

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

Department of Employment Services

MURIEL BOWSER  
MAYOR



DEBORAH A. CARROLL  
DIRECTOR

**CRB No. 14-151**

**KWAKWEA STRIPLING,**

**Claimant–Petitioner,**

**v.**

**COASTAL INTERNATIONAL SECURITY AND CHARTIS INSURANCE,**

**Employer–Respondent.**

Appeal from a November 14, 2014 Compensation Order by  
Administrative Law Judge Gregory P. Lambert  
AHD No. 10-340B, OWC No. 667757

Michael Kitzman for the Petitioner  
Joel Ogden for the Respondent

Before HEATHER C. LESLIE, MELISSA LIN JONES, and JEFFREY P. RUSSELL, *Administrative Appeals Judges.*

HEATHER C. LESLIE, for the Compensation Review Board,  
MELISSA LIN JONES, concurring in part and dissenting in part.

**DECISION AND REMAND ORDER**

**FACTS OF RECORD AND PROCEDURAL HISTORY**

On June 2, 2009, Claimant was employed by Employer as a security guard. On that date she sustained an injury to her right shoulder, which was caused by Claimant being required to repeatedly open and shut a heavy, bullet proof sliding glass door, the sliding mechanism of which was malfunctioning. After having Claimant seen and evaluated by independent medical examiner (IME) Dr. Louis Levitt on November 17, 2009, Employer accepted Claimant's claim for workers' compensation in connection with the right shoulder injury, and provided benefits, including right rotator cuff repair surgery performed by Dr. Uchenna Nwaneri on October 19, 2009.

On October 10, 2009, Claimant was involved in a non work-related motor vehicle accident. Following that accident an MRI was performed revealing that Claimant has degenerative disc

DEPT. OF EMPLOYMENT  
SERVICES  
COMPENSATION REVIEW  
BOARD  
2015 JUN 11 PM 10 33

disease at the C4-5, 5-6 and 6-7 levels. Claimant was evaluated on April 10, 2010 by Dr. Mustafa Hacque for continuing right shoulder pain, and she sought treatment for neck and left shoulder pain from Dr. Haddis Hagos, at the Washington Metro Pain Institute commencing sometime in February 2011.

In a formal hearing conducted by an ALJ in DOES on September 28, 2011, Claimant sought to obtain benefits in connection with her claim that her left shoulder injury was also causally related to the June 2, 2009 work injury. In a Compensation Order issued November 1, 2011, the ALJ denied the claim, finding that the left shoulder injury was the result not of the June 2, 2009 work injury, but rather was the result of the October 10, 2009 motor vehicle accident. That Compensation Order was appealed to the CRB, which affirmed the ALJ's decision on February 2, 2011.

In a formal hearing conducted September 15, 2011, Claimant sought to obtain medical benefits in connection with an injury to her neck, claiming that it, too, is causally related to the June 2, 2009 work injury. The request was denied in a Compensation Order dated May 4, 2012. Claimant appealed the Compensation Order to the CRB, which affirmed the conclusion that the neck condition was not causally related to the work injury.

Claimant was eventually placed under permanent restrictions pertaining to the use of her right shoulder. Claimant was advised by Dr. Nwaneri to avoid lifting or carrying over 5 pounds. Claimant began vocational rehabilitation services in 2011. Claimant began part time employment with Innovative Security Systems on August 2, 2013 and Maryland Parks in January 2014. Employer also had a market labor survey done on January 10, 2014.

Claimant continued to treat with Dr. Nwaneri. After results of objective testing, Dr. Nwaneri recommended further surgery to her right shoulder. Employer sent Claimant's records for Utilization Review (UR) on October 8, 2014, which stated the request surgery is not reasonable or necessary. This surgery has not been authorized. Claimant is not receiving benefits.

A full evidentiary hearing occurred on October 14, 2014. Claimant sought an award of temporary total disability benefits from February 6, 2013 through March 19, 2013, temporary partial disability benefits from August 1, 2013 to the present and continuing, payment of causally related medical expenses, and authorization for medical treatment. Employer requested a suspension of benefits from December 4, 2012 through March 19, 2013 based upon a failure to cooperate with vocational rehabilitation. The issues to be adjudicated were the nature and extent of Claimant's disability, is Claimant's requested medical treatment reasonable and necessary, whether Claimant failed to cooperate with vocational rehabilitation, and whether Claimant voluntarily limited her income.

A Compensation Order (CO) was issued on November 26, 2014, denying Claimant's claim for relief. Employer's request to suspend Claimant's benefits from December 4, 2012 through March 19, 2013 was granted.

Claimant appealed. Claimant argues the ALJ's denial of disability benefits based upon Claimant reaching maximum medical improvement is not in accordance with the law, the CO erred in

concluding Claimant had failed to cooperate with vocational rehabilitation service, erred in finding Claimant had voluntarily limited her income, erred in concluding the requested medical treatment was not reasonable or necessary and erred in rejecting the treating physician's opinion.

### 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.

### ANALYSIS

Preliminarily, we note that after appealing the CO on December 18, 2014, Employer filed a Motion to Extend Time to File Opposition for Review on December 30, 2014. An Order granting the Motion was issued on January 7, 2015, giving Employer until January 19, 2015 to submit its opposition. Employer's opposition was filed with the CRB on January 20, 2014 and is therefore late. Because Employer's motion was filed beyond the deadline, Employer/Insurer's Reply to Claimant's Opposition to Application for Review has not been considered in the resolution of this appeal.

The ALJ, prior to addressing the merits of the case, determined that Dr. Nwaneri was not entitled to the treating physician preference. After acknowledging the preference pursuant to *Short v. DOES*, 723 A.2d 845 (D.C. 1998), the ALJ rejected Dr. Nwaneri's opinion. Specifically,

Without success, Dr. Nwaneri continues to treat Claimant's subjective complaints of pain. *See generally* CE 1 at 26 (Dr. Nwaneri: "All I can tell you is I've tried to do the best work that I can do, and that this particular patient has not responded to treatment. Why that is the case, I really cannot say ...."); CE 1 at 29 ("I-I don't really know why she's having pain. I'm speculating in terms of all the things that it could be ...."). And although Dr. Nwaneri reported some objective findings that supported Claimant's complaints, Dr. Levitt noted that she made "a poor effort at all motors from her shoulder girdle all the way down to the fingertips." CE 1 at 24 (Dr. Nwaneri); EE 1 at 2 (Dr. Levitt). Dr. Levitt saw no "asymmetry to grip and neurovascular examination [was] otherwise unremarkable." EE 1 at 2. "[T]here is no evidence that she has active rotator cuff insufficiency by exam or by recurrent MRI scans performed on the shoulder." EE 1 at 3. "[T]he only problem with this case as I see it," wrote Dr. Levitt, "is the treating physician ... is unwilling to end care. He continues to pursue diagnostic studies on the basis of the patient's clinical complaints when she has no active musculoskeletal disease that requires further treatment." EE 1 at 3. Especially considering Claimant's lack of credibility

when testifying about her pain, Dr. Levitt's thoughtful IME opinion is persuasive; Dr. Nwaneri's opinion is not.

CO at 3-4.

We conclude the ALJ articulated specific and legitimate reasons to reject the opinion of Dr. Nwaneri. It is clear by the above analysis the ALJ had misgivings about the length of time that Claimant had been treated in light of Dr. Nwaneri's lack of an explanation as to why treatment was unsuccessful and why Claimant continues to have pain. The ALJ took into consideration Dr. Nwaneri's reports as well as his deposition in coming to the conclusion that his opinion was "unpersuasive when compared to Dr. Levitt's carefully written IME report." CO at 3. We affirm the above analysis.

Claimant also argues the CO's conclusion that the requested medical treatment is not reasonable and necessary is in error and not in accordance with the law, arguing Dr. Nwaneri's opinion should be given greater weight than the UR as his opinion is more qualified in this particular instance based upon his knowledge of Claimant. After outlining the role of UR and noting the CRB's decision in *Haregewoin v. Loews Washington Hotel*, CRB No. 08-068 (February 19, 2008), the ALJ stated:

Dr. Nwaneri recommends a second surgery to address Claimant's "persistent" complaints of pain in the right shoulder. CE 1 at 10; *see also* CE 2. He proposes a right shoulder arthroscopy to evaluate the rotator cuff, which has collected some fluid, and ideally would perform a shoulder subacromial decompression coupled with a platelet-rich plasma injection. CE 1 at 11-12. Even so, he does "not believe that there's a tear in the rotator cuff." CE 1 at 11; *see also* CE 1 at 22. But he does note that MRIs have shown persistent effusion and tendinosis. CE 1 at 22-23; CE 4 (MRI report: "small amount of fluid"; "minimal tendinosis"; "tiny amount of fluid"). Essentially, the surgery would be diagnostic, with an aim toward identifying Claimant's pain. CE 1 at 42. But "[d]iagnostic arthroscopy should be limited to cases where imaging is inconclusive and acute pain or functional limitation continues despite conservative care." EE 8 at 279. The utilization reviewer, whose opinions are well-reasoned, concluded that the procedure was unnecessary. EE 8 at 280.

Platelet-rich plasma treatment is experimental and unproven. It is unreasonable and unnecessary, particularly because Claimant's first surgery to her shoulder was successful. EE 8 at 281. Dr. Nwaneri hopes that the treatment "would aid in the healing" after the proposed second surgery. HT at 13. But the utilization review details why that is conjecture at best. EE 8 at 280 ("In a blinded, prospective, randomized trial of PRP vs placebo in patients undergoing surgery to repair a torn rotator cuff, there was no difference in pain relief or in function. The only thing that was significantly different was the time it took to do the repair: it was longer if you put PRP in the joint."). Dr. Levitt was "a bit astonished a recommendation has been made to do PRP treatments to the right shoulder." EE 1 at 3 ("They serve

one purpose only and that is to convince this patient that she is ill. There is no clinical justification for PRP treatments." ). The PRP treatments are unnecessary.

Notably, one reason for the proposed surgery is to drain the fluid built up in Claimant's shoulder, which could be done using only a needle and an ultrasound machine. CE 1 at 28. But Dr. Nwaneri himself thought that alternative was inappropriate because he didn't think the fluid was the cause of her symptoms. CE 1 at 29. And even if he were allowed to perform the operation and injection, Dr. Nwaneri could not anticipate the type of recovery to expect. CE 1 at 27 ("Well, I really can't say... [U]sually with ... somebody like her, you anticipate full recovery between six months and some patients may take up to a year. But we're five years down the road and we're still dealing with the same issue. So, I really don't know." ).

After weighing the record evidence, I find the utilization reviewer's opinion more persuasive. Neither the proposed shoulder surgery nor the PRP treatment are reasonable or necessary.

CO at 5.

In arguing that the above analysis is in error, Claimant points to the medical opinions of Dr. Nwaneri for support. It is clear from the above discussion the ALJ took into consideration the reports of Dr. Nwaneri in coming to his conclusion that per the UR, the requested treatment is not reasonable or necessary. What the Claimant is asking us to do is to reweigh the evidence in her favor, a task we cannot do. The CO's conclusion that the requested treatment is not reasonable or necessary is affirmed.

We next turn to Claimant's argument that the CO erred in concluding Claimant unreasonably refused vocational services from December 4, 2012 through March 19, 2013. Claimant argues the ALJ only focused on three specific events in concluding she failed to cooperate and failed to address the testimony of Ms. Villegas. We disagree.

While we do acknowledge that the testimony of Ms. Villegas shows she cooperated with vocational rehabilitation while working with Claimant, during the period of the alleged non-cooperation with vocational services, Claimant worked with another vocational counselor, Ms. Hall. It is these reports the ALJ used in his analysis to determine Claimant had failed to cooperate. The ALJ thoroughly analyzed her participation during this time with Ms. Hall and found Claimant had missed appointments, failed to attend a job fair, failed to provide a potential employer documents to facilitate the hiring process, and failed to tailor her resume or cover letter when she submitted her resume online. See CO at 6.

As Claimant states in argument, a determination for failure to cooperate is determined on a case by case basis and is determined by the totality of the circumstances, including the conduct of the employee. *Johnson v. Epstein, Becker and Green*, Dir. Dkt. No. 01-11, OHA No. 98-273B, OWC No. 519621 (September 22, 2004). The ALJ found Claimant to be an incredible witness based upon her unconvincing testimony and her demeanor, notably finding she exaggerated her

injury at the hearing. See CO at 2, 3 and 6. The ALJ determined Claimant had voluntarily limited her income based upon the totality of the circumstances and suspended benefits from December 4, 2012 through March 19, 2013. We affirm this finding.

Finally, we address Claimant's contention that the denial of disability benefits was in error. Claimant argues that the CO's denial of benefits based upon her reaching maximum medical improvement (MMI) is in error as her disability continued because her restrictions prohibited her from returning to her pre-injury employment. On this point, the CO states:

Claimant has reached maximum medical improvement. EE 1 at 3. Dr. Nwaneri said that the original surgery was a "good repair." CE 1 at 23. Dr. Levitt concluded that "[t]here has been no progression of disease or worsening of her disease." EE 1 at 3. "Nerve conduction studies and EMG's to the right upper extremity were unremarkable." EE 1 at 2. The evidence supports a finding that Claimant reached MMI after the November 2009 surgery but before the claimed-for period of relief, which begins on August 13, 2013. EE 1 at 3. The specific date is unimportant for the purposes of this Order: because her disability reached permanency after her November 2009 surgery and before the claimed period of relief, Claimant is not entitled to a temporary partial disability finding.

CO at 4.

We agree with Claimant that the denial of disability benefits on these grounds is in error. Claimant's shoulder injury may have reached maximum medical improvement, however, that does not mean her wage loss ceased. Indeed, the parties agree that because of her restrictions pertaining to her right shoulder, Claimant cannot return to her pre-injury job, which is the reason Claimant was placed in vocational rehabilitation. Any benefits Claimant may be entitled to is controlled by D.C. Official Code § 32-1508(V)(i)-(iii), which states,

In other cases the employee shall elect:

- (I) To have his or her compensation calculated in accordance with the formula set forth in either sub-subparagraph (ii)(I) or (II) of this subparagraph; and
  - (II) To receive the compensation at the time the employee returns to work or achieves maximum medical improvement.
- (ii) The compensation shall be 66 2/3% of the greater of:
- (I) The difference between the employee's actual wage at the time of injury and the average weekly wage, at the time of injury, of the job that the employee holds after the employee becomes disabled; or

- (II) The difference between the average weekly wage, at the time the employee returns to work, of the job that the employee held before the employee became disabled and the actual wage of the job that the employee holds when the employee returns to work.
- (iii) If the employee voluntarily limits his or her income or fails to accept employment commensurate with the employee's abilities, the employee's wages after the employee becomes disabled shall be deemed to be the amount the employee would earn if the employee did not voluntarily limit his or her income or did accept employment commensurate with the employee's abilities.

The ALJ did determine Claimant had voluntarily limited her income as she testified she was not looking for jobs presently. CO at 7. We affirm this conclusion as the Claimant did testify to this fact. However, that does not mean Claimant is not entitled to benefits in accordance with the statute above. As Claimant points out, pursuant to *Washington Post v. DOES*, 675 A.2d 37 (D.C. 1996), Employer has to prove that work for which Claimant was qualified was available when proving voluntarily limitation of income. To satisfy this burden, Employer presented a labor market survey outlining over 20 jobs Ms. Villegas found to prove that work was available that Claimant was in fact qualified for and could do within her restrictions.<sup>1</sup>

While the ALJ found Claimant had voluntarily limited her income, he did not award disability benefits, which is in error. As the statute states, when Claimant voluntarily limits her income the statute allows for the ALJ to make a determination on what an employee's wages would have been, thus allowing for an award of benefits pursuant to § 32-1508(V)(iii). We must remand the case for the ALJ to determine what job outlined in the labor market survey is suitable and within Claimant's physical and vocational capacity. The ALJ shall bear in mind when making this determination Claimant's age, vocational background and intellectual and physical disabilities. See *Joyner v. DOES*, 502 A.2d 1027, 1031 n.4 (D.C. 1986).

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<sup>1</sup>Indeed, in opening, Employer seemingly acknowledges Claimant is entitled to disability benefits, just a lesser amount than what Claimant was arguing, relying upon the labor market survey. Specifically, the Employer stated:

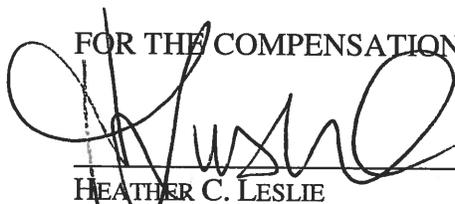
And so I'd ask that you find that the surgery is not reasonable and necessary, find that Ms. Stripling voluntarily limited her income and failed to cooperate with vocational rehabilitation benefits from December 4, 2012 through March 19, 2013 and impute her with a wage earning capacity of over \$650.00 per week so that she can finally move on with her life.

Hearing transcript at 26-27.

### CONCLUSION AND ORDER

The November 11, 2014 Compensation Order, is AFFIRMED in part, VACATED in part, and REMANDED in part. The Compensation Order's conclusion that Claimant's requested surgery is not reasonable and necessary, that Claimant failed to cooperate with vocational rehabilitation and voluntarily limited her income is AFFIRMED. The Compensation Order's denial of disability benefits is VACATED and this case is REMANDED for further consideration of Claimant's entitlement to disability benefits pursuant to D.C. Official Code § 32-1508(V)(iii).

FOR THE COMPENSATION REVIEW BOARD:



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HEATHER C. LESLIE  
Administrative Appeals Judge

June 11, 2015

DATE

MELISSA LIN JONES, concurring in part and dissenting in part:

The majority affirms the ALJ's ruling that Ms. Stripling has reached maximum medical improvement, and I agree that there is substantial evidence in the record to do so; however, having reached maximum medical improvement, although Ms. Stripling's wage loss may not have ceased, her entitlement to temporary total or temporary partial disability benefits has ceased:

After having found the Claimant was at MMI and could not return to work but without specifying the date the Claimant had reached MMI, the ALJ awarded the Claimant *temporary* partial disability. We note in argument both parties concede Claimant is at maximum medical improvement and her condition is permanent. Thus, it would seem that the parties agree to the *permanent* nature of Claimant's disability.

With the finding that Claimant will not improve and the parties agreement that this is indeed the case, we cannot say that the conclusion that Claimant is entitled to *temporary* partial disability is supported by the substantial evidence in the record or in accordance with the law and therefore must remand the case for further findings of fact and consideration. Upon remand, if the CO continues to award temporary partial disability, the ALJ is directed to provide findings of fact to support the conclusion of the temporary nature of Claimant's disability. If, on the other hand, the Claimant is found to be permanently partially disabled, the level of benefits to which she may be entitled must be determined. If the record does not contain sufficient evidence for a determination as to the appropriate compensation, in order to avoid a due process violation, the parties may seek to have the record re-opened for the receipt of additional evidence to determine which method of calculation the Claimant elects pursuant to §32-1508(V)(i).

Until such time as the ALJ reconciles the findings of fact and conclusions of law, we cannot say that the CO is supported by the substantial evidence in the record and in accordance with the law.

*Dzurikaninova v. Barnes & Noble*, CRB No. 14-066, AHD No. 12-197B, OWC No. 682770 (September 8, 2014) (Emphasis in original.) Ms. Stripling may be entitled to permanent partial disability benefits based upon her wage loss, but her claim for relief was limited to temporary total disability benefits from February 6, 2013 through March 19, 2013 and temporary partial disability benefits from August 1, 2013 to the date of the formal hearing and continuing. *Stripling v. Coastal International Securities, Inc.*, AHD No. 10-340B, OWC No 667757 (November 26, 2014), p. 2. To award her any temporary benefits after reaching maximum medical improvement is not in accordance with the law, and to award her permanent partial disability benefits based upon wage loss when Coastal International Securities, Inc. was not on notice of such a claim would not be in accordance with the law. See *Transportation Leasing Co. v. DOES*, 690 A.2d 487 (D.C. 1997). For these reasons, I dissent from the portions of the majority opinion affirming Ms. Stripling's entitlement to temporary partial or temporary total

disability benefits even if the amount of those benefits is reduced as a result of her voluntary limitation of income.

  
MELISSA LIN JONES  
Administrative Appeals Judge