEL AND PMA INSURANCE GROUP,

Employer–Respondent.

Appeal from an Order of
Claims Examiner Rosita Clemmons and Supervisor Alonzo Patterson
OWC No. 604611

Michael J. Kitzman, Esquire, for the Claimant-Petitioner
Douglas A. Datt, Esquire, for the Employer-Respondent

Before HEATHER C. LESLIE,[1] MELISSA LIN JONES, and LAWRENCE D. TARR, *Administrative Appeals Judges*.

HEATHER C. LESLIE, *Administrative Appeals Judge*, for the Compensation Review Board.

DECISION AND REMAND ORDER

OVERVIEW

This case is before the Compensation Review Board (CRB) on the request of the Claimant, Abdullah Al-Nori, for review of an August 31, 2011, OWC Final Order on Remand (FOR),[2]

[1]Judge Heather C. Leslie is appointed by the Director of DOES as an interim Board Member pursuant to DOES Administrative Policy Issuance No. 11-02 (June 13, 2011).

[2] The document is titled an OWC Final Compensation Order on Remand. The regulations do not give OWC the authority to issue Compensation Orders. See DCMR 7-219. As such, we will refer to the document being appealed as a Final Order on Remand.

issued by a Claims Examiner (CE) in the Office of Workers Compensation (OWC) of the District of Columbia's Department of Employment Services (DOES).

BACKGROUND FACTS OF RECORD

On June 13, 2003, while employed by the Employer as a bellman, the Claimant sustained injuries to his hips and legs lifting heavy luggage and subsequently underwent total replacement of both hips. In a March 3, 2005 Memorandum of Informal Conference (MIC), OWC recommended that Employer pay the Claimant temporary total disability benefits from October 18, 2003 to the present and continuing or "until the claimant is capable of performing his pre-injury duties." The Employer voluntarily commenced paying the recommended benefits. On April 29, 2005, the recommended order was converted into a Final Order.

On August 29, 2008, Dr. Robert Collins completed an Independent Medical Evaluation (IME) of the Claimant. Dr. Collins determined that regarding his hips, the Claimant was at maximum medical improvement and could return to light duty with lifting restrictions and progress to full duty over 3 to 4 weeks time. On October 7, 2008, the Employer filed a Notice of Controversion terminating the payment of disability benefits on the basis that the Claimant had reached MMI and could return to work.

On April 15, 2010, an Informal Conference was held in an attempt to facilitate a settlement. On April 27, 2010, an MIC was issued in which it was recommended that the Claimant submit to an IME. Neither party filed an objection to this order.

On June 2, 2010, the Claimant filed an Application for Formal Hearing (AFH) with the Office of Hearings and Adjudications. One of the issues stated for resolution was temporary total disability from August 1, 2007 to the present and continuing.

On June 21, 2010, OWC issued an Addendum to the April 27, 2010 MIC suspending the Claimant's disability benefits pursuant to D.C. Code § 32-1507(7)(d)[3] (sic) for his failure to appear at two scheduled IME appointments and providing no reasons for failing to do so.

On December 3, 2010, the Claimant filed a request to withdraw the AFH, which was granted and the AFH was dismissed without prejudice.

On December 20, 2010, the Claimant filed a Motion for Default with OWC for the non-payment of disability benefits. OWC denied this motion on January 20, 2011 stating there were no grounds for a default and as the Claimant remained non-compliant in not attending two

[3]In its Addendum Order, OWC misstates the cited provision as D.C. Code § 32-1507(7)(d) when the applicable provision is 32-1507(d), which states in pertinent part:

> If at any time during such period the employee unreasonably refuses to submit to medical or surgical treatment or to an examination by a physician selected by the employer, or to accept vocational rehabilitation the Mayor shall, by order, suspend the payment of further compensation, medical payments, and health insurance coverage during such period, unless the circumstances justified the refusal.

scheduled IMEs, his benefits remained suspended. The Claimant timely appealed the denial to the CRB.

In a Decision and Remand Order dated August 10, 2011, the CRB affirmed the suspension of Claimant's benefits and remanded the Order back to OWC to begin the suspension of benefits on the date of the second missed IME. The CRB vacated that part of the order denying the motion for default and remanded to OWC for further consideration.

In response to the CRB's Decision and Order, OWC issued the FOR on August 31, 2011. In that FOR, the CE amended the prior order to reflect that the Claimant's benefits were to be suspended effective July 9, 2010 -- the date of the second missed IME -- until such time as the Claimant attended an IME. Finally, the CE indicated that the,

> Final Order issued in this matter on April 29, 2005 is hereby modified and will be binding on any changes in physical condition demonstrated by the claimant and may subject claimant to continued suspension of benefits for non-compliance.

The Claimant timely appealed with the Employer opposing.

THE STANDARD OF REVIEW

In the review of an appeal from the Office of Workers' Compensation (OWC), the CRB must affirm the order under review unless it is determined to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. *See* 6 Stein, Mitchell & Mezines, *Administrative Law*, § 51.03 (2001).

ANALYSIS

Turning to the appeal at hand, the Claimant first argues that the FOR is in error when it states that the previous Order is modified without an evidentiary hearing. The Employer counters that the language, taken in context of the entire order, was only intended to reflect that the Claimant's benefits were suspended. A review of the order reveals the following,

> Further, the (OWC) Final Order issued in this matter on April 25, 2005 is hereby modified and will be binding on any changes in physical condition demonstrated by the claimant and may subject claimant to continued suspension of benefits for non-compliance.

We agree with the Claimant that the above language requires reversal. After amending the Order pursuant to the CRB directions in the previous two paragraphs, the CE took the extra step of unilaterally modifying the April 25, 2005 Final Order. We are unclear what the CE meant when after amending the order, it was necessary to "further" modify the Final Order and then "bind" the parties to any "changes in physical condition demonstrated by the Claimant and may subject the claimant to continued suspension of benefits for non-compliance." This language is speculative at best requiring us to vacate this part of the Order. Upon remand, OWC is ordered to strike the above language from the FOR.

Next, the Claimant argues that the Order "improperly contends that the Claimant's benefits must remain suspended until the IME results are received." The Claimant also incorrectly argues that once the Claimant has agreed to attend the IME, he is no longer in violation of the Act and thus entitled to benefits, even before he actually submits to the IME. In contrast, the Employer argues that the Claimant's benefits should be suspended until he actually attends an IME, relying upon *Wolfe v. Washington Sports and Entertainment*, OHA No. 04-405, OWC No. 590946, (December 20, 2004). We agree with the Employer.

As stated in the prior CRB remand order, § 32-1507(d) states:

> If at any time during such period the employee unreasonably refuses to ***submit*** to medical or surgical treatment or to an examination by a physician selected by the employer, or to accept vocational rehabilitation the Mayor shall, by order, suspend the payment of further compensation, medical payments, and health insurance coverage during such period, unless circumstances justified the refusal. (Emphasis added.)

In addition, D.C. Official Code § 32-1520(f) states:

> An injured employee claiming or entitled to compensation shall ***submit*** to such physical examination by a medical officer of the District of Columbia or by a duly qualified physician or panel of physicians designated or approved by the Mayor as the Mayor may require. The place or places shall be reasonably convenient for the employee. Proceedings shall be suspended and no compensation be payable for any period during which the employee may refuse to ***submit*** to examination. (Emphasis added.)

Thus, taken together, it is clear that the Claimant must ***submit to a physical examination***, *i.e.*, attend an IME. We do not agree, as the Claimant urges us to do, that once he agrees to attend the IME, the Claimant is no longer in violation. The Claimant, pursuant to the statute, must submit to the actual physical examination. Stated another way, "Claimant's entitlement to benefits under the Act must, under the mandatory language of the Act, be suspended until such time as the reasonably requested follow up IME is accomplished." *Wolfe, supra.*

We disagree with the Claimant's interpretation of the FOR in regards to when benefits could be reinstated, specifically the Claimant's contention that the FOR erroneously states that benefits are to remain suspended until receipt of the IME. A review of the Final Order reveals that the Claim Examiner simply states that an adjustment to the Claimant's benefits will be "determined once (OWC) is in receipt of the results of the anticipated (IME)." We do not read the Order, as the Claimant does, as indicating that the benefits will be reinstated upon on the date of OWC's receipt of the IME regardless of the date of the Claimant's attendance of the IME, but simply that a determination will be made by OWC when the results are received as, clearly, no action can be made by OWC until such time. Upon receipt of the results of the IME, then OWC can reinstate benefits on a date certain as appropriate.

Finally, the Claimant argues that the FOR failed to address the Claimant's Motion for Default. In the prior Decision and Remand Order issued by the CRB, it was determined that OWC's denial of the Claimant's Motion for Default was not in accordance with the law. The CRB remanded the case, in part, for further consideration of the Claimant's Motion for Default of the April 29, 2005 Order.

A review of the August 31, 2011 FOR reveals that this issue was not addressed as directed by the CRB. We are forced to remand the case back to OWC again with instructions to OWC to address the Claimant's Motion for Default of the April 29, 2005 Order.

CONCLUSION AND ORDER

As the August 31, 2011 OWC Final Order is not in accordance with the law, it is VACATED AND REMANDED IN PART for further proceedings consistent with this Decision and Remand Order.

FOR THE COMPENSATION REVIEW BOARD:

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HEATHER C. LESLIE
Administrative Appeals Judge

February 23, 2012
DATE