

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

Muriel Bowser
Mayor



Deborah A. Carroll
Director

COMPENSATION REVIEW BOARD

CRB No. 15-157

JEROME AUSTIN,
Claimant-Petitioner,

v.

AGGREGATE INDUSTRIES and
GALLAGHER BASSETT SERVICES, INC.,
Employer and Third-Party Administrator-Respondents.

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2016 FEB 29 AM 10 30

Appeal from a September 10, 2015 Compensation Order on Remand by
Administrative Law Judge Joan E. Knight
AHD No. 08-343D, OWC No. 642778

(Decided February 29, 2016)

Charles Krikawa IV for the Claimant
Tony D. Villeral for the Employer

Before HEATHER C. LESLIE, LINDA F. JORY, and JEFFREY P. RUSSELL, *Administrative Appeals Judges*.

HEATHER C. LESLIE, *Administrative Appeals Judge*, for the Compensation Review Board.

DECISION AND REMAND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

The underlying facts of the injury and treatment are described by the CRB in a prior Decision and Remand Order, *Austin v. Aggregate Industries*, CRB No. 15-028 (June 24, 2015) (DRO), quoting from a prior Compensation Order in this case, and adding some additional background:

The underlying facts of the injury and treatment are not in dispute and are sufficiently outlined in *Austin v. Aggregate Industries*, AHD No. 08-343B, OWC No. 642778 (May 26, 2011):

Claimant's cement truck operator duties include driving the cement truck but also lifting materials to add the cement mixer and attaching the chutes in order to "drop" the concrete. Adding the chutes requires climbing a ladder and lifting the chutes to attach them to the vehicle. The chutes weigh approximately 20 pounds.

Further the cement materials must be carried up to the top of the truck.

On August 29, 2007, while working as a cement truck operator for employer, claimant slipped while exiting his work truck; lost his footing; and grabbed on to the truck door to prevent himself from falling. Claimant initially treated with Dr. J. Michael Joly who referred claimant to Dr. Steven Webber who recommended an arthroscopic procedure to confirm the pathology and treatment plan. Pursuant to the adopted Findings of Fact, Claimant's MRI revealed a non-displaced labral tear anteriorly and posteriorly and a partial rotator cuff tear of the supraspinatus tendon.

On October 9, 2008, Dr. Webber performed an Anterior-inferior labral repair after he performed an examination under anesthesia. He determined claimant had not suffered a tear of the rotator cuff tendon but did suffer a tear of the anterior-inferior labrum which he repaired.

Dr. Webber followed claimant's recovery from the repair of the anterior and anterior-inferior labrum on October 15, 2008 and regularly thereafter. On November 19, 2008, Dr. Webber recommended physical therapy. Dr. Webber reported on December 17, 2008, that physical therapy had not been approved by Workers' Comp and claimant was doing exercises on his own. Dr. Webber reported that claimant was making good progress despite not having physical therapy. On January 28, 2009, Dr. Webber reported that the status of claimant's case is still pending so physical therapy has not been approved by Workman's Compensation. On March 9, 2009, Dr. Webber provided his opinion that he believed that his inability to go to physical therapy has had a significant negative impact on his progress.

Claimant was unable to seek further treatment from Dr. Webber again until his return on May 19, 2010 because his visits were not being paid for by the carrier. Dr. Webber at that time indicated that claimant's stiffness was partly related to claimant's inability to go to physical therapy because it was never approved. Dr. Webber noted claimant has made improvement in his range of motion over time but he still had a limitation in his motion and weakness. Once again, Dr. Webber provided claimant with a prescription for physical therapy two or three times a week for four weeks.

Claimant finally started physical therapy treatments in June 2010 but was having increased pain. As a result, Dr. Webber recommended claimant continue physical therapy and provided

claimant with a disability slip from work as a heavy equipment operator through July 2010. On August 4, 2010, Dr. Webber noted the physical therapy helped claimant to improve the function of the shoulder and some range of motion but did not improve his pain. Dr. Webber did not release claimant to return to his pre-injury duties but instead asked for a functional capacity evaluation.

Dr. Webber reported on August 17, 2010, that the functional capacity evaluation he recommended was denied. Dr. Webber indicated that he would attempt to determine claimant's limitations based on claimant's symptoms as well as his physical examination and review of the physical therapy notes.

On August 17, 2010, Dr. Webber's found claimant unable to do repetitive overhead activity, only infrequent overhead activity. Claimant's lifting was limited to waist height and limited to 50 pounds. Lifting to shoulder height was limited to 25 pounds. Dr. Webber limited claimant's driving to four hours per work day.

I find that due to the lifting overhead and driving more than four hours a day, claimant was prevented from returning to his pre-injury duties as a result of the work injury; Employer has not provided any suitable alternative or modified duty commensurate with claimant's physical restrictions.

On December 1, 2010, claimant began working for a newspaper distribution, working three to four hours a day, seven days a week. His duties involve loading 20 newspapers into a bag and delivering them to apartments or homes. The bags of 20 papers weighs approximately five pounds.

Claimant was referred to perform a functional capacity evaluation (FCE) on October 21, 2011 by Dr. Webber. This appointment was facilitated by Ms. Leslie Rice, a vocational counselor. Claimant did not attend the FCE. Ms. Rice was informed by Claimant's counsel on September 21, 2011 that he was employed and not in need of vocational services.

A full evidentiary hearing was held on April 11, 2012. At that hearing, Employer sought to modify the May 26, 2011 Compensation Order, quoted above, and suspend Claimant's temporary partial disability benefits due to a failure to cooperate with vocational rehabilitation. A Compensation Order (CO) was issued on January 21, 2015 which denied Employer's request and further ordered Employer to reinstitute vocational rehabilitation.

Employer appealed. Employer argues the CO is not supported by the substantial evidence in the record, is not in accordance with the law, and that the ALJ abused her discretion when ordering the Employer to continue vocational rehabilitation.

Claimant opposes Employer's appeal, arguing the CO is supported by the substantial evidence in the record and is in accordance with the law.

DRO at 1-3.

After analyzing the argument of the parties, the CRB, relying on *DameGreene v. American Red Cross*, CRB No. 13-050 (August 6, 2014), determined that by refusing to cooperate with vocational rehabilitation on September 21, 2011, Claimant had voluntarily limited his income. The CRB vacated the Compensation Order and remanded the case with instructions to the Administrative Law Judge (ALJ) to enter an award granting Employer's request to modify the prior order and suspend disability benefits as the Claimant unreasonably refused to cooperate with vocational rehabilitation as of September 21, 2011.

A Compensation Order on Remand was issued on September 10, 2015 which granted Employer's request for a modification of the prior order, concluding Claimant had voluntarily limited his income as of September 21, 2011.

Claimant appealed. Claimant argues:

In the present case, the Administrative Law Judge ignored substantial evidence in [sic] record about the claimant's expressed willingness to cooperate with vocational rehabilitation. In addition, she erroneously applied the law with regard to non-cooperation and abused her discretion in not-reopening the record to received additional evidence on claimant's cooperation, underpayment of temporary total disability benefits and the amount of any credit due the employer for potential over payment of indemnity benefits.

Claimant's argument at 5.

Employer did not respond to Claimant's appeal.

ANALYSIS¹

As we concluded in our prior DRO,

It is undisputed that Claimant's counsel, as a representative for Claimant, indicated on September 21, 2011 that Claimant would not be participating in vocational rehabilitation as Claimant had obtained other employment. Having obtained other employment is not a reasonable reason to refuse vocational rehabilitation. As we stated in *DameGreene v. American Red Cross*, CRB No. 13-050, AHD No. 97-411F (August 6, 2014) (*DameGreene*),

There is nothing in the statute that prohibits a claimant who has returned to work to still request vocational rehabilitation services, and if the request is reasonable, the employer must provide them. Conversely, there is nothing in the statute that eliminates the obligation to accept vocational rehabilitation services of a claimant who has returned to employment earning less than the pre-injury wage.

DRO at 5.

Claimant, through counsel, points to his testimony at the April 11, 2012 hearing wherein he testified he would cooperate with vocational rehabilitation and relies on *Darden v. DOES*, 911 A.2d 410 (D.C. 2006) (*Darden*) in support of the argument that this cured his non-cooperation with rehabilitation. While Claimant did testify he would cooperate with vocational rehabilitation at the Formal Hearing, Claimant's counsel qualified that testimony in closing argument, stating Claimant would only cooperate with vocational rehabilitation pursuant to an order wherein Employer was ordered to pay temporary total disability to the Claimant who would then cooperate with vocational rehabilitation. Hearing transcript at 81-82. We note Employer was already under an order to pay Claimant temporary partial disability as he was at one time working part time for a newspaper distributorship. It was Employer who was attempting to modify this prior order due to non-cooperation with vocational rehabilitation.

To qualify cooperating with vocational rehabilitation subject to Employer paying Claimant temporary total disability benefits, is not a "cure" warranting a suspension of benefits only through the date of the Formal Hearing. *Darden, supra*. Claimant qualified his cooperation with vocational rehabilitation by demanding benefits that were not ordered in the prior Compensation Order that was sought to be modified by the Employer; Claimant was only entitled to temporary partial disability pursuant to the prior order. There is no evidence that after

¹ 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.

Claimant ceased working that Claimant sought to modify the prior order to seek temporary total disability. We do not accept Claimant's argument on this point and again point to our DRO and our decision in *DameGreene*.

While the case was on remand pursuant to our DRO, Claimant asserts he submitted a Motion to Reopen the Record, seeking to introduce evidence regarding his cooperation with vocational rehabilitation after the Formal Hearing. That motion was denied. We find this to be in error.

In *Darden*,

The Board acknowledged that a suspension of benefits pursuant to section 32-1507 (d) "is only appropriate throughout the period that the injured employee unreasonably refuses to accept vocational rehabilitation" and that "[u]pon demonstration of a willingness to participate in the vocational rehabilitation which [Employer] is obliged to continue to provide, the suspension of benefits must end."

Darden, at 414.

The District of Columbia Court of Appeals in *Darden* took issue with the CRB not addressing Claimant's post-hearing evidence (referred to by both parties in argument) of an email sent by Claimant's counsel to Employer stating that the claimant was "ready, willing and able to participate in vocational rehabilitation services." *Id.*

The Board had discretion in responding to the post-hearing evidence pertaining to cure. Under D.C. Code § 32-1521.01(d)(2), the Board had authority to remand the August 20, 2003 Compensation Order to OHA for further review. Under 7 DCMR § 230 (1986), the Board had authority to grant "leave to adduce additional evidence" and to remand the matter to "permit the presentation of the additional evidence" and for possible modification of the compensation order, as the evidence warranted. In light of the Act's remedial intent "to give substantial protection against interruption of income," and in light of both parties' reference to post-OHA-hearing activities that bore on the issue of cure, we hold that the Board erred in not considering whether to remand the cure issue to OHA for further proceedings. The Board's statement that the issue of cure could "only be addressed in a modification of the prior order following the disposition of the instant appeal" was incorrect as a matter of law. Because this court is "not obliged to stand aside and affirm an administrative determination which reflects a misconception of the relevant law," *Jones v. District of Columbia Dep't of Employment Servs.*, 553 A.2d at 647 (internal citations omitted), we reverse this aspect of the Board's decision. (Footnotes omitted.)

Id.

We will use that discretion now, especially in light of the facts of the case before us, including the time it took to issue the Compensation Order after the Formal Hearing was held, as well as Claimant's Motion to Re-Open the Record. Because of Claimant's uncontested assertion that

after the Formal Hearing he began to cooperate with vocational rehabilitation, the ALJ's refusal to consider this evidence is in error. We are mindful that the ALJ may have felt constrained by our DRO, however, in light of the Motion to Re-Open the record, we rectify that error now. Upon remand, the ALJ is to re-open the record to allow Claimant to introduce post-hearing evidence bearing on the issue of cure as well as any evidence Employer finds relevant to the issue, pursuant to the rational in *Darden*.

We also leave it to the discretion of the ALJ to allow additional evidence regarding Claimant's work status since the last Formal Hearing to be introduced, allowing for a modification of the prior order's conclusion on the nature and extent of Claimant's disability. Thus, on remand, the ALJ is to address whether post-hearing Claimant cured his refusal to cooperate with vocational rehabilitation. If so, then the ALJ would then determine the Claimant's work status after cure and modify the prior order's conclusion on the nature and extent of Claimant's disability.

CONCLUSION AND ORDER

The September 10, 2015 Compensation Order on Remand is VACATED and REMANDED for further findings of fact and conclusions of law consistent with the above discussion.

So ordered.