GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

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COMPENSATION REVIEW BOARD

DEPT. OF EMPLOYMENT SERVICES
COMPENSATION REVIEW BOARD
2014 APR 7 PM 12 01

CRB No. 10-141(2)(R)

NATHALIA L. BROWN,
Petitioner,

v.

POTOMAC ELECTRIC POWER COMPANY,
Intervenor

On Remand from the District of Columbia Court of Appeals
83 A.3d 739 (D.C. 2014).

Matthew J. Peffer for the Petitioner
Kevin J. O'Connell for the Intervenor

Before MELISSA LIN JONES and JEFFREY P. RUSSELL, *Administrative Appeals Judges*, and LAWRENCE D. TARR, *Chief Administrative Appeals Judge*.

MELISSA LIN JONES for the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

On March 26, 1995 while working as a lead shop-mechanic for the Potomac Electric Power Company ("Pepco"), Ms. Nathalia Brown touched a live wire as she was standing on a ladder. She received an electric shock, and to break the connection, a coworker kicked the ladder out from under her.

On March 15, 2005, an administrative law judge ("ALJ") held Ms. Brown had sustained multiple injuries to her back, neck, arms, and legs. The ALJ awarded Ms. Brown specified medical treatment.[1] This Compensation Order was not appealed.

On January 5, 2006, another ALJ presided over another formal hearing. At this proceeding, Ms.

[1] *Brown v. PEPCO,* AHD No. 98-259A, OWC No. 525617 (March 15, 2005).

Brown requested an award of permanent total disability benefits. The issues raised by the parties were

1. The nature and extent of disability, if any.

2. Whether Claimant voluntarily limited her income in contravention of D.C. Official Code §32-1508(3)(V)(iii)?

3. Whether Claimant failed to cooperate with vocational rehabilitation services provided by Employer in contravention of D.C. Official Code §32-1507(d)?[2]

On the issue of Ms. Brown's failure to cooperate with vocational rehabilitation, the ALJ found:

> [I]n November 2005 Employer retained the services of a vocational consultant to provide Claimant with vocational rehabilitation services and direct job placement. I find that the vocational consultant arranged for Claimant to undergo a functional capacity evaluation (FCE), which indicated Claimant could work four hours a day in a sedentary position. I find that the vocational consultant also performed a labor market survey, which identified actual and available sedentary positions that Claimant was capable of performing within her physical limitations.
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> I find that out of eight scheduled meeting[s] with the vocational consultant, Claimant attended only four and did not complete any of her vocational job-search assignments. I find that the vocational consultant sent Claimant four set of job leads. Claimant only contacted a couple of employers on the first list but not in the manner required by the potential employers.[3]

When analyzing this issue, the ALJ stated:

> Employer seeks a determination that Claimant fail[ed] to cooperate with vocational rehabilitation in violation of D.C. Official Code §32-1507(d), which states in pertinent part:
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> > "If at any time during such period the employee unreasonably refuses . . . to accept vocational rehabilitation that the Mayor shall, by Order, suspend the payment of further compensation, medical payments, and other health insurance coverage during such period, unless the circumstances justified the refusal."

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[2] *Brown v. Potomac Electric Power Company,* AHD No. 98-259B, OWC No. 525617 (January 18, 2007), pp. 2-3.

[3] *Id.* at 4.

> In support, Employer points to Claimant's initial statement to the vocational consultant that she was not motivated to return to work or learn a new vocation. Claimant also failed to attend regularly scheduled vocational rehabilitation appointments. The consultant made Claimant aware of weekly meetings to assist in developing job skills and in direct job placement. A total of eight counseling session appointments had to be scheduled for Claimant to make four meetings with the consultant.
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> At the conclusion of each meeting, a subsequent meeting was scheduled with Clamant notified in writing, given a vocational assignment, and asked to confirm receipt of the correspondence and the appointment.
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> Claimant failed to follow through on any of her vocational assignments using a variety of excuses. Prior to scheduled meetings, Claimant was asked to assist in drafting a resume, to make a list of jobs at Pepco that she was capable of performing, and to develop a list of nontraditional jobs that she would be interested in; all of which she failed to either attempt or complete. On four separate occasions, Claimant was sent a list of job leads that were deemed within her work restrictions. The list also contained specific instructions on how to contact the employer and how to apply for each position. Claimant admitted that she only called a few of the employers on the first list and did not apply for any of the positions and sought to justify her actions by stating that [it] was during the holiday. HT at 72.
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> The substantial evidence in the record establishes a continued pattern of conduct by Claimant evincing an unwillingness to cooperate with vocational rehabilitation. Evidence in the record shows that Claimant is employable based upon the results in the FCE report, the IME reports, the labor market survey, and Claimant's own testimony of her physical capabilities as independently verified by video surveillance. Claimant's actions warrant a finding that she has failed to cooperate with vocational rehabilitation and thus her temporary total disability benefits should be suspended until such time as she expresses a willingness to cooperate.[4]

In a Compensation Order dated January 18, 2007, the ALJ denied Ms. Brown's claim for relief and suspended Ms. Brown's benefits because she had failed to cooperate with vocational rehabilitation services. The ALJ also found Ms. Brown had voluntarily limited her income because she had refused light duty work.

On appeal, Ms. Brown raised three arguments before the Compensation Review Board:

1. The Employer failed to establish the availability of suitable jobs for which Ms. Brown can compete and realistically secure. In the alternative, Ms. Brown

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[4] *Id.* at pp. 8-9.

provided substantial evidence challenging the legitimacy of the Employer's evidence of available employment.

* * *

2. The ALJ's findings that Ms. White-Fowler's report about Ms. Brown's physical capabilities is more persuasive evidence of employment capabilities is not supported by substantial evidence.

* * *

3. The ALJ's conclusion that Ms. Brown did not want to return to work and voluntarily limited her income is not supported by substantial evidence.[5]

Ms. Brown did not raise any issue regarding the ruling that she had failed to cooperate with vocational rehabilitation, and on May 15, 2007, the Compensation Review Board ("CRB") affirmed this Compensation Order.[6] No appeal was taken to the District of Columbia Court of Appeals nor did Ms. Brown "seek to terminate the suspension of her benefits by expressing a willingness to cooperate with vocational rehabilitation."[7]

In November 2008, the parties proceeded to a third formal hearing. At that time, Ms. Brown requested permanent partial disability schedule benefits and permanent partial disability wage loss benefits.

In the resulting Compensation Order dated April 30, 2009, an ALJ acknowledged the January 18, 2007 Compensation Order's denial of permanent total disability and voluntary limitation of income. The ALJ did not mention the suspension of Ms. Brown's benefits for failure to cooperate with vocational rehabilitation, but she incorporated by reference the findings of fact and conclusions of law in that prior Compensation Order.[8] In the end, the ALJ awarded Ms. Brown consecutive permanent partial disability schedule benefits and permanent partial disability wage loss benefits subject to her reduced average weekly wage in accordance with the previous ruling that she had voluntarily limited her income.

Ms. Brown appealed only the ruling that her schedule member benefits and non-schedule-member, wage-loss benefits should run consecutively; in response, Pepco only addressed Ms. Brown's arguments regarding consecutive payment of her benefits. The CRB affirmed the ruling that any awards should run consecutively; however, because the ALJ had not addressed the issue

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[5] Memorandum of Points and Authorities in Support of Application for Review (CRB No. 07-046), pp. 12, 17, 19. The CRB takes official notice of the administrative record created by both the CRB and by the Office of Administrative Hearings, Administrative Hearings Division.

[6] *Brown v. PEPCO,* CRB No. 07-46, AHD No. 98-259B, OWC No. 525617 (May 15, 2007).

[7] *Brown v. DOES*, 83 A.3d 739, 743 (D.C. 2014).

[8] *Brown v. Potomac Electric Power Company,* AHD No. 98-259D, OWC No. 525617 (April 30, 2009).

of whether Ms. Brown was eligible to receive any award following the previous suspension of benefits, the case was remanded:

> On January 18, 2007, an ALJ suspended Petitioner's benefits because she failed to cooperate with vocational rehabilitation "until such time as she expresses a willingness to cooperate." (CO 2 at 9). The ALJ did not discuss in CO3 that Petitioner's benefits were suspended because she failed to cooperate with vocational rehabilitation.
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> There is nothing in the record before the CRB that shows this finding was modified. If Petitioner's benefits remain suspended because she failed to cooperate with vocational rehabilitation, then the ALJ did not have authority to enter any award. D.C. Official Code §32-1507(d).
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> * * *
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> Without an explanation as to the basis for any award in light of the earlier and unmodified holding that Petitioner refused vocational rehabilitation, and without an explanation as to the basis for a permanent partial award in light of the earlier and unmodified holding that Petitioner voluntarily limited her income, the CRB is unable to determine that the awards entered in CO3 are supported by substantial evidence and in accordance with the law.[9]

Neither party requested reconsideration, and on June 10, 2010, an ALJ issued a Compensation Order on Remand. The ALJ ruled Ms. Brown is not entitled to permanent partial disability benefits because Ms. Brown had neither requested a modification of the January 18, 2007 Compensation Order nor demonstrated a change in condition since the issuance of that Compensation Order:

> Claimant began receiving temporary total disability benefits in 2000. (CO3). [The January 18, 2007 Compensation Order ("CO2")] determined that Claimant was not permanently and totally disabled, that she could perform light weight work, and that she failed to cooperate with vocational rehabilitation. (CO2 p.9). ALJ McCoy suspended Claimant's disability benefits because of her failure to cooperate with vocational rehabilitation. (CO2 p.10). In CO3, Claimant did not seek to modify the order consistent with §32-1524 of the Act and the modification process established by *Snipes*. The ALJ did not issue an order to modify previous holdings in CO3. *See* CO3. Instead, Claimant sought a permanent partial disability award without providing evidence of a change in condition or asking the court to review whether there was a change in Claimant's condition that made her continued failure to cooperate with vocational rehabilitation reasonable or that justified her refusal to cooperate with vocational rehabilitation. Therefore,

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[9] *Brown v. Potomac Electric Power Company,* CRB No. 09-085, AHD No. 98-259B, OWC No. 525617 (August 18, 2009). (Footnote omitted.)

> Claimant's benefits remain suspended pursuant to §32-1507(d), and she is not entitled to receive permanent partial disability benefits.[10]

Notwithstanding the January 18, 2007 Compensation Order ruling that Ms. Brown has voluntarily limited her income and has failed to cooperate with vocational rehabilitation, on appeal to the CRB, Ms. Brown argued she was entitled to concurrent schedule member permanent partial disability benefits and wage loss permanent partial disability benefits because "the consequences of Ms. Brown's refusal to participate in vocational rehabilitation was a finding that she voluntarily limited her income and was not entitled to temporary total disability benefits[,and t]his finding does not preclude the finding reached previously that Ms. Brown is entitled to permanent partial scheduled member and wage loss benefits."[11] She requested the CRB reverse the June 10, 2010 Compensation Order on Remand.

On the other hand, Pepco argued Ms. Brown is not entitled to permanent partial disability benefits because the January 18, 2007 Compensation Order suspending benefits for failure to cooperate with vocational rehabilitation and voluntary limitation of income has not been modified. In addition, Pepco argued the law of the case establishes Ms. Brown is not entitled to concurrent permanent partial disability benefits for schedule and non-schedule injuries. Pepco requested the CRB affirm the June 10, 2010 Compensation Order on Remand.

The CRB did affirm the June 10, 2010 Compensation Order on Remand,[12] and Ms. Brown filed an appeal with the District of Columbia Court of Appeals ("Court"). On appeal, Ms. Brown raised two points of error by the CRB:

> *first*, by raising *sua sponte* a previous suspension of her benefits on account of her refusal to cooperate with vocational rehabilitation as a continuing bar to any disability compensation award; and *second*, in holding that if the bar is removed and Brown is awarded permanent partial disability compensation for both "schedule" and "non-schedule" injuries, those partial disability awards must be paid to her consecutively rather than concurrently because concurrent payments would exceed the payments that Brown could receive if she were permanently and totally disabled.[13]

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[10] *Brown v. Potomac Electric Power Company*, AHD No. 98-259D, OWC No. 525617 (June 10, 2010), p.5.

[11] Claimant's Application for Review (CRB No. 10-141), unnumbered p. 6. (Footnote omitted.)

[12] *Brown v. Potomac Electric Power Company*, CRB No. 10-141(2), AHD No. 98-259D, OWC No. 525617 (March 8, 2012).

While a decision was pending on appeal, the parties proceeded to a fourth formal hearing before a different ALJ. On the issue of authorization for medical treatment (MRIs of the right knee and left wrist) and for a whirlpool bathtub. The ALJ determined a whirlpool bathtub was not reasonable and necessary, and the ALJ agreed with Pepco's argument that the suspension of benefits previously imposed for Ms. Brown's failure to cooperate with vocational rehabilitation prevented the ALJ from awarding Ms. Brown authorization for an MRI, out-of-pocket expenses, or the whirlpool bathtub. *Brown v. Pepco*, AHD No. 98-259F, OWC No. 525617 (February 29, 2012).

[13] *Brown*, 83 A.3d at 741-742.

The Court affirmed the CRB's holding that "the awards for permanent partial disability schedule benefits and for permanent partial wage loss benefits are payable consecutively."[14] It vacated the CRB's holding "that any further payment of disability benefits to Brown is suspended until such time as the January 18, 2007 compensation order finding that she failed to cooperate with vocational rehabilitation is modified pursuant to D.C. Code §32-1524."[15]

ISSUES ON APPEAL

1. When a Compensation Order suspends a claimant's benefits for failure to cooperate with vocational rehabilitation is a claimant entitled to an award of additional benefits without first obtaining a modification of that prior Compensation Order?

2. When requesting modification of a prior Compensation Order suspending benefits for failure to cooperate with vocational rehabilitation is the party requesting the modification bound by the imitations periods in §32-1524(a) of the District of Columbia Workers' Compensation Act, as amended, D.C. Code §32-150 *et seq.* ("Act")?

ANALYSIS

There is no dispute that following a formal hearing to adjudicate Ms. Brown's entitlement to permanent total disability benefits, her benefits were suspended for failure to cooperate with vocational rehabilitation:

> The ALJ rendered his decision in a January 18, 2007, compensation order. Finding that Brown was not totally disabled, that she had voluntarily limited her income by failing to accept offered employment, and that she had refused unreasonably to cooperate with vocational rehabilitation, the ALJ denied her claim for permanent total disability benefits and, in accordance with D.C. Code §32-1507(d), declared that Brown's "temporary total disability benefits should be suspended until such time as she expresses a willingness to cooperate" with vocational rehabilitation.[16]

That Compensation Order was affirmed by the CRB, and no appeal was taken to the District of Columbia Court of Appeals. In addition, Ms. Brown made no effort to cure her failure to cooperate in order to terminate the suspension of her benefits pursuant to that Compensation Order.

At a formal hearing to adjudicate Ms. Brown's entitlement to permanent partial disability benefits more than a year later, neither party addressed the ongoing suspension, and an ALJ

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[14] *Id.* at 756.

[15] *Id.*

[16] *Id.* at 742-743. (Footnotes omitted.)

awarded Ms. Brown both schedule permanent partial disability benefits and wage loss permanent partial disability benefits. Even on appeal to the CRB, neither party addressed the outstanding Compensation Order suspending Ms. Brown's entitlement to benefits until she cured her failure to cooperate with vocational rehabilitation.

To begin, in the April 30, 2009 Compensation Order, the ALJ "adopted and incorporated the findings of fact and conclusions of law set forth in both the March 15, 2005 Compensation Order and in the January 18, 2007 Compensation Order."[17] One of the conclusions of law incorporated by reference was Ms. Brown is not entitled to benefits because she failed to cooperate with vocational rehabilitation. Awarding any benefits without addressing this previous ruling resulted in a Compensation Order that is internally inconsistent and, therefore, is not in supported by substantial evidence in the record.

Furthermore, as a matter of law, until Ms. Brown cures her failure to cooperate with vocational rehabilitation, she is not entitled to any additional benefits. Pursuant to §32-1507(d) of the Act,

> 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.

As the Court agrees, the plain language of the Act does not discriminate as to the type of benefit to be suspended when a claimant fails to cooperate;[18] the payment of all "further compensation, medical payments, and health insurance" is suspended.[19] Until the suspension is lifted, an ALJ has no power to award any additional benefits, and in this way, the failure to address the suspension in the April 30, 2009 Compensation Order presents an impediment as noted in the August 18, 2009 Decision and Remand Order.

With an understanding of the posture of this case, the CRB did not raise an issue *sua sponte*; it did not engage in fact-finding; and it did not "deny a disability claim on a ground not presented by the parties to the ALJ or considered by the ALJ."[20] What the CRB'S August 18, 2009 Decision and Remand Order did was remind everyone involved in this matter that as is often the situation, adjudication of a workers' compensation claim does not occur in a vacuum, and in this case the procedural posture of the matter was (and is) such that there remained in place a Compensation Order suspending Ms. Brown's entitlement to benefits. This prior ruling is not

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[17] *Brown v. Potomac Electric Power Company,* AHD No. 98-259D, OWC No. 525617 (April 30, 2009), p. 2.

[18] *Brown v. DOES*, 83 A.3d at 750.

[19] An employer's obligation to continue to pay health insurance premiums pursuant to §32-1507(a-1)(4) of the Act has been preempted by §514(a) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1144. *D.C. v. Greater Washington Board of Trade*, 506 U.S. 125, 113 S.Ct. 580 (1992).

[20] *Brown v. DOES*, 83 A.3d at 746.

one that simply could be ignored; for the CRB to do so would have been to accept a "material misconception of the law"[21] and to affirm a Compensation Order that was not in accordance with the law.

Even assuming Pepco somehow waived the suspension[22] by ignoring the procedural posture of the case, the error here is clear; pursuant to the Act, Ms. Brown is not entitled to benefits because the ruling that she failed to cooperate with vocational rehabilitation has not been modified. This tribunal has an obligation to address an error that is in contravention of the law and that prejudicially affects the proceedings below. Under such circumstances, the CRB is required to correct the error that seriously affects the fairness, integrity, and reputation of the proceedings.

As for requiring a claimant to comply with the modification provisions in §32-1524 of the Act in order to lift a suspension, we find no language in the Act that excludes from the modification provision a Compensation Order that suspends benefits as opposed to one that grants or denies benefits:

> (a) At any time prior to 1 year after the date of the last payment of compensation or at any time prior to 1 year after the rejection of a claim, provided, however, that in the case of a claim filed pursuant to §32-1508(a)(3)(V) the time period shall be at any time prior to 3 years after the date of the last payment of compensation or at any time prior to 3 years after the rejection of a claim, the Mayor may, upon his own initiative or upon application of a party in interest, order a review of a compensation case pursuant to the procedures provided in §32-1520 where there is reason to believe that a change of conditions has occurred which raises issues concerning:
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> > (1) The fact or the degree of disability or the amount of compensation payable pursuant thereto; or
> >
> > (2) The fact of eligibility or the amount of compensation payable pursuant to §32-1509.
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> (b) A review ordered pursuant to subsection (a) of this section shall be limited solely to new evidence which directly addresses the alleged change of conditions.
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> (c) Upon the completion of a review conducted pursuant to subsection (a) of this section, the Mayor shall issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation previously paid, or award compensation. An award increasing or decreasing the compensation rate may be made and shall be effective from the date of the Mayor's order for a review of the compensation case. If, since the date of the Mayor's order for a

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[21] See *Moore v. DOES*, 813 A.2d 227, 229 (D.C. 2002).

[22] It is unclear how a party unilaterally could waive a suspension imposed by an ALJ in a Compensation Order and affirmed by the CRB in a Decision and Remand Order.

> review of the compensation case, the employer has made any payments of compensation at a rate greater than the rate provided in the new compensation order, the employer shall be entitled to be reimbursed for the difference in accordance with rules promulgated by the Mayor. If, since the date of the Mayor's order for review of the compensation case, the employer has made any payments of compensation at a rate less than the rate provided in the new compensation order, the employee shall be entitled to the difference as additional compensation in accordance with rules promulgated by the Mayor.
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> (d) A compensation order issued pursuant to subsection (c) of this section shall be reviewable pursuant to §32-1522.

Pepco and Ms. Brown have reciprocal obligations in terms of vocational rehabilitation.[23] Ms. Brown failed to satisfy her obligation to cooperate with the vocational rehabilitation provided by Pepco, and as a result, her benefits were suspended. Although suspension of benefits lasts "only 'during such period' as 'the employee unreasonably refuses. . . to accept vocational rehabilitation,"[24] this language is not in conflict with the Act's modification provision at §32-1524(a) that requires a party protect its rights within

> any time prior to 1 year after the date of the last payment of compensation or at any time prior to 1 year after the rejection of a claim, provided, however, that in the case of a claim filed pursuant to §32-1508(a)(3)(V) the time period shall be at any time prior to 3 years after the date of the last payment of compensation or at any time prior to 3 years after the rejection of a claim.[25]

At any time, it was solely within Ms. Brown's power to end the suspension by cooperating with vocational rehabilitation[26] or by merely expressing a willingness to do so.[27] There is nothing unreasonable or contradictory about requiring a claimant to make such a minimal showing within "1 year after the date of the last payment of compensation or at any time prior to 1 year after the rejection of a claim, provided, however, that in the case of a claim filed pursuant to §32-1508(a)(3)(V) the time period shall be at any time prior to 3 years after the date of the last

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[23] Section §32-1507 of the Act.

[24] *Brown v. DOES*, 83 A.3d at 751.

[25] Section §32-1524(a) of the Act.

[26] *Black v. DOES*, 801 A.2d 983, 986 (D.C. 2002). See also, *Brown v. DOES*, 83 A.3d. at 750, nt. 39:

> Brown argues that there was no evidence that PEPCO had continued to offer her vocational rehabilitation services after her benefits were suspended, which she contends it was obligated to do by D.C. Code § 32-1507 (a). But the lack of such evidence is immaterial to the continuation of the suspension in the absence of any expression by Brown of a genuine willingness to take advantage of such services.

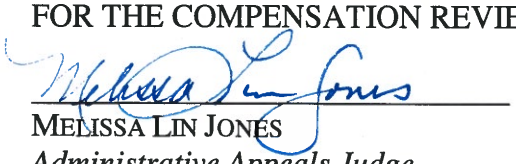
[27] *Darden v. DOES*, 911 A.2d 410, 416-417 (D.C. 2006).

payment of compensation or at any time prior to 3 years after the rejection of a claim."[28] We cannot dispute that given the plain and unambiguous language of §§32-1507 and 32-1524 of the Act claimants have strong incentives to cooperate with vocational rehabilitation in order to avoid suspension of entitlement to any additional benefits any more than we can dispute that the threshold for undoing the suspension is so low as to be readily accomplished even within one year under the worst of circumstances.

CONCLUSION AND ORDER

When a Compensation Order suspends a claimant's benefits for failure to cooperate with vocational rehabilitation, a claimant is not entitled to an award of additional benefits without first obtaining a modification of that prior Compensation Order. When requesting modification of a prior Compensation Order the party requesting the modification is bound by the limitations periods in §32-1524(a) of the Act.

FOR THE COMPENSATION REVIEW BOARD:



MELISSA LIN JONES
Administrative Appeals Judge

April 7, 2014
DATE

[28] Section 32-1524(a) of the Act.