# GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR

LISA MARÍA MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

**CRB No. 13-023**

**FAHAD N. AL-KHATAWI,**
**Claimant-Petitioner,**

**v.**

**HERSONS GLASS COMPANY and CNA INSURANCE CO.,**
**Employer/Insurer-Respondent/Cross-Petitioner.**

Appeal from a February 4, 2013 Compensation Order By
Administrative Law Judge David L. Boddie
AHD No. 11-231, OWC No. 560167

Matthew Peffer, Esquire for Petitioner
Joseph C. Veith, III, Esquire for Respondent/Cross-Petitioner

Before MELISSA LIN JONES and HENRY W. MCCOY, *Administrative Appeals Judges* and LAWRENCE D. TARR, *Chief Administrative Appeals Judge*.

MELISSA LIN JONES for the Compensation Review Board.

## DECISION AND REMAND ORDER

### FACTS OF RECORD AND PROCEDURAL HISTORY

On October 5, 2000, Mr. Fahad N. Al-Khatawi injured his back while working for Hersons Glass Company ("Hersons"). Mr. Al-Khatawi underwent back surgery in March 2001. Post-surgery conservative treatment did not alleviate his back pain, but Mr. Al-Khatawi declined a second surgery.

In April 2010, Mr. Al-Khatawi underwent a functional capacity evaluation. He was capable of working full-time in a sedentary job with restrictions. In January 2011, Dr. Donald G. Hope performed an independent medical evaluation at Hersons' request and concluded Mr. Al-Khatawi was capable of returning to full-duty work without restrictions.

Although Hersons made voluntary payments of compensation, a dispute arose over Mr. Al-Khatawi's entitlement to permanent total disability benefits from November 6, 2006 to the date of the formal hearing and continuing as well as his failure to cooperate with vocational rehabilitation and voluntary limitation of income. Consequently, the parties proceeded to a

formal hearing, and on February 4, 2013 an administrative law judge ("ALJ") denied Mr. Al-Khatawi's claim for relief.[1] The ALJ also imposed a suspension of benefits from May 2011 to October 2011 for Mr. Al-Khatawi's failure to cooperate with vocational rehabilitation but ruled Mr. Al-Khatawi had not limited his income.

On appeal, Mr. Al-Khatawi asserts he has proven entitlement to permanent total disability benefits. Mr. Al-Khatawi argues Hersons failed to meet its burden to prove suitable, available, alternative employment, but even if Hersons did meet its burden, Mr. Al-Khatawi rebutted that evidence. Mr. Al-Khatawi also argues his behavior did not constitute an unreasonable failure to cooperate with vocational rehabilitation and he did not voluntarily limit his income because he was never offered a job by any employer. Mr. Al-Khatawi requests the Compensation Review Board ("CRB") reverse the Compensation Order and grant his claim for relief.

In opposition to Mr. Al-Khatawi's appeal, Hersons contends the ALJ's ruling that Mr. Al-Khatawi has not reached maximum medical improvement is supported by substantial evidence because additional treatment modalities might improve Mr. Al-Khatawi's condition and because no doctor has opined he has reached maximum medical improvement. In addition, Hersons agrees with the ALJ's assessment of the medical evidence and the vocational evidence and takes issue with Mr. Al-Khatawi's request that the CRB reweigh the evidence in his favor. Finally, Hersons asserts the ALJ's credibility determination coupled with the other evidence relied upon by the ALJ supports the ruling that Mr. Al-Khatawi failed to cooperate with vocational rehabilitation by not following through on virtually any of the vocational rehabilitation counselor's requests.

Hersons also filed a cross-appeal. Hersons asserts that Mr. Al-Khatawi's failure to cooperate extends beyond October 2011 because the ALJ erred by ending the suspension on the grounds that there was no actual offer of suitable employment and because Mr. Al-Khatawi failed to follow-up on job leads thereby limiting his income. Hersons requests the CRB reverse this portion of the Compensation Order.

## ISSUES ON APPEAL

1. Is the February 4, 2013 Compensation Order supported by substantial evidence and in accordance with the law?

2. Did the ALJ properly apply the *Logan* burden-shifting analysis to determine Mr. Al-Khatawi's entitlement to permanent total disability benefits?

3. Does the evidence support the ruling that Mr. Al-Khatawi failed to cooperate with vocational rehabilitation?

4. Does the evidence support the ruling that Mr. Al-Khatawi did not voluntarily limit his income?

[1] *Al-Khatawi v. Hersons Glass Company*, AHD No. 11-231, OWC No. 560167 (February 4, 2013).

5. Does the suspension of Mr. Al-Khatawi's benefits from May 2011 to October 2011 comply with the requirements of the Administrative Procedures Act?

## ANALYSIS[2]

In order to be entitled to permanent total disability benefits, a claimant's disability must be both permanent and total.

To prove a disability is permanent, the claimant can prove (1) maximum medical improvement has been achieved or (2) the disability has continued for a sufficient period of time that it is of lasting or indefinite duration:

> Relying on prior DOES decisions, the hearing examiner interpreted this definition as requiring a claimant to show (1) that his condition has reached maximum medical improvement and (2) that he is unable to return to his usual, or to any other, employment as a result of the injury. [Footnote omitted.] With one small adjustment, these proof elements are consistent with this court's understanding of the statute. Thus, we have said that "[a] disability is *permanent* if it 'has continued for a lengthy period, and it appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period.'" *Smith v. District of Columbia Dep't of Employment Servs.*, 548 A.2d 95, 98 n.7 (D.C. 1988) (emphasis added) (citing *Crum v. General Adjustment Bureau*, 238 U.S. App. D.C. 80, 86, 738 F.2d 474, 480 (1984)); *see also* 4 ARTHUR LARSON, LARSON'S WORKERS' COMPENSATION LAW § 80.04, at 80-13 (Matthew Bender ed. 2002) ("Permanent means lasting the rest of claimant's life. A condition that, according to available medical opinion, will not improve during the claimant's lifetime is deemed to be a permanent one.").[3]

Based upon the evidence, the ALJ ruled that Mr. Al-Khatawi did not satisfy this requirement:

> Contrary to the Claimant's contentions that the November 6, 2006 medical report supports his claim that he is permanently and totally disabled as a result of his work injury, a review of it fails to reveal what that is based upon. In response to questions posed following his physical examination of the Claimant, and a review of medical reports and testing results, Dr. Cherrick opined that the

[2] The scope of review by the CRB is limited to making a determination as to whether the factual findings of the appealed Compensation Order are based upon substantial evidence in the record and whether the legal conclusions drawn from those facts are in accordance with applicable law. Section 32-1521.01(d)(2)(A) of the District of Columbia Workers' Compensation Act, as amended, D.C. Code § 32-1501 to 32-1545 ("Act"). Consistent with this standard of review, the CRB is constrained to uphold a Compensation Order that is supported by substantial evidence, even if there also is contained within the record under review substantial evidence to support a contrary conclusion and even if the CRB might have reached a contrary conclusion. *Marriott International v. DOES*, 834 A.2d 882, 885 (D.C. 2003).

[3] *Logan v. DOES*, 805 A.2d 237, 241 (D.C. 2002).

> Claimant had not reached maximum medical improvement, and noted that he could possibly improve from treatment with nerve block injections, as well as a spinal stimulator.[4]

Mr. Al-Khatawi's argument that he

> was placed under certain restrictions. The FCE indicates Mr. Al-Khatawi's permanent working restrictions to be within the "sedentary" level of duty on a part-time basis. His testimony supported both this as well as a finding that he has not been able to return to his pre-injury employment. Similarly, because he has reached maximum medical improvement and the FCE has indicated that he has permanent work restrictions, Mr. Al-Khatawi has established that he is totally disabled.[5]

is not based upon the facts found by the ALJ which are supported by substantial evidence. The ALJ made a specific ruling that Mr. Al-Khatawi has not reached maximum medical improvement, and in the absence of such a finding, Mr. Al-Khatawi is not entitled to permanent total disability benefits.

Furthermore, to prove a disability is total, the claimant must prove an inability to return to usual employment as a result of the work-related injury.[6] There is no dispute Mr. Al-Khatawi is unable to perform his pre-injury job.

Because there is no dispute Mr. Al-Khatawi is unable to perform his pre-injury job, the burden shifted to Hersons to prove suitable, alternative employment is available to Mr. Al-Khatawi:

> To summarize, once a claimant establishes a *prima facie* case of total disability, the employer must present sufficient evidence of suitable job availability to overcome a finding of total disability. If the employer meets that evidentiary burden, the claimant may refute the employer's presentation -- thereby sustaining a finding of total disability -- either by challenging the legitimacy of the employer's evidence of available employment or by demonstrating diligence, but a lack of success, in obtaining other employment. [Footnote omitted.] Absent either showing by the claimant, he is entitled only to a finding of partial disability. See *Palombo*, 937 F.2d at 73; *Director, Office of Workers' Comp. Programs v. Berkstresser*, 287 U.S. App. D.C. 266, 272, 921 F.2d 306, 312 (1991).[7]

To make his point that Hersons failed to satisfy its burden of demonstrating suitable, available,

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[4] *Al-Khatawi*, *supra*, at 5.

[5] Memorandum of Points and Authorities in Support of Application for Review, p. 10.

[6] *Logan*, *supra*.

[7] *Logan*, *supra*, 243.

alternative employment, Mr. Al-Khatawi takes issue with Hersons' labor market survey and the lack of a job offer despite vocational rehabilitation. Mr. Al-Khatawi's issues with the labor market survey (it didn't consider Al-Khatawi's transferrable skills; the jobs included in it are not within his restrictions; it was not reviewed by any of his doctors) go to the weight given to this evidence, but the CRB lacks authority to reweigh evidence in Mr. Al-Khatawi's favor.[8] In addition, there is no requirement that a claimant secure a job offer in order for an employer to satisfy its burden under *Logan*.

Similarly, Mr. Al-Khatawi's argument lacks recognition of the ALJ's ruling that Mr. Al-Khatawi failed to cooperate with vocational rehabilitation. Inherent in such a ruling is a determination that the lack of success in vocational rehabilitation at least in part is attributable to Mr. Al-Khatawi. There is no basis for reweighing this evidence.

Finally on this issue, Mr. Al-Khatawi's argument that he "successfully challenged the legitimacy of the employer's evidence by presenting the testimony of a vocational rehabilitation counselor"[9] also goes to the weight given to the evidence. At this risk of being redundant, reweighing evidence is beyond the CRB's authority.[10]

Regarding the period of suspension from May 2011 to October 2011, after submitting pages of law inapplicable to the issues in this case,[11] Mr. Al-Khatawi asserts Hersons

> failed to establish that Mr. Al-Khatawi has refused to accept vocational rehabilitation services. The evidence established that Mr. Al-Khatawis [*sic*] attended nearly all appointments/meetings with Mr. Encinas and was on time for all of them. Although Mr. Al-Khatawi sought out only a minimal number of jobs on his own, with the help of Mr. Encinas, Mr. Al-Khatawi applied for many jobs and went on several job interviews that were arranged by Mr. Encinas.[12]

The CRB rejects Mr. Al-Khatawi's fact-based argument. Not only is this argument, again, based upon a request for the CRB to reweigh the evidence, it ignores the basis for the ALJ's finding of failure to cooperate, namely Mr. Al-Khatawi "did not perform the periodic independent job searches or maintain a job log as instructed. I find that []he also did not follow up on the job leads identified by the vocational rehabilitation counselor."[13] Failure to comply with a vocational rehabilitation counselor's reasonable requests to conduct a job search is an obligation under the Act as that request is "designed, within reason, to return the employee to employment at a wage

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[8] *Marriott*, *supra*.

[9] Memorandum of Points and Authorities in Support of Application for Review, p. 12.

[10] *Marriott*, *supra*.

[11] Accidental injury, arising out of and in the course of employment, and the presumption of compensability were not issues in this case.

[12] Memorandum of Points and Authorities in Support of Application for Review, p. 17.

[13] *Al-Khatawi*, *supra*, at 3.

as close as possible to the wage that the employee earned at the time of injury."[14] The ALJ's ruling that Mr. Al-Khatawi failed to comply with that request is supported by substantial evidence in the record as explained in more detail below.

Hersons agrees with the ALJ's ruling that Mr. Al-Khatawi failed to cooperate with vocational rehabilitation, but it disagrees with the ALJ's decision to end the suspension of Mr. Al-Khatawi's benefits in October 2011. Because Mr. Al-Khatawi's failure to cooperate was premised on more than just Mr. Al-Khatawi 's missing meetings, Hersons argues continued attendance at such meetings cannot cure his lack of cooperation.

After reviewing the evidence submitted by each party, the ALJ determined Mr. Al-Khatawi did not cooperate with vocational rehabilitation for reasons other than his failure to attend meetings:

> I find that evidence in the record reflects that the Claimant was provided with information and instruction in techniques and strategies in how to perform job searches and identifying suitable job openings and instructed to conduct these job searches periodically and to maintain a job search log indicating the jobs he had identified through his []own efforts. I find that the evidence in the record reflects that the Claimant consistently did not perform these activities as part of the vocational rehabilitation process as instructed. I find that the evidence in the record reflects that the Claimant was provided with specific job leads of available jobs by his vocational rehabilitation counselor to pursue and follow up on, and the evidence in the record reflects that the Claimant failed or declined to pursue or follow up on the job leads that were provided to him.
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> I recognize the Claimant's argument that the jobs which were identified and provided to him by the vocational rehabilitation counselor were not suitable alternative employment, for one reason or another. However, notwithstanding that argument, and assuming it to be true, there is no evidence that there was anything that prevented the Claimant from performing his own independent job search, as he was encouraged to do, and identifying employment opportunities that he considered were suitable alternative job opportunities. While the Court of Appeals has held to defeat a claim of total disability, that the burden is on the employer to show that work for which the claimant is qualified was in fact available, *Joyner v. DOES*, 502 A.2d 1027, at 1031, n. 4 (D.C. 1986), it has explained that "however, that the employer can meet that burden 'by proof short of offering the claimant a specific job or proving that some employer specifically offered clamant a job,'" stating that a contrary rule,
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> > would invite at least some claimant's to adopt a passive, or even negative, attitude about pursuing re-employment, since workers' compensation benefits could be terminated only after the claimant refused a specific offer. There might be no specific offer if the claimant failed to take the steps necessary to procure offers (*e.g.*,

[14] Section 32-1507 of the Act.

> investigating job opportunities, circulating resumes, interviewing, etc.).
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> *Id.* at 1031; *also see Logan v. DOES*, 805 A.2d 237, 243 (D.C. 2002).
>
> In addition to the above, I find that the Claimant was not a credible witness when he testified that he did everything that was requested of him in cooperating with vocational rehabilitation, including following up on job leads, and performing his own independent job search activities. HT pp. 59-61, 67-69.
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> I find based upon the evidence in the record, that the Claimant took a passive approach to the vocational rehabilitation job search reflecting a lack of motivation, and in doing so failed to cooperate with vocational rehabilitation thereby justifying a suspension of compensation benefits from May 2011 to October 2011, the period of his non-cooperation.[15]

There is no justification for disturbing the ALJ's findings or conclusion; however, the law requires we remand this matter for the limited purpose of specifically defining Mr. Al-Khatawi's period of non-cooperation based upon those findings and conclusions.

A suspension of benefits pursuant to § 32-1507(7)(d) of the Act lasts only until the claimant cures the non-cooperation.[16] In this case, the ALJ imposed a suspension from an unspecified date in May 2011 to an unspecified date in October 2011 "in recognition of the Claimant's testimony that he is presently continuing to meet with the counselor and attempting to cooperate with vocational rehabilitation efforts."[17] It is 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, particularly in light of the credibility ruling against Mr. Al-Khatawi.

In order to conform to the requirements of the D.C. Administrative Procedures Act [18] (1) the agency's decision must state findings of fact on each material, contested factual issue; (2) those findings must be based on substantial evidence; and (3) the conclusions of law must follow rationally from the findings.[19] Thus, when an ALJ fails to make factual findings on each

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[15] *Al-Khatawi*, *supra*, at 7-8. (Footnote omitted.)

[16] *Freeman v. Washington Convention Center*, Dir. Dkt. No. 01-24, OHA No. 00-531, OWC No. 521712 (February 28, 2002).

[17] *Al-Khatawi*, *supra*, at 8, nt. 1.

[18] D.C. Code § 2-501 *et seq.* as amended.

[19] *Perkins v. DOES,* 482 A.2d 401, 402 (D.C. 1984).

materially contested issue, an appellate court is not permitted to make its own finding on the issue; it must remand the case for the proper factual finding.[20]

The CRB is no less constrained in its review of Compensation Orders.[21] Moreover, whether an ALJ's decision complies with the APA requirements is a determination limited in scope to the four corners of the Compensation Order under review. Thus, when, as here, an ALJ fails to make express findings on all contested issues of material fact, the CRB can no more "fill the gap" by making its own findings from the record than can the Court of Appeals but must remand the case to permit the ALJ to make the necessary findings.[22] For this reason, the law requires we remand this matter.

Finally, at the formal hearing, Hersons raised the defense of voluntary limitation of income. The ALJ found

> no offer of employment was made to the Claimant by any employer. I find that there being no offer to hire or employ the Claimant was made to him [*sic*] there was no rejection by him of a job. I find that the Claimant has not voluntarily limited his income by failing to accept employment.[23]

Based upon this finding, the ALJ ruled

> [t]here is no evidence in the record, by the Employer or the Claimant that an offer of hire for a specific job was made by anyone at anytime to the Claimant. While the Employer has raised this issue as a defense against the Claimant's claim, it would seem that the provisions of D.C. Code §32-1508(V)(iii) imply that in order for it to apply, the employee has to have failed to accept employment commensurate with their abilities. It is difficult to understand how you can fail to *accept* something that has not been offered. (emphasis added).[24]

The ALJ's ruling on failure to cooperate was limited to Mr. Al-Khatawi's independent job search and resulting logs; it did not consider Mr. Al-Khatawi's alleged failure to follow-up on leads provided by the vocational rehabilitation counselor:

> I find that evidence in the record reflects that the Claimant was provided with information and instruction in techniques and strategies in how to perform

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[20] *King v. DOES,* 742 A.2d. 460, 465 (Basic findings of fact on all material issues are required; only then can the appellate court "determine upon review whether the agency's findings are supported by substantial evidence and whether those findings lead rationally to its conclusions of law.")

[21] See *Washington Metropolitan Area Transit Authority v. DOES,* 926 A.2d 140 (D.C. 2007).

[22] See *Mack v. DOES,* 651 A.2d 804, 806 (D.C. 1994).

[23] *Al-Khatawi*, *supra*, at 3.

[24] *Id.* at 6.

job searches and identifying suitable job openings and instructed to conduct these job searches periodically and to maintain a job search log indicating the jobs he had identified through his own efforts. I find that the evidence in the record reflects that the Claimant consistently did not perform these activities as part of the vocational rehabilitation process as instructed. I find that the evidence in the record reflects that the Claimant was provided with specific job leads of available jobs by his vocational rehabilitation counselor to pursue and follow up on, and the evidence in the record reflects that the Claimant failed or declined to pursue or follow up on the job leads that were provided to him.

I recognize the Claimant's argument that the jobs which were identified and provided to him by the vocational rehabilitation counselor were not suitable alternative employment, for one reason or another. However, notwithstanding that argument, and assuming it to be true, there is no evidence that there was anything that prevented the Claimant from performing his own independent job search, as he was encouraged to do, and identifying employment opportunities that he considered were suitable alternative job opportunities. While the Court of Appeals has held to defeat a claim of total disability, that the burden is on the employer to show that work for which the claimant is qualified was in fact available, *Joyner v. DOES*, 502 A.2d 1027, at 1031, n. 4 (D.C. 1986), it has explained that "however, that the employer can meet that burden 'by proof short of offering the claimant a specific job or proving that some employer specifically offered clamant a job,'" stating that a contrary rule,

> would invite at least some claimant's [*sic*] to adopt a passive, or even negative, attitude about pursuing re-employment, since workers' compensation benefits could be terminated only after the claimant refused a specific offer. There might be no specific offer if the claimant failed to take the steps necessary to procure offers (*e.g.*, investigating job opportunities, circulating resumes, interviewing, etc.).

*Id.* at 1031; *also see Logan v. DOES*, 805 A.2d 237, 243 (D.C. 2002).[25]

Without an actual ruling regarding suitability of the job leads, the issue of voluntary limitation of income based upon a failure to follow-up on job leads provided by the vocational rehabilitation counselor needs to be analyzed.

[25] *Al-Khatawi*, *supra*, at 7-8.

## CONCLUSION AND ORDER

The ALJ properly applied the *Logan* burden-shifting analysis to determine Mr. Al-Khatawi's entitlement to permanent total disability benefits. The evidence and the law support the ruling that Mr. Al-Khatawi failed to cooperate with vocational rehabilitation. Those portions of the February 4, 2013 Compensation Order are AFFIRMED.

The suspension of Mr. Al-Khatawi's benefits from May 2011 to October 2011 does not comply with the requirements of the Administrative Procedures Act; therefore, that portion of the Compensation Order is VACATED. This matter is REMANDED for the limited purposes of specifically defining Mr. Al-Khatawi's period of non-cooperation and for a determination as to whether Mr. Al-Khatawi voluntarily limited his income by failing to follow-up on job leads provided by the vocational rehabilitation counselor including but not limited to whether or not those job leads qualify as suitable, alternative employment.

FOR THE COMPENSATION REVIEW BOARD:

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MELISSA LIN JONES
*Administrative Appeals Judge*

November 14, 2013
DATE