GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

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COMPENSATION REVIEW BOARD

DEPT. OF EMPLOYMENT SERVICES
COMPENSATION REVIEW BOARD
2017 MAR 8 PM 1 39

CRB No. 16-141

RICHARD A. WALSH,
Claimant–Petitioner,

v.

VERIZON COMMUNICATIONS, INC., and
SEDGWICK CLAIMS MANAGEMENT SERVICES,
Self-Insured Employer/Third-Party Administrator-Respondent.

Appeal from a September 26, 2016 Compensation Order
by Administrative Law Judge Gregory P. Lambert
AHD No. 07-122G, OWC No. 563988

(Decided March 8, 2017)

Matthew J. Peffer for Claimant
James D. Reed for Employer

Before JEFFREY P. RUSSELL, HEATHER C. LESLIE and GENNET PURCELL, *Administrative Appeals Judges.*

JEFFREY P. RUSSELL for the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

This matter arises out of a claim for workers' compensation benefits pursuant to D.C. Code § 32-1501, *et seq*. the District of Columbia Workers' Compensation Act of 1979 (as amended) (the "Act").

Richard A. Walsh, Jr. ("Claimant") was injured while employed by Verizon Communications, Inc., on January 22, 2001. He has been receiving wage loss, medical and vocational rehabilitation benefits variously since then, during which time he has had his benefits suspended for unreasonable non-cooperation with vocational rehabilitation, and then restored, as will be discussed below, the details of which are not pertinent to this appeal.

As is also discussed below, Employer filed a Notice of Final Compensation Payments on January 6, 2015, stating that Claimant's entitlement to further temporary total disability (TTD) benefits has ended due to his having received the statutory maximum 500 weeks of TTD.

On June 23, 2016 a formal hearing was conducted before an Administrative Law Judge ("ALJ") in the Administrative Hearings Division in the Hearings and Adjudication Section of the District of Columbia Department of Employment Services ("DOES"). Following the formal hearing, the ALJ issued a Compensation Order ("CO") on September 26, 2016.

In the CO, the ALJ denied Claimant's claim for permanent total disability (PTD), temporary total disability (TTD) and additional medical care. The denials of wage loss benefits (PTD and TTD) were premised upon multiple and alternative grounds.

First, the ALJ determined that Claimant was not disabled (CO at 7), that even if Claimant had made a *prima facie* case of disability under *Logan v. DOES*, 805 A.2d 237 (D.C. 2002), Employer had demonstrated the availability of suitable alternative employment (CO at 7), and that Claimant had failed to refute Employer's showing of job availability (CO at 8).

Second, the claims were denied because the ALJ determined that Claimant has unreasonably failed to cooperate with vocational rehabilitation. CO at 8-9.

Although Employer had opposed the provision of the additional medical care and services on the grounds that they were neither reasonable nor necessary, the ALJ noted that no utilization review report to that effect had been adduced. Therefore, the CO does not contain a finding on the issue of reasonableness and necessity. Nonetheless, citing *Brown v. PEPCO*, CRB No. 10-141(2)(R) (August 3, 2015), the ALJ denied the claimed medical care due to the suspension of benefits determination.

Claimant filed Claimant's Application for Review and Memorandum of Points and Authorities in Support of Application for Review ("Claimant's Brief") with the Compensation Review Board ("CRB"), as well as Claimant's Motion to Reopen the Record for Receipt of Additional Evidence.

In Claimant's Brief, there is no complaint or argument concerning the ALJ's determinations that Claimant had failed to demonstrate that he was disabled from performing his pre-injury job, that Employer had demonstrated the existence and availability of suitable alternative employment, or that Claimant had failed to refute that showing.

Rather, Claimant's only complaints in this appeal relate to the suspension of benefits for unreasonable failure to cooperate, and Claimant seeks that the determination that Claimant's "benefits should be suspended to the Present and Continuing" be reversed. Claimant's Brief at 15.

Employer filed Employer's Opposition to Claimant's Application for Review and Memorandum of Points and Authorities in Support of the Employer's Response to the Claimant's Application for Review ("Employer's Brief").

In its Brief, Employer argued that the ALJ's determination that Claimant failed to cooperate with vocational rehabilitation is supported by substantial evidence and that the CO should be affirmed.

ANALYSIS

As an initial matter we address Claimant's Motion to Reopen the Record for Receipt of Additional Evidence.

In the motion, Claimant seeks to have the CRB re-open the record for receipt of a letter purportedly written to Claimant by Julie Overcash, Claimant's Vocational Case Manager at Restore Rehabilitation, dated October 3, 2016. The document purports to notify Claimant that she is closing Claimant's case management file at Employer's request. Citing *Bennett v. DOES*, 629 A.2d 28 (D.C. 1993) and *King v. DOES*, 560 A.2d 1067 (D.C. 1989) upon which *Bennett* was premised, Claimant argues that the letter is material to the claim presented at the formal hearing and that because it was written after the formal hearing, there exists a reasonable ground for the failure to offer the letter at the time of the formal hearing.

We note that not only was the document purportedly authored after the formal hearing, it was purportedly authored after the issuance of the CO on September 26, 2016. We therefore reject that the document was material to the issues presented at the formal hearing, since regardless of its legal effect, if any, upon Claimant's entitlement to vocational rehabilitation benefits, TTD, PTD or medical benefits at this time, it is of no relevance to any claim that was presented on June 23, 2016. Rather, to the extent that the matters set forth in the document have any relevance to this case, they represent a change or changes in conditions effecting entitlement to vocational rehabilitation and other benefits, and are properly presented in the context of a modification request under D.C. Code § 32-1524.[1] The motion is therefore denied.

As a second preliminary matter, we take administrative notice[2] of the Notice of Final Payment of Compensation, also known as Form No. 15 DCWC, which was filed by Employer on January 6, 2016 in the Office of Workers' Compensation ("OWC") in DOES. That document establishes that Employer made a final payment of temporary total disability on December 29, 2015. The

[1] In a slightly different context, Claimant argues that because the CO suspended Claimant's benefits due to non-cooperation with vocational rehabilitation "to the present and continuing", Claimant is precluded from seeking a modification to have his vocational rehabilitation services recommenced upon demonstrating a willingness to begin to cooperate. Claimant's Brief at 14. For the purposes of the motion, we reject this argument.

If a claimant, whose vocational rehabilitation benefits have been suspended in a compensation order because the employer has demonstrated that such efforts are futile due to non-cooperation, subsequently takes steps that the claimant claims have "cured" that non-cooperation, and the employer fails to resume provision of those vocational rehabilitation services, there is no impediment to the claimant seeking a modification of the suspension via the modification procedures set forth in the Act.

[2] We take administrative notice of the Form 15, as it is contained within the official records of DOES. *See Renard v. DOES*, 673 A.2d 1274 (D.C. 1996). For the purposes of this Decision we denominate the document as Agency Exhibit (AE) 1.

reason for the cessation of payment is stated as "TTD has been paid pursuant to statute-limited to 500 weeks". AE 1.

The Act provides in part:

> § 32-1505. Commencement of compensation; maximum compensation.
>
> * * *
>
> (b) Compensation for disability or death shall not exceed the average weekly wages of insured employees in the District of Columbia or $ 396.78, whichever is greater. For any one injury causing temporary or permanent partial disability, the payment for disability benefits shall not continue for more than a total of 500 weeks. Within 60 days of the expiration of the duration of the compensation provided for in this subsection, an employee may petition the Mayor for an extension of up to 167 weeks. The extension shall be granted only upon a finding by an independent medical examiner appointed by the Mayor of continued whole body impairment exceeding 20% under the American Medical Association's Guides to the Evaluation of Permanent Impairment. An injured employee shall have up to 3 years after termination of nonscheduled benefits to re-open his or her case due to changes in condition.

Although the document was not entered into evidence at the formal hearing, the termination of benefits for that reason is alluded to by both Employer's and Claimant's counsels in their opening statements. *See* HT 8 and 17. The code provision and the fact that Claimant received "over 500 weeks of disability benefits. D.C. Code 32-1505(b)"are noted in the CO. CO at 5, n. 4.

Claimant's entitlement to additional temporary total disability benefits is therefore, as a matter of law, ended. *See Royston Clement and Marie Eason v. DOES, et al.*, 126 A.3d 1137 (D.C. 2015), affirming *Clement v. Sterne, Kessler, Goldstein & Fox*, CRB No. 10-201 (March 26, 2013) and *Eason v. Center Radiology*, CRB No. 14-040 (July 9, 2014). Accordingly we need not address further any matter concerning the TTD claims raised in this appeal, whether related to issues surrounding Claimant's alleged unreasonable failure to cooperate with vocational rehabilitation efforts, Claimant's physical capacity to perform his pre-injury job, or the availability of suitable alternative employment. The denial of any claim for TTD in the CO is in accordance with the 500 week limitation on TTD in the Act.

Because the suspension of benefits is not limited to the TTD to which Claimant is no longer entitled, but also includes suspension of the provision of additional medical care and additional vocational rehabilitation services, we now address that issue.

Claimant's first argument, identified as part 2 of Claimant's Brief, is that the CO and ALJ "used an incorrect legal standard, 'failure to cooperate'", resulting in the ALJ erroneously "failing to take into account the totality of the circumstances regarding the provision of vocational rehabilitation services" to Claimant. Claimant's Brief at 6. Claimant asserts that "Employer was ... required to make two demonstrations: first, to establish that [Claimant] refused to accept

vocational rehabilitation services, and second, to establish that his refusal was unreasonable." Claimant's Brief at 7. As authority for this proposition, Claimant states:

> In the recent case of *Juana Cortez-Luna v. Georgetown University*, CRB No. 16-061, the CRB noted that "failure to cooperate" was not the standard that should be applied by Administrative Law Judges, but rather if the injured worker "unreasonably … refuses to accept Vocational rehabilitation." *See Cortez-Luna v. Georgetown University*, CRB No. 16-061, slip op. at 4 n. 1(October 11, 2016).

Claimant's Brief at 7.

The cited but unquoted footnote in *Cortez-Luna* reads as follows:

> We note that in her findings of fact the ALJ stated "Claimant has cooperated with vocational rehabilitation..." and in her Conclusions of Law the ALJ found "Claimant has participated in vocational rehabilitation ...".The Code provides for suspension of benefits if an "employee unreasonably refuses ... to accept vocational rehabilitation..." D.C. Code § 32-1507 (d). The CO's identification of issues properly identified the issue as whether Claimant unreasonably failed to participate in vocational rehabilitation and in her Discussion the ALJ stated she did not find "a basis to conclude (Claimant) has been unreasonable in her refusal to accept vocational rehabilitation." CO at 15. Despite not always including the word "unreasonable" we find the ALJ used the correct standard in analyzing the evidence presented regarding vocational rehabilitation.

Id. at 4, n. 1.

We are not certain precisely what point Claimant is attempting to make in this argument, but nothing to which we have been directed or which we have found in the CO runs afoul of the cited footnote. If the footnote stands for any legal proposition at all, it is that an ALJ need not always utilize the word "unreasonable" when modifying the phrase "accept vocational rehabilitation" as long as it is clear from the context of the compensation order that "unreasonableness" was implied.

The footnote certainly does not establish the proposition that an "unreasonable failure to accept vocational rehabilitation" cannot also be described as an "unreasonable failure to cooperate" with vocational rehabilitation. To the extent that Claimant argues that this footnote somehow distinguishes "unreasonable failure to cooperate with" from "unreasonably refuses to accept" vocational rehabilitation, the argument is rejected.

Other than arguing that the ALJ used the wrong "standard", which argument we have rejected, Claimant does not argue that the record does not contain substantial evidence to support the standard that was employed. Nor does Claimant challenge as unsupported by substantial evidence any of the facts as found by the ALJ. Accordingly we need not recite the ALJ's findings nor need we consider whether his conclusion that Claimant unreasonably failed to cooperate with vocational rehabilitation flows rationally from those findings.

Claimant's only remaining argument, denominated as part 3 in Claimant's Brief, relates to and relies upon the document for which Claimant sought to reopen the record for admission, which request we have denied. Therefore, other than the discussion in footnote 1, *ante*, we do not consider it.[3]

However, the denial of the requested medical care is still not in accordance with the law *vis a vis* noncooperation with vocational rehabilitation for a more fundamental reason.[4]

As Claimant points out, vocational rehabilitation entails a mutuality of obligations. Employers are entitled to claimants' cooperation in vocational rehabilitation in order to attempt to limit their ongoing obligation to pay wage loss benefits. Claimants are entitled to receive wage loss benefits but in return must cooperate with employers' attempts to return claimants to gainful employment so as to limit the obligation to pay those benefits.

However, in this case Claimant is no longer receiving or entitled to receive wage loss payments, and Employer is not paying or obligated to pay them. There is no mutuality of obligation.

Thus, there is no basis under the vocational rehabilitation provisions of the Act to deny Claimant ongoing medical care, devices or services that are reasonable and necessary for treatment of any medical condition that Claimant continues to experience as a result of the work injury. Claimants are entitled to such medical care even after they are no longer disabled. *See Santos v. DOES and Washington Hilton Hotel*, 536 A.2d 1085 (1985) .

In this case, the ALJ noted that no Utilization Review report had been submitted by Employer supporting the claim for medical care and treatment. Where reasonableness and necessity are at issue, a Utilization Review must be undertaken by either party in order for AHD to consider the issue. That being the case, and considering that Claimant has not appealed the specific denial of medical care raised at the formal hearing,[5] no remand is necessary.

CONCLUSION AND ORDER

The ALJ applied the proper legal standard in determining whether to suspend Claimant's benefits for unreasonably refusing to accept vocational rehabilitation. However, inasmuch as

[3] Claimant not only sought to have the record re-opened to receive the additional document, but also that the exhibit be denominated "CRB Exhibit #1" and that the CRB consider it "along with the other evidence of record." If we had determined that the record should be re-opened, our obligation would have been to remand the matter to the ALJ for further consideration of the claim, not consider it *de novo*. This differs from our having taken administrative notice of AE 1, in that AE 1 is a DOES form required by law to be filed upon an employer's making a final payment of compensation, which is included in the DOES file for this claim, and its effect is determinative as a matter of law on the issue for which it has been cited in this Decision and Order.

[4] Nothing in this decision should be read so as to foreclose issues related to Claimant's unreasonable refusal to accept vocational rehabilitation services if, at some point in the future, circumstances change such that Claimant claims entitlement to additional wage loss benefits.

[5] Claimant's complaints concerning the CO's handling of the medical benefits issue was premised upon the denial of benefits "to the present and continuing", but not upon the denial of the specific benefits sought at the formal hearing.

Claimant's entitlement to ongoing wage loss benefits has ended for reasons unrelated to Claimant's participation in the vocational rehabilitation process, and given the lack of any mutuality of obligations at this time, the suspension of medical benefits is not in accordance with the law, and is REVERSED AND VACATED. Claimant continues to be entitled to reasonable and necessary medical care which is causally related to the work injury.

So ordered.