GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR

LISA MARÍA MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 13-050

SUSAN DAMEGREENE,
Claimant–Petitioner,

v.

AMERICAN RED CROSS,
Self-Insured Employer-Respondent.

Appeal from a April 1, 2013 Compensation Order on Remand of
Linda F. Jory, Administrative Law Judge
AHD No. 97-411F, OWC No. 532792

Benjamin T. Boscolo, Esquire, for the Petitioner
Robert C. Baker, Esquire, for the Respondent

Before JEFFREY P. RUSSELL, and HENRY W. MCCOY, *Administrative Appeals Judges* and LAWRENCE D. TARR, *Chief Administrative Appeals Judge*.

JEFFREY P. RUSSELL, *Administrative Appeals Judge,* for the Compensation Review Board.

DECISION AND ORDER

BACKGROUND

Respondent Susan DameGreene was awarded temporary partial disability benefits in a Compensation Order issued September 27, 2001. In a Compensation Order issued July 2, 2004, those benefits were modified to permanent partial disability benefits, to be calculated pursuant to D.C. Code § 32-1508 (3)(v)(ii)(II), with her net profits from self-employment being the measure of her post-injury earnings. Ms. DameGreene's self-employment consisted of managing and operating a company by the name of "Bipster, Inc.", an endeavor that she claimed consumed all of her available work time.

In order to limit its ongoing and future liability for wage loss benefits, Petitioner American Red Cross (the Red Cross) instituted a program of vocational rehabilitation. Ms. DameGreene's participation in the program was severely limited by her claims that her work injury, a poly-substance allergy, rendered it virtually impossible for her to work out side her home on a regular basis, or to attend job interviews in any but the most super-clean environments.

The Red Cross's vocational consultants referred Ms. DameGreene to a program called Expediter. According to the consultant, the program would pay Ms. DameGreene training wages (funded by the Red Cross) for 500 hours of telephone training and telephone solicitor/survey work, the work and training for this endeavor to be conducted via telephone from Ms. DameGreene's home. Ms. DameGreene advised the consultant that she was unable and/or unwilling to participate in this particular program because she was already employed full time with Bipster, that according to information from her attorney the Expediter position was not a "bona fide employment opportunity", that the Expediter position was only temporary, and other reasons.

The Red Cross sought to modify the Compensation Order to suspend the permanent partial disability benefits, claiming that Ms. DameGreene's failure to apply to numerous potential employers, the nature of her communications with those employers that she did contact, and her failure to participate in the Expediter program constituted an unreasonable failure to cooperate with vocational rehabilitation.

After a series of dismissals of the Red Cross's Application for Formal Hearing, appeals to the CRB and remands to AHD, the matter was appealed to the District of Columbia Court of Appeals (DCCA). The DCCA ruled that the CRB's affirmance of the last dismissal of the Application for Formal Hearing was in error, and remanded the matter to the CRB with instructions to determine whether there was sufficient evidence to warrant a hearing on modification, and if Ms. DameGreene was determined to be employed full time, to decide whether a claimant who is working full time could nonetheless be compelled to cooperate with vocational rehabilitation.

The CRB determined that there was sufficient evidence alleging a change of conditions warranting a formal hearing on modification, and remanded the matter to AHD to conduct that hearing and to decide the other issues for which the DCCA remanded. The hearing occurred on October 29, 2009.

On May 24, 2010, an ALJ issued a Compensation Order in which it was determined that a claimant employed full time remained under an obligation to cooperate reasonably with vocational rehabilitation, that being employed full time is a factor that could be considered in determining whether a claimant's failure to participate is unreasonable, and that Ms. DameGreene's failure to apply for numerous positions, given her poly-substance allergies and the inability to ensure that she would not be exposed to harmful allergens**,** did not constitute an unreasonable refusal to cooperate with vocational rehabilitation.

The Red Cross appealed to the CRB, arguing that the ALJ's determination that the failure to apply to numerous positions was not unreasonable was unsupported by substantial evidence, and that the ALJ failed to address the failure to participate in the Expediter program, which it argued constituted a vocational rehabilitation program that did not require Ms. DameGreene to be exposed to anything outside her home.

The CRB affirmed the ALJ's determinations concerning an employee's continuing obligation to cooperate with vocational rehabilitation even if employed full time, and that such employment could be considered in connection with assessing the reasonableness of an employee's level of cooperation with those efforts. The CRB also affirmed the ALJ's determination that Ms. DameGreene's level of cooperation relating to the several job leads received was not unreasonably

uncooperative. However, the CRB remanded the matter because the ALJ failed to address the Red Cross's argument that Ms. DameGreene's failure to participate in the Expediter program was a failure to cooperate warranting benefits suspension.

On January 5, 2012, the ALJ issued a Compensation Order on Remand, in which she again denied the Red Cross's modification request, determining that Ms. DameGreene's refusal to participate in the Expediter program was not an unreasonable failure to cooperate. The Red Cross appealed to the CRB, which on February 12, 2012 vacated the denial and remanded for further consideration.

The various reasons for vacating the denial are a matter of record and need not be repeated here. In conclusion, the CRB remanded the matter for further consideration as follows:

> The ALJ's denial of the request for modification is vacated. The matter is remanded for further consideration in a manner consistent with the foregoing. The ALJ is not to assess the nature of the Expediter program by reference to anything external to the record, nor is the legal opinion of Respondent's attorney concerning whether the Expediter program constituted a "bona fide employment opportunity" to be considered. To the extent that the ALJ's determination turns upon the fact that the events in question occurred in 2006, the ALJ is to explain why that fact is significant to the outcome of this case.

DameGreene v. American Red Cross, CRB No. 12-003 (February 12, 2013).

On April 1, 2013, the ALJ issued a Compensation Order on Remand, in which it was determined that Ms. DameGreene had failed to participate in the Expediter program and that that failure was unreasonable. Accordingly, the ALJ ordered that Ms. DameGreene's benefits be suspended as requested by the Red Cross, and further directed that the Red Cross continue to make vocational rehabilitation services available to Ms. DameGreene such that she would be in a position to cure the failure to cooperate.

Ms. DameGreene appealed the Compensation Order on Remand to the CRB, which appeal the Red Cross opposes. Further, the Red Cross did not appeal the ALJ's directive that it renew its offer of vocational rehabilitation. We affirm.

STANDARD OF REVIEW

The scope of review by the CRB is generally limited to making a determination as to whether the factual findings of the 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. *See*, D.C. Workers' Compensation Act of 1979, as amended, D.C. Code § 32-1501, *et seq.*, (the Act) at § 32-1521.01 (d) (2) (A), and *Marriott International v. DOES*, 834 A.2d 882 (D.C. 2003). Consistent with this standard of review, the CRB and this review panel must affirm a Compensation Order that is supported by substantial evidence, even if there is also contained within the record under review substantial evidence to support a contrary conclusion, and even where this panel might have reached a contrary conclusion. *Id.*, at 885.

DISCUSSION AND ANALYSIS

In addressing the concerns of the CRB regarding consideration of whether the failure to participate in the Expediter program constituted an unreasonable refusal to accept vocational rehabilitation, the ALJ wrote as follows:

> As outlined in the instant findings of fact, claimant provided her reasoning for not accepting the 15 hour position at Expediter as it did not pay her as much as she was earning. When asked by counsel for employer if she told Ms. Bardecki [the vocational rehabilitation counselor] she was working 20 to 30 hours per week and her cover letters indicated she was available up to 15 hours a week, claimant answered yes. HT at 77. Claimant also testified […] that she did not tell Ms. Bardecki that she was already working 40-plus hours until after she was offered the Expediter position. HT at 78.
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> No other information with regard to her refusal was elicited at the formal hearing except for claimant's testimony that she had been working full time since August 2005. HT at 83. Claimant did testify about her multiple chemical sensitivities and that if she is required to attend conferences outside the home she is sick afterwards and that she can only tolerate natural clothing. See HT at 86, 87, 92, 94.
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> It is clear that the misunderstanding there was with regard to the Expediter position, specifically that it was not intended to replace her current home office job, was addressed by employer's October 31, 2006 letter explaining that the 15 hour position was intended to supplement claimant's earnings. Claimant further conceded that she never advised Ms. Bardecki while she was applying for jobs provided by Ms. Bardecki that she was working 40 to 50 hours per week. In fact, as noted in the findings of fact herein, claimant included in her cover letters that she was available if the position is part time at 15 or less hours per week and can be done from her home office. See HT 78, EE 5 at 2.
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> As there is nothing in the record that required claimant to leave her home or cause her to interact with any person or chemical substance, the undersigned is unable to conclude that claimant's refusal was a reasonable refusal of Expediter's training. As such, employer is entitled to a modification of the existing Compensation Order which awarded claimant permanent partial disability benefits as pursuant to D.C. Code § 32-1507 (d) claimant's permanent partial disability benefits shall be suspended until such time as her unreasonable refusal is cured.

Compensation Order on Remand, page 8.

In this appeal, Ms. DameGreene argues that the ALJ failed to consider all the reasons why she refused to participate in the Expediter program. In support of this argument, she posits that Expediter is not a vocational rehabilitation resource, but is in fact "sham employment" and is "in a field of make-work designed specifically for injured workers and no one else" which "inherently justif[ies] refusal to participate". Petitioner's Memorandum, page 5.

This is a characterization of the program that is counter to, or at last not compelled by, Ms. DameGreene's expert witness's views, as expressed in CE 4. Nowhere in that document does the author call the program a "sham" or "make-work". Rather, the letter addressed the question of whether Expediter was offering suitable gainful employment, which the expert, Trudy Koslow, believed it was not. Rather, Ms. Koslow characterized Expediter as being "a training/placement company that attempts to train injured and disabled individuals in an effort to place the individuals in telephone solicitation positions" which has "developed relationships with companies that provide subsidized training of injured and/or disabled individuals in positions in telemarketing and telephone survey work". CE 4.

Ms. DameGreene also argues that Red Cross's vocational counselor "attempted to mislead Ms. DameGreene about the true nature of Expediter, and thus the Compensation Order on Remand must be remanded to address whether Ms. DameGreene's refusal was reasonable in light of having been mislead by the vocational rehabilitation counselor". Yet she does not direct us to anything in the record to support the contention that Ms. DameGreene was mislead as to any aspect of what the program required of her or what it offered to her. She directs us to nothing at all in the record in support of her characterizations of Expediter or Ms. DameGreene's understanding of it.

She also argues that "The ALJ should have relied upon other jurisdiction's determinations about Expediter and similar companies in assessing Expediter's suitability in returning injured workers to work". Memorandum, page 11.

Without getting into a digressive discussion concerning what the cases cited by Ms. DameGreene do and do not have to say about "Expediter and similar companies", suffice it to say that the ALJ properly noted that the ALJ was not free to make findings of fact concerning the nature of the vocational services offered by Expediter by reference to information that was not the subject of evidence presented in the case. In other words, the ALJ was not free to take administrative notice of what Expediter was, particularly if that notice was that Expediter was somehow something other than the record evidence suggested, at least not without providing the parties the opportunity to challenge that of which the ALJ intended to take such notice.[1]

Ms. DameGreene states in her Memorandum that "In the first Decision and Remand Order, the CRB found that a goal of the Expediter program was to provide Ms. DameGreene with experience and skills associated with work that can be performed from home and without the need to come into contact with the public", then footnotes that statement with the statement that "The CRB is not permitted to make findings of fact. See discussion infra Part 2.d."

In the referenced "discussion Part 2.d.", she repeats that "The CRB is not permitted to make findings of fact", then asserts that "The ALJ never reached the conclusion found by the CRB in the

[1] Ms. DameGreene's arguments and legal citations (see, Memorandum, page 11) appear to suggest that perhaps she misses the point that the ALJ's finding that the Red Cross did not offer suitable alternative employment has been affirmed, and that the questions being presented on remand and in this appeal concern *not* whether the Expediter program constitutes such employment, rather the appeal concerns whether it constitutes that which Ms. DameGreene's expert called it, a vocational rehabilitation and training program.

decisions below that Expediter constituted 'legitimate' vocational rehabilitation". Petitioner's Memorandum, page 13.

We must point out that typically, when quotation marks are employed, there is an implication that the words contained within those marks are being quoted from some other source, and typically that source is identified with sufficient particularity to permit the reader to verify that the source actually contained the words. Unfortunately, Ms. DameGreene did not avail herself of the typical approach in this instance. We have no idea from whence she quotes the CRB as having found any facts, let alone used the word "legitimate".

We have been able to locate the portion of the CRB's December 1, 2011 Decision and Remand Order which is the apparent source of Ms. DameGreene's complaint that "The CRB made [the] determination on its own" that "the goal of the Expediter training was to provide Ms. DameGreene with experience and skills associated with work that can be performed from home and without the need to come into contact with the public." Memorandum, page 13. The portion of the December 1, 2011 Decision and Remand Order which contains words to that effect reads as follows:

> However, the ALJ failed to address the on-the-job training program offered through the Expediter Corporation. The ALJ found, properly in our view, that the program did not constitute an offer of employment sufficient to support the Red Cross's claim that Ms. DameGreene had voluntarily limited her income. Indeed, that finding is not challenged in this appeal. Nonetheless, despite the Red Cross having argued at the formal hearing (HT 24, lines 4 – 18) and in its post-hearing "Proposed Findings of Fact and Conclusions of Law" (*Failure to Cooperate with Vocational Rehabilitation, 3. The Expediter job as vocational rehabilitation,* page 24) [footnote omitted] that Ms. DameGreene's refusal to participate in the program constituted an unreasonable failure to cooperate with vocational rehabilitation, the ALJ did not address that argument.
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> As the ALJ noted, the uncontradicted evidence concerning this program was that it would provide Ms. DameGreene with 500 hours of training, to be obtained telephonically without the need for her to leave her home or come into contact with anyone else, and pay her $9.00 per hour throughout the course of the training. *The goal of the training was to provide Ms. DameGreene with experience and skills associated with work that can be performed from home and without the need to come into contact with the public.* In this case, the ALJ found, as a fact, that "Expediter is a vocational rehabilitation resource retained by insurance companies and employers seeking to return injured employees to work." Compensation Order, Findings of Fact, page 4.
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> The Red Cross raised the issue of whether Ms. DameGreene's failure to participate in this paid training program constituted an unreasonable failure to cooperate with vocational rehabilitation efforts. The ALJ's finding that the program is a "vocational rehabilitation resource" is supported by substantial evidence, in the form of the testimony of [the Red Cross's vocational rehabilitation counselor] Ms. Bardecki, and the letter from Trudy Koslow, a vocational rehabilitation counselor who authored CE

> 4 at Ms. DameGreene's counsel's request for presentation at the formal hearing. While there may be reasons for the non-participation, and those reasons might be reasonable, the Compensation Order does not address them.

DameGreene v. American Red Cross, CRB No. 10-135, (December 1, 2011), page 4 (italics added).

The italicized language can not be characterized as a "finding of fact" by the CRB. Rather it is a summary of the program's activities as they relate to this specific case, involving as it does a poly-substance oversensitivity, and is employed to explain why the failure to address the refusal to participate required further consideration in a context other than as an offer of employment. The operative "facts" are outlined in the sentence that follows the italicized quote: "In this case, the ALJ found, as a fact, that 'Expediter is a vocational rehabilitation resource retained by insurance companies and employers seeking to return injured employees to work.' Compensation Order, Findings of Fact, page 4." And that fact was premised primarily upon Ms. DameGreene's own evidence, CE 4. [2]

If Ms. DameGreene had wished to challenge, by record evidence, not only the status of the Expediter program as suitable alternative employment (as she did successfully before the ALJ) but also as "a vocational rehabilitation resource", the place to have done so was at the formal hearing. And the method would in all likelihood not have been to submit an expert opinion to the effect that "Expediter Corporation is a training/placement company that attempts to train injured and disabled individuals in telephone solicitation positions". CE 4.

Ms. DameGreene also argues that even if she is found to have unreasonably failed to cooperate with vocational rehabilitation, the maximum appropriate sanction would be limited to the maximum period of time that the Expediter program would have lasted and/or the maximum amount of payments that would have been made to Ms. DameGreene through the program.

Such an argument might carry some weight had the ALJ found Expediter to have been suitable alternative employment, and not a vocational rehabilitation program. In that case, refusal to participate would arguably amount to a voluntary limitation of income to the extent that the program would have provided her with income. But that is not the theory (or the statutory basis) upon which the benefits were suspended.

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[2] At the risk of repeating ourselves, we direct attention to footnote 3 in the February 12, 2013 Decision and Remand Order, addressing the same point:

> The CRB has not "classified" Expediter. The ALJ did. The CRB affirmed the ALJ's finding of fact that "Expediter is a vocational rehabilitation resource retained by insurance companies and employers seeking to return injured employees to work." The CRB made no independent findings of its own; rather, it determined that the ALJ's finding was supported by substantial evidence.
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> This is a significant finding, because the ALJ could have found otherwise. Rather than being a "vocational rehabilitation resource retained by insurance companies and employers seeking to return injured employees to work", the ALJ might have determined that the Expediter program was really merely "sheltered employment" existing for the purpose of limiting or eliminating the employer's exposure to liability for the full extent of claimant's disability, or a form of "job stuffing" with a similar aim. But the ALJ did not so find, and the record supports the finding that was made.

The goal of vocational rehabilitation is to return an injured worker to the workplace at or as near as possible to the level of earnings the worker had prior to the injury, not to replace income. Thus, a refusal to send out resumes, meet with counselors, attend interviews, sabotage those interviews that are attended can all lead to suspension of benefits regardless of whether any of the prospective employers would have hired the worker had the worker cooperated.

In theory, as described by Ms. DameGreene's expert, the program aimed to provide training that might possibly lead to an offer of employment from a third party. While Ms. DameGreene may argue that that is a remote possibility, the fact that she refused to undertake the program renders such an argument speculative.

Further, in our jurisdiction, the statutory scheme established by the City Council mandates that the wages are the primary focus of considering vocational rehabilitation. Code Section 32-1507 (c) provides that vocational rehabilitation "shall be designed, within reason to return the employee to employment at a wage as close as possible to that wage that the employee earned at the time of injury." Here, the evidence shows that the offered training paid more per hour ($9.00) than the most the claimant earned per hour at her self-employment ($4.80).[3]

In summary, the ALJ found the program to be a vocational rehabilitation program, not an income replacement program. Virtually all vocational rehabilitation efforts have a beginning and an end to any particular phase. Refusing to undertake a training program that is time limited doesn't change the fact that the point of the program is to obtain skills and experience to make a worker competitive in the labor market. It is the unreasonable refusal to accept the training or other vocational service that results in the suspension, which pursuant to the statute is to be "during such period" as the worker refuses to accept the services. See, D.C. Code § 32-1507 (d). The period can't end until it has started.

Finally, Ms. DameGreene's argues that the existence of "several Agency orders" during the period October 26 2006 to April 1, 2013 "finding her refusal was reasonable" renders the suspension during that period improper. We must disagree with the predicate: there are no such orders finding the refusal to accept the Expediter program to be "reasonable" in the context of vocational rehabilitation. The ALJ found the program not to be suitable alternative employment and declined to reduce her ongoing benefits premised upon a voluntary limitation of income theory. That involves the nature and extent of disability, and does not involve the part of the workers' compensation system aimed at returning an injured worker to employment.

[3] Reference to case law in other jurisdictions is not dispositive of the issue presented by this case because those jurisdictions have different requirements for vocational rehabilitation. For example, the claimant relies on Virginia case law. However, the Virginia statute provides a different analysis for assessing a vocational rehabilitation program. VA Code Section 65.2-603 (3) states that vocational rehabilitation "shall take into account the employee's preinjury job and wage classification; his age, aptitude, and level of education; the likelihood of success in the new vocation; and the relative costs and benefits to be derived from such services."

CONCLUSION AND ORDER

The ALJ's findings of fact concerning the nature of the Expediter program, and the reasons for Ms. DameGreene's refusal to participate therein, are supported by substantial evidence. The conclusion that such refusal is unreasonable and warrants suspension of benefits under the Act flows rationally from those findings of fact and is in accordance with the law. The Compensation Order on Remand of April 1, 2013 is affirmed.

FOR THE COMPENSATION REVIEW BOARD:

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JEFFREY P. RUSSELL
Administrative Appeals Judge

July 2, 2013
DATE