

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA M. MALLORY
DIRECTOR

CRB No. 10-083(2)

JOSEPHINE BEMBRY,
Claimant–Respondent,

v.

GOOD HOPE INSTITUTE and GUARD INSURANCE GROUP,
Employer–Petitioner.

Appeal from a Compensation Order on Remand by
The Honorable Joan E. Knight
AHD No. 08-377A, OWC No. 647887

Jeffrey Ochsman, Esquire for the Petitioner
Matthew Peffer, Esquire for the Respondent

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

MELISSA LIN JONES, *Administrative Appeals Judge*, for the Compensation Review Board.

ORDER DENYING EMPLOYER/CARRIER’S MOTION FOR RECONSIDERATION

In a Compensation Order dated March 13, 2009, Ms. Josephine Bembry was awarded medical benefits and temporary total disability benefits from May 6, 2008 to the date of the formal hearing and continuing. Good Hope Institute (“Good Hope”) requested modification of the March 13, 2009 Compensation Order.

On July 21, 2009, an administrative law judge (“ALJ”) held a *Snipes* hearing to determine if there was reason to believe a change of condition had taken place. The ALJ concluded there was reason to believe a change of condition had taken place, and on September 8, 2009, a full evidentiary hearing was conducted to determine if Good Hope was entitled to terminate payment of temporary total disability benefits.

On February 16, 2010, a Compensation Order issued. Good Hope’s request to terminate wage loss benefits was denied.

¹ Judge Leslie has been appointed by the Director of the DOES as a temporary Compensation Review Board (“CRB”) member pursuant to DOES Administrative Policy Issuance No. 11-02 (June 13, 2011).

Good Hope appealed the February 16, 2010 Compensation Order, and on April 13, 2012, the CRB issued a Decision and Remand Order. The award denying Good Hope's request to terminate temporary total disability benefits was affirmed, but the matter was remanded for additional consideration regarding Ms. Bemby's participation in vocational rehabilitation.

On April 18, 2012, Good Hope filed Employer/Carrier's Motion for Reconsideration.² Good Hope requests we reverse the Compensation Order and require termination of temporary total disability benefits as of May 5, 2009 because that is the date Dr. Byrne effectively cleared Ms. Bemby to participate in vocational rehabilitation. Good Hope also requests we find Ms. Bemby's physical limitations and restrictions permitted her to return to her pre-injury work.

In the April 13, 2012 Decision and Remand Order, the CRB determined

the issue of failure to cooperate with vocational rehabilitation, the ALJ ruled Good Hope's vocational rehabilitation efforts were "premature as the Claimant was not an 'eligible employee.'"³ The ALJ did not define "eligible employee," and that phrase is not defined in the Act; however, given the findings that there was no Functional Capacity Evaluation performed to assess Ms. Bemby's work capacity and that there was no evidence Dr. John P. Byrne had released Ms. Bemby to return to work before September 1, 2009, it seems the ALJ determined that Ms. Bemby did not need to participate in vocational rehabilitation because she had not been released to work at the time vocational rehabilitation efforts were offered. This ruling reflects a misconception as to when vocational rehabilitation is appropriate- a physician's release is not required to compel participation in vocational rehabilitation if it does not require physical exertion.⁴

Based upon this determination, the CRB vacated the ruling regarding Ms. Bemby's purported failure to cooperate with vocational rehabilitation. On remand, the ALJ will make the appropriate factual determinations including the date Ms. Bemby was capable of participating in vocational rehabilitation, if ever, and whether or not Ms. Bemby failed to cooperate with vocational rehabilitation, if necessary; making such determinations in this case is not within the scope of appeal to this tribunal.

We now turn to Good Hope's remaining argument. Good Hope characterizes the April 13, 2012 Decision and Remand Order as "imposing a burden that an actual job offer must be made if the claimant has been released by the treating physician to return to her normal and usual occupation"⁵ because Ms. Bemby's physical limitations and restrictions were within the parameters of her pre-injury job.

² Ms. Bemby did not file any reply.

³ *Bembry v. Good Hope Institute*, AHD No. 08-377A, OWC No. 647887 (February 16, 2010), p.6.

⁴ *Bembry v. Good Hope Institute*, CRB No. 10-083, AHD No. 08-377A, OWC No. 647887 (April 13, 2012), p.4. (Internal footnote omitted.)

⁵ Employer/Carrier's Motion for Reconsideration, p.2.

There is substantial evidence in the record to support the ALJ's ruling that until September 1, 2009, Dr. Byrne (Ms. Bembry's treating physician) had not released her to return to any work; when he did release her, he did so with light duty limitations to "limit walking, prolonged stair climbing, and to avoid lifting, bending, and twisting."⁶ The ALJ further ruled that Ms. Bembry's pre-injury employment was not "commensurate with any limitations she may have."⁷ It is this ruling that caused the ALJ to analyze Ms. Bembry's purported voluntary limitation of income and determine Good Hope had not "made a job offer commensurate with her physical limitations and medical restrictions"⁸ and had "failed to show the existence of a viable job offer."⁹

At the hearing, Good Hope argued the independent medical examination physician's opinion and the opinion of Dr. Bryne were that Ms. Bembry "could go back to her normal job."¹⁰ The ALJ accepted the opinion of the treating physician over that of the independent medical examination physician, and as noted above, Dr. Byrne did not release Ms. Bembry to return to her pre-injury work; Dr. Byrne released Ms. Bembry with light duty limitations. It is only on appeal that Good Hope asserted that Ms. Bembry's pre-injury position was commensurate with her limitations,¹¹ and we decline to address this issue which was not raised at the hearing.¹²

Employer/Carrier's Motion for Reconsideration is DENIED.

FOR THE COMPENSATION REVIEW BOARD:

MELISSA LIN JONES
Administrative Appeals Judge

May 9 2012
DATE

⁶ *Bembry v. Good Hope Institute*, AHD No. 08-377A, OWC No. 647887 (February 16, 2010), p.3.

⁷ *Id.*

⁸ *Bembry v. Good Hope Institute*, AHD No. 08-377A, OWC No. 647887 (February 16, 2010), p. 7.

⁹ *Id.*

¹⁰ Hearing Transcript p. 11; see also, Hearing Transcript p. 62.

¹¹ Good Hope also asserts "the treating doctor testified that all of the jobs located by the vocational rehabilitation counselor, and available, were within her restrictions" (Employer/Carrier's Motion for Reconsideration, p. 3), but there is no evidence Ms. Bembry's pre-injury position at Good Hope was one "of the jobs located by the vocational rehabilitation counselor."

¹² *Frick v. Cirque du Soleil*, Dir. Dkt. No. 95-00, H&AS No. 92-731A, OWC No. 224235 (November 9, 1995) ("[W]hen a case is appealed from Hearings and Adjudication for review at this level, such review is limited to that which was presented at the evidentiary hearing conducted below.")