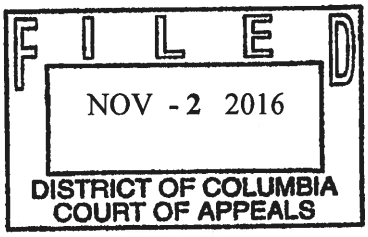
DISTRICT OF COLUMBIA COURT OF APPEALS

No. 15-AA-1192



ELIZABETH P. LAGON, PETITIONER,

v.

DISTRICT OF COLUMBIA
DEPARTMENT OF EMPLOYMENT SERVICES, RESPONDENT,

and

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY, INTERVENOR.

On Petition for Review of Decision and Order
of the District of Columbia Department of Employment Services,
Compensation Review Board
(CRB-94-15)

(Submitted September 13, 2016 Decided November 2, 2016)

Before THOMPSON and MCLEESE, *Associate Judges*, and RUIZ, *Senior Judge*.

MEMORANDUM OPINION AND JUDGMENT

PER CURIAM: Petitioner Elizabeth Lagon seeks review of a September 30, 2015, order of the Department of Employment Services ("DOES") Compensation Review Board (the "CRB" or the "Board") that affirmed a May 6, 2015, Compensation Order issued by a DOES Administrative Law Judge ("ALJ") in favor of petitioner's former employer, intervenor Washington Metropolitan Area Transit Authority ("WMATA" or the "Employer"). The CRB ruled that substantial evidence supported the ALJ's determination that petitioner "unreasonably refused [the] [E]mployer's vocational rehabilitation efforts for the period of July 9, 2014 to September 18, 2014," and that the ALJ "correctly awarded [the] Employer a credit" for temporary total disability ("TTD") benefits paid for that period. For reasons discussed herein, we affirm the CRB's decision.

I.

Petitioner, a former WMATA bus operator, injured her right arm, right leg, elbow, and head when another vehicle struck the bus she was operating on March 23, 2011. Petitioner underwent neck surgery to relieve neck pain. In October 2012, her treating neurologist released her to light duty work with restrictions that prevented her from returning to work as a bus operator. WMATA accepted her workers' compensation claim and voluntarily began paying her TTD benefits. WMATA also initiated vocational rehabilitation services on January 8, 2013. Beginning in May 2014, petitioner's vocational rehabilitation counselor was Melissa Street. WMATA filed a Notice of Controversion on September 15, 2014, asserting that petitioner was unreasonably refusing to participate in vocational rehabilitation and stating that WMATA had ceased its voluntary TTD payments as of September 14, 2014.

On September 18, 2014, petitioner sent WMATA's claims adjuster a letter, through her counsel, stating that she was willing to participate in vocational rehabilitation. WMATA resumed making voluntary TTD payments and reinstated vocational rehabilitation services on November 6, 2014, but continued to withhold benefits for the period from September 19 to November 5. Petitioner filed a claim to recover those benefits, and the matter came before the ALJ for a hearing on March 18, 2015. The DOES ALJ heard testimony from petitioner and from vocational rehabilitation counselor Street.

The ALJ observed after the hearing that "[t]he record [was] replete with instances of [petitioner's] failure to cooperate with vocational rehabilitation." The ALJ concluded that petitioner's "unwillingness to submit job logs detailing her employment contacts" and "unwillingness to participate in computer training classes" constituted "an unreasonable refusal to participate in vocational rehabilitation." The ALJ found that WMATA was entitled to suspend petitioner's benefits for the July 9 – September 18, 2014, period, but that petitioner's September 18, 2014, letter had cured her refusal to participate, such that WMATA's suspension of benefit payments was required to end after that date. The ALJ also found, however, that WMATA was entitled to a credit for the benefits it paid during the July 9 – September 18, 2014, period.

Petitioner appealed the ALJ's decision to the CRB, contending that the evidence did not establish that she had refused to accept vocational rehabilitation services. She also argued that the suspension of benefits was contrary to law

because WMATA failed to give her prior notice and an opportunity to cure her alleged refusal of vocational rehabilitation before the suspension. The CRB disagreed. It concluded that even if, as petitioner contended, there was some evidence that she cooperated with vocational rehabilitation by meeting with her counselor and applying for jobs, there was substantial evidence to support the ALJ's determination that she had unjustifiably refused vocational rehabilitation. In rejecting petitioner's argument that she was not afforded notice and an opportunity to cure her perceived failure to cooperate, the CRB cited this court's decision in *Epstein v. District of Columbia Dep't of Emp't Servs.*, 850 A.2d 1140, 1143–44 (D.C. 2004) (holding that in the absence of a statutory or regulatory requirement that an employee be given notice and an opportunity to cure her non-cooperation with vocational rehabilitation, and in the absence of a DOES decision establishing or foreshadowing such a requirement, the employer could not be held to such a requirement before acting to suspend benefits). The CRB stated that since *Epstein*, "neither [DOES] nor the CRB has imposed a 'notice and opportunity to cure' condition precedent to suspending benefits for unreasonably refusing vocational rehabilitation services nor has there been any Code or regulatory changes to that effect."

Before this court, petitioner contends that the CRB improperly affirmed the ALJ's decision, which she asserts "contains both errors of law and fact by finding [that petitioner] had unreasonably refused vocational rehabilitation services . . . ." She asserts that the ALJ failed to consider, and the CRB erred as a matter of law by not reviewing, the totality of circumstances that bore on whether she could be said to have refused to accept vocational rehabilitation. She also argues that the CRB decision upheld a failure-to-cooperate date range (July 9, 2014, through September 15, 2015) that was not supported by substantial evidence. Additionally, petitioner argues the CRB erred in failing to recognize that "a notice and [opportunity to] cure requirement must be found to be implicit within the text of D.C. Code § 32-1507(d)."

II.

"In a workers' compensation case, we review the decision of the Board, not that of the ALJ" but "cannot ignore the compensation order which is the subject of the Board's review." *Marriott at Wardman Park v. District of Columbia Dep't of Emp't Servs.*, 85 A.3d 1272, 1276 (D.C. 2014) (internal quotation marks omitted). "Our standard of review mirrors that which the Board is bound to apply." *Id.*

"That is, the Board was not entitled to consider the evidence de novo or to make factual findings different from those of the ALJ." *Id.* "Rather, the Board was bound by the ALJ's findings of fact even if it might have reached a contrary result based on an independent review of the record." *Id.* "Further, if substantial evidence exists to support the ALJ's findings, the existence of substantial evidence to the contrary did not permit the Board to substitute its judgment for that of the ALJ." *Id.* (brackets and internal quotation marks omitted). "'Substantial evidence' is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Id.* (internal quotation marks omitted). This court "will not disturb an agency's decision if it flows rationally from the facts which are supported by substantial evidence in the record." *Georgetown Univ. Hosp. v. District of Columbia Dep't of Emp't Servs.*, 929 A.2d 865, 869 (D.C. 2007) (internal quotation marks omitted).

"Our review of the CRB's legal rulings is de novo." *Bowser v. District of Columbia Dep't of Emp't Servs.*, 129 A.3d 253, 258 (D.C. 2015). Nevertheless, "[g]iven the CRB's expertise in administering the [workers' compensation statute]," *Clement v. District of Columbia Dep't of Emp't Servs.*, 126 A.3d 1137, 1139 (D.C. 2015), we defer to its interpretation of the statute "unless its interpretation is unreasonable or in contravention of the language or legislative history of the statute . . . ." *Felder v. District of Columbia Dep't of Emp't Servs.*, 97 A.3d 86, 89 (D.C. 2014) (internal quotation marks omitted).

III.

The District of Columbia Workers' Compensation Act "requires employers to furnish [to employees whose work-related injuries render them unable to return to their pre-injury jobs] rehabilitation services 'designed, within reason, to return the employee to employment at a wage as close as possible to the wage that the employee earned at the time of injury.'" *Brown v. District of Columbia Dep't of Emp't Servs.*, 83 A.3d 739, 749 (D.C. 2014) (quoting D.C. Code § 32-1507 (c) (2012 Repl.)). It further provides for suspension of workers' compensation benefits for as long as "the employee unreasonably refuses . . . to accept vocational rehabilitation . . . unless the circumstances justified the refusal." D.C. Code § 32-1507 (d). Our case law recognizes that a finding that a claimant has unreasonably refused to accept vocational rehabilitation may be warranted not only where the claimant has unjustifiably refused to attend vocational rehabilitation meetings, but also where she has, for example, without justification, refused to participate in a

job-search preparation program, *see Black v. District of Columbia Dep't of Emp't Servs.*, 801 A.2d 983, 984, 986 (D.C. 2002), or has failed to pursue suitable job opportunities to which she has been alerted, *see Joyner v. District of Columbia Dep't of Emp't Servs.*, 502 A.2d 1027, 1032 (D.C. 1986).

Here, we conclude that the CRB did not err in holding that substantial evidence supported the ALJ's finding that petitioner "unreasonably refused [the] [E]mployer's vocational rehabilitation efforts." It is undisputed that petitioner maintained contact with her vocational rehabilitation counselor, generally was punctual for weekly meetings with her, and provided "input" when the vocational rehabilitation counselor submitted job applications on her behalf during those meetings. However, that level of cooperation by petitioner did not preclude the ALJ from finding that petitioner refused to accept vocational rehabilitation within the meaning of the statute if her activities (or lack thereof) outside of the meetings established that she had "adopt[ed] a passive, or even negative" approach toward pursuing re-employment. *Joyner*, 502 A.2d at 1031. The evidence before the ALJ showed what the ALJ could rationally conclude was just such an unreasonably passive approach. Vocational rehabilitation counselor Street testified that petitioner was expected to document that she made telephone contacts with or submitted applications to ten to fifteen potential employers each week; that "the bulk of the work . . . should be done through the claimant" rather than during the weekly one- to two-hour meetings; and that Street "like[d] to tell [her] clients" that if the client is not treating the job-search and application process "as a full time job," there is very little chance of finding employment. The ALJ found, however, that during the period of May 2014, through September 2014, the vocational rehabilitation counselor "was the only one that applied for jobs [for petitioner] . . . ." The ALJ further found that petitioner (who according to Street had "very minimal computer skills") failed to sign up for a basic computer skills class, even though, according to the counselor, "most employers want electronic applications;" and that petitioner "failed to follow-up with potential employers" that Street identified. Our review of the record shows that those findings were supported by Street's testimony and by her written vocational rehabilitation reports (which documented that Street advised petitioner to "apply to positions independently"), and either were corroborated by petitioner's specific testimony (e.g., that she never went to any computer classes) or were uncontroverted by her vague testimony about having, at some unspecified time during the vocational rehabilitation process, applied for "a couple" of jobs on her own.

We reject petitioner's argument that in upholding the ALJ's determination, the CRB affirmed findings reached without consideration of the totality of the

circumstances. Although petitioner contends that the ALJ failed to consider her medical restrictions and medical condition, the ALJ specifically noted petitioner's explanation that she did not want to take computer classes because her "neck injury prevented her from sitting for a long period of time." The ALJ also noted, however (and the CRB specifically referred to), the vocational rehabilitation counselor's testimony that she informed petitioner about free computer classes that she could complete online at her own pace so as to accommodate her physical condition. Further, the ALJ and the CRB acknowledged petitioner's testimony that she did not have a working computer at home, but also noted the vocational rehabilitation counselor's testimony that petitioner could have submitted applications online at the library or at a work force center. And while petitioner's brief refers to her experiencing "severe" "pain in her neck" and implies that any deficiencies in her participation in vocational rehabilitation were attributable to that, at the hearing petitioner did not testify about experiencing neck pain and did not testify, as the brief asserts, that "using the computer for extended periods of time caused [her] pain."[1]

We also reject petitioner's argument that there was not substantial evidence to support the ALJ's finding about the "date range selected by the Compensation Order" and her assertion that the Employer never specified why July 9, 2014, was the date when her actions amounted to an unreasonable refusal to cooperate. It appears either that WMATA counsel misspoke in his questioning of the vocational rehabilitation counselor or that there is an error in the hearing transcript; page 53 of the transcript, which is page 0102 of the administrative record, indicates that Street

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[1] Petitioner did testify that during the period in dispute, she had a "problem[]" with her neck and also had gout. At the time of the hearing, she was not taking any medications for conditions relating to her work accident, and she stated that her physical problem was numbness in her arms and hands and a limited range of motion in her neck.

We note that in the factual background section of her brief, petitioner recounts that treating neurologist Dr. Matthew Ammerman characterized her neck injury (which required a surgical "three-level cervical fusion") as a "career-ending injury" that would preclude her from typing on computers and that made vocational rehabilitation expectations "just unreasonable." However, neither during the hearing before the ALJ nor in the argument section of her brief did petitioner dispute that she has a "light duty residual capacity" for gainful employment.

agreed that "beginning in *September* 9, 2014, [petitioner] did not hand in any employer logs" Admin. Hearing Tr. at 53:1–2, Mar. 18, 2015 (italics added). The context makes it clear, however, that Street was agreeing that petitioner's consistent failure to hand in employer logs began on *July* 9, 2014, and continued at meetings on July 16, 23, and 30, and on August 6, 20, and 27, and on September 3, 2014. Notations in Street's Vocational Rehabilitation Progress Report and timeline corroborate this testimony. (By contrast, the counselor testified, during meetings in June 2014, petitioner submitted logs, though the logs showed that "she did not apply for any specific positions.")

Petitioner is correct that nothing in the law requires an injured worker to provide job logs, but the vocational rehabilitation counselor testified that petitioner did not otherwise indicate, during meetings with the counselor in July, August, and September, 2014, that she had "independently applied for any positions on her own." Moreover, although petitioner testified at one point that she was "sending applications or calling . . . employers," she did not testify that she did so during the July – September 2014, period in issue here. Further, the ALJ's statement that petitioner "did not offer an explanation for why she did not submit the job logs" suggests that the ALJ would not have found an unreasonable failure to cooperate with vocational rehabilitation if petitioner had presented alternative evidence that she made job-search efforts during the period in dispute. Even if *arguendo* the ALJ too narrowly focused on petitioner's failure to submit job logs, nothing in the record suggests that his conclusion would have been any different if he had focused on other documentation or evidence of petitioner's job-search efforts.

Finally, we are not persuaded by petitioner's argument that the effect of the CRB's decision is to "transform[] vocational rehabilitation into a system by which injured workers are required to apply for dead-end, low paying work . . . outside of their previous salary range; or [work] that would put them into a position of risking re-injury in order to avoid the suspension of their workers' compensation benefits." Petitioner's benefits were suspended because, during the relevant period, she was neither looking for nor applying on her own to *any* positions. There is no evidence in the record that the only available positions were ones that were "dead-end" or "low-paying" relative to petitioner's job as a bus operator. We acknowledge petitioner's testimony and explanation in her brief that she did not pursue an interview offer from potential employer Reddy Ice "because of the dangers of re-injury [of her neck] due to the possibility of slick floors due to melted ice." However, vocational rehabilitation counselor Street testified that she had "just wanted" petitioner to take the initiative "to call [Reddy Ice] back just to see what

they needed to say" about whether the hazardous condition of "water in the area" would affect the dispatcher or receptionist position for which petitioner had been invited to interview.

IV.

We next address petitioner's argument that the CRB erred as a matter of law in ruling that the Employer was not required to give petitioner notice that it believed her conduct amounted to an unreasonable refusal to accept vocational rehabilitation and a chance to cure the perceived refusal. Petitioner asserts that WMATA failed to let her know that "it thought she was acting unreasonably" so that the parties' "reasonable disagreement" about what constituted sufficient participation in the vocational rehabilitation process could have been avoided.

As the CRB's decision notes, prior to this court's decision in *Epstein*, the DOES Director took the position that notice and an opportunity to cure was required. However, as permitted by *Epstein* (which prohibited application of the DOES Director's previously "[un]foreshadowed" policy, but did not decide whether the policy was consistent with the Workers' Compensation Act), *see* 850 A.2d at 1143, the CRB has clarified that "the Director-created 'notice and opportunity to cure' rule is not the law under the [Workers' Compensation] Act." *Al-Khatawi*, CRB No. 15-032, 2015 WL 5554685, at *9 (D.C. Dep't of Emp't Servs. Aug. 3, 2015) ("A claimant's and employer's obligations are defined by the Act and the regulations; they contain no such specific requirement, and we decline to create or perpetuate one."). We defer to this CRB interpretation because the CRB has both acknowledged the change in interpretation and provided a non-arbitrary reason for it, explaining that its changed interpretation better aligns with the text of the Workers' Compensation Act. *Id.* at *8 (explaining that while "the Act has numerous provisions requiring that one party give specific notice of certain facts in order to be in compliance with the Act, . . . 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.").[2]

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[2] *Cf. FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514–15 (2009) (emphasis omitted) (rejecting the view that "agency action representing a policy (continued...)

In *Epstein*, this court stated that DOES "may consider whether [the Employer's] own actions (or inaction) may have led [the employee] to believe that her cooperation was not in question[,] [b]ut what [the agency] may not do is short-circuit the inquiry solely by reference to a newly-fashioned requirement of notice and opportunity to cure." 850 A.2d at 1144. The CRB, too, recognized in *Al-Khatawi* 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 [may] be a factor in deciding whether the claimant's conduct was unreasonable," but that "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." 2015 WL 5554685, at *9.

We have considered in this case whether the record would support a finding that WMATA's actions led petitioner to believe that her level of participation in vocational rehabilitation was reasonable (such that a remand for a finding by the ALJ would be warranted). We are satisfied that the record would not support such a finding (and that petitioner's assertion that the parties had a "reasonable disagreement" about what constituted sufficient participation in the vocational rehabilitation process is untenable).

The record shows that prior to July 2014, petitioner had been submitting weekly logs that showed job searches (although no applications for specific positions). The record further shows that beginning on July 9, 2014, petitioner submitted no job logs and also gave no indication that she had independently applied for positions. In addition, the record shows that on August 5, 2014, the vocational rehabilitation counselor requested a meeting with petitioner's counsel to discuss the fact that "for about a month" (i.e., beginning in early July 2014),

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(...continued)
change must be justified by reasons more substantial than those required to adopt a policy in the first instance" and explaining that while "the requirement that an agency provide reasoned explanation for its action . . . ordinarily demand[s] that it display awareness that it is changing position" and while "the agency must show that there are good reasons for the new policy[,]" "it need not demonstrate to a court's satisfaction that the reasons for the new policy are better than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better, which the conscious change of course adequately indicates").

petitioner had been saying that she "wasn't sure if she wanted to continue with vocational services" or that "she was just tired and . . . didn't know if she wanted to do this anymore." Thus, the record evidence is that by mid-July, petitioner's participation and expression of interest in participating in the vocational rehabilitation process were markedly reduced from her prior level of participation, such that her conduct prompted a call to petitioner's counsel to address the situation.[3] On this record, we are satisfied that the ALJ would have no basis for finding that WMATA "led [petitioner] to believe that her cooperation was not in question," *Epstein*, 850 A.2d at 1144, or that petitioner and the vocational rehabilitation counselor had what petitioner could have perceived as a mere reasonable disagreement about how to approach the job-search process, such that WMATA should have been precluded from suspending petitioner's benefits.

For the foregoing reasons, the decision of the CRB is

Affirmed.

ENTERED BY DIRECTION OF THE COURT:

JULIO A. CASTILLO
Clerk of the Court

[3] Petitioner asserts in her brief that the vocational rehabilitation counselor indicated during a meeting on August 14, 2014, that she "had no concerns" and "did not express any concerns" about petitioner's participation in vocational rehabilitation, but the record belies those assertions. To the contrary, Street testified that, if asked for a recommendation, she would not have recommended that the Employer continue vocational rehabilitation, "because [petitioner] kept stating in [the weekly] meetings that she did not want to pursue it" and because petitioner was "not handing in the . . . employer contact logs."