

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 15-191

**HIWET GEBREYOHANNES,¹
Claimant-Petitioner,**

v.

**HYATT REGENCY HOTEL and
GALLAGHER BASSETT SERVICES,
Employer/Third-Party Administrator-Respondent.**

Appeal from an October 30, 2015 Compensation Order
by Administrative Law Judge Douglas A. Seymour
AHD No. 07-361D, OWC Nos. 639045

(Decided April 28, 2016)

Matthew J. Peffer for Claimant
Tony D. Villereal for Employer

Before JEFFREY P. RUSSELL and LINDA F. JORY, *Administrative Appeals Judges*, and LAWRENCE D. TARR, *Chief Administrative Appeals Judge*.

JEFFREY P. RUSSELL for the Compensation Review Board.

DECISION AND REMAND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

On February 18, 2007, Ms. Hiwat Gebreyohannes (Claimant) injured her right knee while employed as a “service busser”² for Hyatt Regency Hotel (Employer). The parties stipulated that Claimant is unable to return to her pre-injury job and is limited to sedentary jobs as a result of the injury.

¹ Although the claimant’s first name as reflected in the caption of the Compensation Order is spelled as “Hiwat” - both the Claimant’s and Employer’s filings, and a prior CRB decision in another appeal involving this Claimant reflect his name is spelled “Hiwet”.

² The job is not otherwise described in the Compensation Order, nor are the nature of or the circumstances surrounding the injury.

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Employer made voluntary payments of temporary total disability benefits from July 18, 2007 through January 2, 2012, and from April 22, 2012 through April 11, 2015.

Employer offered vocational rehabilitation (VR) services in the form of job placement assistance beginning January 29, 2015. Because Employer believed that Claimant was not cooperating with the provision of those services, Employer sought an order suspending ongoing temporary total disability and other compensation benefits beginning April 12, 2015 at a formal hearing in the Administrative Hearings Division (AHD) of the Department of Employment Services (DOES). At that hearing Claimant also sought authorization for acupuncture treatment.

On October 30, 2015, the ALJ issued a Compensation Order (the CO) in which Claimant's compensation benefits were suspended as requested by Employer, and the acupuncture treatment was denied as being not reasonable and necessary.

Claimant filed Claimant's Application for Review and a memorandum in support thereof (Claimant's Brief) with Compensation Review Board (CRB) seeking reversal of the suspension of benefits. Claimant did not appeal the denial of the acupuncture treatment.

Employer filed Employer/Administrator's Opposition to Claimant's Application for Review (Employer's Brief), opposing the appeal and seeking to have the CO affirmed.

Because the findings the CO contains no findings or conclusions concerning whether Employer's vocational rehabilitation services satisfied its obligations under D.C. § 32-1507 (c), the suspension of benefits is vacated and the matter is remanded to AHD for further findings of fact and conclusions of law.

ANALYSIS

As a preliminary matter, we note that both parties in this appeal refer to and rely on *Joyner v. DOES*, 502 A.2d 1027 (D.C. 1986) (*Joyner*).

Claimant relies on *Joyner* to support her argument that "In order for the Employer to demonstrate that an injured worker has failed to cooperate with vocational rehabilitation, the Employer must demonstrate job availability that considers the workers' age, background, etc., what kind of positions can they do or be trained to do; and whether those positions exist which the injured worker could with reasonable likelihood secured [sic], based on the injured worker's age, education, and vocational background." Claimant's Brief, at 7.

Similarly, Employer asserts "the Court of Appeals has specified that the burden of establishing job availability is on the employer...", also citing *Joyner*. Employer's Brief, at 7.

While neither party asserts that *Joyner* concerned provision of VR services, their disagreement in this case is fundamentally based upon the matter central to *Joyner* -- the suitability of alternative jobs in the labor market in cases where, as here, a claimant is unable to return to the pre-injury job as a result of incapacity brought about by a compensable work injury.

As we have stated before:

There is no one test for failure to cooperate; the determination is made on a case-by-case basis. The totality of the circumstances, including but not limited to, the medical status of the employee, the conduct of the employee, the conduct of the vocational rehabilitation service, and the conduct of the employer are examined and weighed for indicia of a pattern of conduct evincing an unwillingness to cooperate with vocational rehabilitation. See, *Johnson v. Epstein, Becker and Green*, Dir. Dkt. No. 01-11, OHA No. 98-273B, OWC No. 519621 (September 22, 2004).

Ford v. All Glass Systems, CRB No. 11-069 at 5, (February 9, 2012) (*Ford*).

Although we have explicitly rejected other aspects of the Director's ruling in *Epstein, Becker and Green*, *supra* in *Al-Khatawi v. Herson Glass*, CRB No. 15-032 (August 3, 2015), ("Thus, we take this opportunity to clearly state that the Director-created 'notice and opportunity to cure' rule is not the law under the Act. 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 have adhered to the "totality of the circumstances" approach described in *Ford*.

Claimant argues that no suspension is in order "because the jobs identified by the vocational rehabilitation counselor were outside [Claimant's] capabilities to acquire and attain". (Claimant's Brief at 7).

As stated in *Ford*, the "conduct of the vocational rehabilitation service" is one factor to be considered in determining whether a claimant's conduct warrants suspension of benefits. While this consideration has numerous aspects, among the most important is the number, variety and characteristics of the job leads provided.

Among the purposes of VR is to ascertain what jobs might be available to a particular claimant, and there is an obligation upon the VR provider to provide leads that are arguably within a claimant's capacity.

However, if the only leads to which a claimant is directed are on their face not appropriate, a failure to follow up on such leads is less significant, and doesn't necessarily suggest, "a passive, or even negative, attitude about pursuing re-employment." See *Joyner*, at 1031.

The ALJ considered and accepted the testimony of the VR counselor (see CO at 5), who identified what he described as "four keys" which are part of returning an injured employee to work. CO at 3.

They were identified as (1) follow up on job leads, (2) to document the job search and its results, (3) stay in regular communication with the counselor, and (4) attend the regularly scheduled meeting with the VR counselor. The ALJ then found

A review of [the counselor's] August 15, 2015 Progress Report, pages 2 and 3, reveals between April 15, 2015 and August 25, 2015, there are two (2) references to Claimant not meeting with him, three (3) references to Claimant not applying for jobs, and two (2) references to having no contact with Claimant.

* * *

... [The VR counselor] concluded, based on the four keys that an injured worker needs to do to cooperate, that Claimant had not cooperated with his rehabilitation efforts. HT 59-67.

CO at 4.

In reaching the conclusion that Claimant's conduct warranted suspension of benefits, the ALJ wrote:

Based on a review of the totality of the evidence, I find Claimant, who I did not find to be a credible witness, unreasonably failed to cooperate with Employer's vocational rehabilitation efforts. While Claimant's 17 day absence in Texas could be excused because of her daughter's medical emergency, her failure to attend numerous properly scheduled meetings with [the VR counselor] cannot be justified because Claimant received letters from [the counselor] and used a cell phone to communicate with him. Most importantly, her failure to apply for any jobs on her own, or to apply for any of the numerous job leads provided to her by [the counselor] over the course of five months, cannot be justified because she provided no explanation for her failure to apply for the jobs. I also rely on the credible testimony of [the counselor], who testified that claimant did not cooperate with his vocational rehabilitation efforts. HT 38, 65-67, 80, 82-84. CE 12.

I also found Claimant's testimony not credible that she cannot currently work because of back and knee pain, because her sedentary restrictions, which the parties stipulated to, were established in the February 11, 2014 FCE, which had been recommended by [treating physician] Dr. Klimkiewicz. HT 6, 16, 35. CE 1, 9. In view of Claimant's *ongoing failure to apply for any jobs on her own*, or to apply for any of the jobs provided her by [the counselor], and her insistence that she cannot work at this time, I find her unreasonable failure to be continuing *See Al-Khatawi v. Herson Glass*, CRB No. 13-023, AHD No. 11-231 (November 13, 2014)

CO at 5 (footnotes omitted).

In a footnote in the above quoted portion of the CO, the ALJ held:

I did not find credible Claimant's testimony that she had applied for three (3) jobs, in part because she could not recall when she applied for the jobs, and in part because she produced no job search logs. HT 52, 53.

CO at 5, n.3.

We shall assume for the purposes of this decision that the ALJ is correct when he finds that Claimant has not instigated any job search activities on her own, and that she failed to apply for any of the jobs to which she was directed. We shall also accept the ALJ's determination that the lack of contact between the counselor and Claimant prior to March 4, 2015 was not unreasonable, being the result of a family medical emergency.

As the ALJ points out:

Under the Act, vocational rehabilitation involves mutual obligations. Employers are charged with instituting vocational rehabilitation in an effort to return claimants to gainful employment at a wage as close as possible to the wage claimant earned at the time of his or her injury. D.C. Code 32-1507 (c). Claimants are tasked with cooperating with those vocational rehabilitation efforts. D.C. Code 32-1507(d) states, in pertinent part, as follows:

“If at any time during such period the employee unreasonably refuses to submit to medical or surgical treatment or to an examination by a physician selected by the employer, or to accept vocational rehabilitation the Mayor shall, by order, suspend the payment of further compensation, medical payments. And health insurance coverage during such period, unless the circumstances justified the refusal.”

CO at 4, 5.

Review of the vocational assessment reports (CE 12) in the record reveals that the VR counselor accepted that Claimant had three significant factors effecting employability including a limited command of English, a sedentary work restriction, and a lack of formal education beyond the 10th grade.

Review of those same records reveals that the VR counselor forwarded “job leads” to Claimant on twelve occasions. However, nowhere does the ALJ make an assessment as to how or if these job leads conform to Claimant's vocationally related assets and deficits, nor does the ALJ consider whether the identified jobs are full or part time, or how much they pay, or their proximity to Claimant's home. Part of the “reasonableness” consideration (as a subset of considerations of the quality of the VR services being offered) includes consideration of aspects of the jobs for which leads have been provided. For example, a claimant could hardly be expected to apply for a part time, low wage job far from the claimant's home if transportation time and expense outweigh the benefits of the job, or for a job that obviously requires skills or special aptitudes that the claimant does not possess and that Employer's VR program is not designed to provide or enhance.

Further, while we agree that a claimant is obligated to reasonably engage in the job placement process, the ALJ made no assessment as to whether the VR services being provided in this case were “designed to return the employee to employment at a wage as close as possible to the wage the employee earned at the time of the injury”, as required by D.C. Code § 32-1507 (c).

In order for there to be a suspension of benefits, an employer must first offer VR as described in the Act. The suspension in this case therefore includes within it an implied finding that the VR offered in this case meets Employer’s statutory obligations.

Our review of the record reveals that the job leads provided have various qualities that the ALJ could have, but did not consider in assessing whether Claimant’s failure to apply for them was “unreasonable”, as required by the Act, to warrant suspension of benefits. The CO fails to address these considerations, and from the record before us, we cannot assume that it is unreasonable.

In addition, Claimant argues in this appeal that even if the ALJ’s suspension of benefits is supported by substantial evidence, her non-cooperation was cured by her expressing a willingness to commence cooperation as of June 5, 2015. Although Claimant does not fully explicate the exact reasons why she believes that she “cured” her non-cooperation, the CO did not address this defense to the Employer’s request for suspension of benefits.

As noted above, although the CRB has rejected the argument that an employer must prove that it offered a non-cooperative claimant an opportunity to cure the non-cooperation, where a claimant asserts that the non-cooperating has in fact been cured, the claimant is entitled to have that claim addressed.

Accordingly, we vacate the suspension and remand for further consideration of the evidence to determine whether the VR offered by Employer satisfies its obligations under the Act in order to trigger Claimant’s obligation to cooperate, and if so, whether Claimant has demonstrated that she has cured her non-cooperation.

CONCLUSION AND ORDER

The Compensation Order fails to make findings of fact and conclusions of law concerning whether the vocational services offered by Employer in this case meet the requirements of D.C. Code § 32-1507 (c), triggering Claimant’s obligation to cooperate or face suspension of benefits. The suspension of benefits is therefore unsupported by substantial evidence, and is vacated. Further, the Compensation Order does not address Claimant’s argument that any non-cooperation had been cured prior to the first scheduled formal hearing.

The matter is remanded for consideration of whether vocational rehabilitation efforts offered by Employer were adequate to trigger Claimant's obligation to cooperate. If on remand the ALJ determines that Claimant's conduct warrants suspension of compensation benefits, the specific conduct so warranting such suspension shall be identified, and the ALJ shall consider whether, on the record adduced at the formal hearing, Claimant demonstrated that her non-cooperation has been cured, and if so, how that was accomplished.

So ordered.