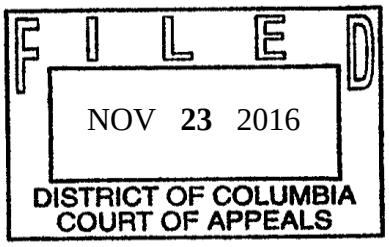
DISTRICT OF COLUMBIA COURT OF APPEALS

No. 15-AA-969



FAHAD AL-KHATAWI, PETITIONER,

v.

DISTRICT OF COLUMBIA DEPARTMENT OF EMPLOYMENT SERVICES, RESPONDENT,

and

HERSONS GLASS COMPANY, *et al.*, INTERVENORS.

Appeal from the Office of Hearings and
Adjudications Section, District of Columbia
Department of Employment Services
(CRB-32-15)

(Submitted September 29, 2016 Decided November 23, 2016)

Before GLICKMAN and EASTERLY, *Associate Judges*, and PRYOR, *Senior Judge*.

MEMORANDUM OPINION AND JUDGMENT

PER CURIAM: Petitioner Fahad Al-Khatawi challenges the Compensation Review Board's affirmance of the Administrative Law Judge's Compensation Order on Remand, which denied his claim for disability benefits from Respondent Employer, Hersons Glass Company. For the reasons below, we affirm the Board's decision.

I.

Petitioner worked as a glass installer for Respondent. On October 5, 2000, Petitioner was injured while lifting a heavy piece of floor-to-ceiling glass. Petitioner was diagnosed with a herniated disc and underwent back surgery on March 16, 2001. Respondent began voluntary compensation payments to Petitioner on October 5, 2000.

In February 2011, Respondent initiated vocational rehabilitation job placement assistance for Petitioner. Petitioner was instructed as part of the vocational rehabilitation to perform independent job searches periodically and to maintain a log of identified jobs.

On October 6, 2011, a formal hearing before Administrative Law Judge ("ALJ") David L. Boddie commenced. Petitioner argued that he was permanently and totally disabled as a result of his work injury. On February 4, 2013, the ALJ issued a compensation order finding that Petitioner was temporarily totally disabled. The ALJ found that Petitioner's medical reports were insufficient to find him permanently and totally disabled. The ALJ further found that Petitioner had the capacity to work in other sedentary jobs. Moreover, the ALJ found that Petitioner had failed to perform independent job searches, maintain a job log, or follow up on job leads as instructed by his vocational rehabilitation counselor. The ALJ did not find Petitioner "credible when he testified that he did everything that was requested of him in cooperating with vocational rehabilitation." Furthermore, the ALJ found that Petitioner was advised of his non-compliance by his counselor. The ALJ concluded that Petitioner had unreasonably refused vocational rehabilitation from May 2011 to October 2011.

On November 14, 2014, the Compensation Review Board ("Board") affirmed in part and remanded in part. The Board affirmed the ALJ's finding that Petitioner was not permanently and totally disabled because there was a specific finding that Petitioner had not reached maximum medical improvement. The Board also affirmed the finding that Petitioner was required to perform an independent job search and maintain a job log and that failure to do so amounted to a failure to comply with vocational rehabilitation. The Board remanded to specifically define Petitioner's period of non-cooperation, finding that it was "unclear precisely when the period of suspension begins and ends; it also is unclear what evidence the ALJ relied upon to reach the conclusion that Mr. Al-Khatawi cured his failure to cooperate [in October 2011], particularly in light of the credibility ruling against Mr. Al-Khatawi." The Board also remanded for a determination as to whether Petitioner voluntarily limited his income by failing to follow up on job leads.

On January 28, 2015, ALJ Gregory Lambert issued a compensation order on remand finding that Petitioner had been uncooperative with vocational rehabilitation beginning on April 26 until an undefined point in the future. Lambert did not address the issue of whether Petitioner voluntarily limited his income — finding that the issue was moot given the findings concerning vocational rehabilitation. Petitioner appealed and Respondent cross-appealed.

On August 3, 2015, the Board affirmed the compensation order on remand. The Board made clear that meeting with a vocational rehabilitation officer was insufficient to constitute an indication that Petitioner had cured his failure to cooperate. The Board disagreed with Petitioner's argument that the Respondent was required to notify him of alleged deficiencies in his participation and provide him with the opportunity to cure said deficiencies.

II.

We review the Board's decision that affirmed the ALJ's compensation order — we do not directly review the ALJ's determination. *Jones v. District of Columbia Dep't of Emp't Servs.*, 41 A.3d 1219, 1221 (D.C. 2012). "We will affirm the Board's decision unless it was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Id.* (quoting D.C. Code § 2-510 (a)(3)(A) (2001). Moreover, this Court defers to the Board as long as the Board's decision flows rationally from the facts, and those facts are supported by substantial evidence in the record. *Clark v. District of Columbia Dep't of Emp't Servs.*, 772 A.2d 198 (D.C. 2001). We affirm the Board's determinations for the foregoing reasons.

We affirm the Board's determination that Petitioner was non-compliant with respect to his vocational rehabilitation duties. Pursuant to the Worker's Compensation Act ("Act"), an employer may discontinue compensation payments if the employee "unreasonably refuses to . . . accept vocational rehabilitation." D.C. Code § 32-1501, *et seq.* (2008) (Worker's Compensation Act or "WCA"). Given the ALJ's findings that, among others, Petitioner applied to less than two jobs per month, did not follow up with job leads, did not conduct an independent job search — all of which are supported by substantial evidence in the record — we find that the Board's decision to affirm that ALJ's order denying petitioner's compensation benefits flow rationally from the facts. *See Clark*, 772 A.2d at 201. Thus, we affirm the Board's decision denying Petitioner compensation benefits due to his failure to comply with vocational rehabilitation requirements.

Petitioner argues that the CRB should have construed the Act to impose on employers an implicit requirement to provide an employee with notice and an opportunity to cure before requesting the suspension of benefits on account of the employee's failure to cooperate with vocational rehabilitation services. When this Court reviews questions of law, "our review is subject to well-established doctrines mandating deference to an administrative agency's interpretation of its own rules and regulations and of the statute it is charged with implementing." *See Brown v. District of Columbia Dep't of Emp't Servs.*, 83 A.3d 739, 745-46. The Board

found Petitioner's argument in favor of a notice and opportunity-to-cure requirement unpersuasive. For the reasons that follow, we conclude that the Board adequately justified its rejection of the proposed requirement and we defer to its construction of the Act in this regard.

Prior to the Board's creation, the Director of the Department of Employment Services announced a notice and opportunity-to-cure requirement with respect to suspension of benefits for failure to cooperate with vocational rehabilitation services in a decision that was overturned by this court on other grounds. *See Epstein v. District of Columbia Department of Employment Services*, 850 A.2d 1440, 1443 (D.C. 2004). As we noted in that case, "the Director did not point to any provision of the Workers' Compensation Act or regulation as justifying the rule," and it was "not foreshadowed" by any prior agency decision. *Id.* Rather, the Director simply viewed the requirement as desirable in light of the humanitarian policy of the Act. *See id.* at 1442. As we also noted, the Director did not define "the contours" of the notice and opportunity-to-cure requirement, *id.* at 1443, and thus left many basic questions unanswered: "For instance, what form must the notice take? Is informal notice sufficient or must it be in writing? Must the notice specify the consequences of failure to cure? And how long must the cure period last?" *Id.* at 1143-44. None of these questions has been answered in the years since *Epstein*. Indeed, as the Board observes in the present case, "the Director never again, to our knowledge, applied the rule, and the CRB has likewise never been called upon to address it." *See also In re Elizabeth Lagon*, AHD 14-599, 2015 WL 6128697, at *3 (Sept. 30, 2015) (same).

"Decisions issued by the Director prior to the establishment of the Board shall be accorded persuasive authority by the Board." 7 DMCR § 255.7. Accordingly, as the Board concluded, "while [the Board] owe[s] some deference to Director's decisions, [the Board is] not bound by them except to the extent that [the Board] deem[s] them to be persuasive." The Board therefore was free to reconsider and reject the notice and opportunity-to-cure requirement adopted by the Director, and – after noting what it took to be this court's evident skepticism of the requirement in *Epstein* – it concluded that "the Director-created 'notice and opportunity to cure' rule is not the law under the Act."

In finding the Director's decision unpersuasive, the Board reasoned that "[a] claimant's and employer's obligations are defined by the Act and the regulations" implementing it, and that there is no language in the Act or the regulations requiring such notice. More particularly, the Board emphasized that "the Act has numerous provisions requiring that one party give specific notice of certain facts in order to be in compliance with the Act, and none of these provisions are contained

in the law or regulations governing the provision of vocational rehabilitation, and most notably, no such requirement is included in the suspension of benefits provision." Nor did the Board perceive a sufficiently strong policy justification for implying a notice and opportunity-to-cure requirement in the absence of its formal adoption by legislation or regulation. Rather, the Board explained,

> While a claimant is certainly permitted to argue that under the facts of a given case, the failure of someone to advise the claimant that the level of cooperation constitutes a threat to continuing to receive benefits should be a factor in deciding whether the claimant's conduct was unreasonable, the relevance of that fact and the significance that it has on a particular set of facts is a matter best and properly left to the sound discretion of the fact finder.

The Board's interpretation of the Act and the implementing regulations "is binding on this court unless it conflicts with the plain meaning of the statute or its legislative history." *Brown*, 83 A.3d at 746 n.21 (internal quotation marks and citation omitted). "Indeed, we must sustain the agency's interpretation even if a petitioner advances another reasonable interpretation of the statute or if we might have been persuaded by the alternate interpretation had we been construing the statute in the first instance." *Id.*

We are satisfied that the Board's interpretation is a reasonable one. It certainly is consistent with the Act and the regulations. In contrast, there exists no textual support for inferring a notice and opportunity-to-cure requirement. Nor is the Board's interpretation in conflict with the humanitarian policy of the Act. The most that can be said is that adoption of a notice and opportunity-to-cure rule might further that policy somewhat. That is not enough to permit this court to override the reasoned judgment of the CRB in this area. Accordingly, we defer to the Board's construction of the Act and hold that the Board adequately justified its decision not to follow the decision of the Director in *Epstein*.

Finally, Petitioner argues that he is eligible for permanent and total disability benefits. If an "employee is unable to earn any wages in the same or other employment," then the employee may be able to demonstrate permanent total disability. D.C. Code § 32-1508(1). Moreover, a claimant may prove permanence by establishing that maximum medical improvement has been attained or that the disability is of lasting or indefinite duration. *See Smith v. District of Columbia Dep't of Emp't Servs.*, 548 A.2d 95, 98 (D.C. 1998). Petitioner asserts that his

disability is "one of lasting or indefinite duration." However, we need not consider the question of the disability's permanence given the ALJ's findings that other sedentary jobs, with similar earning capacity, were physically possible for Petitioner. Thus, pursuant to D.C. Code § 32-1508(1), claimant is ineligible for permanent total disability benefits given his other viable job options.

Accordingly, we affirm the Board's judgment.

Affirmed.

ENTERED BY DIRECTION OF THE COURT:

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Clerk of the Court

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