

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services
Labor Standards Bureau

Office of Hearings and Adjudication
COMPENSATION REVIEW BOARD



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CRB No. 08-015

MAMIE DAUGHETY,

Claimant - Petitioner

v.

D. C. DEPARTMENT OF HUMAN SERVICES

Employer - Respondent

Appeal from a Compensation Order of
Administrative Law Judge Terri Thompson Mallett
AHD PBL No. 06-0098, DCP No. 761010-0008-1999-0011

Harold L. Levi, Esquire, for the Petitioner

Kevin Turner, Esquire, for the Respondent

Before LINDA F. JORY, and JEFFREY P. RUSSELL, and FLOYD LEWIS *Administrative Appeals Judges*.

LINDA F. JORY, *Administrative Appeals Judge*, on behalf of the Review Panel

DECISION AND ORDER

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board pursuant to D.C. Official Code §1-623.28, §32-1521.01, 7 DCMR § 118, Department of Employment Services (DOES) Director's Directive, Administrative Policy Issuance 05-01(February 5, 2005)¹.

¹Pursuant to Administrative Policy Issuance No. 05-01, dated February 5, 2005, the Director of the Department of Employment Services realigned the Office of Hearings and Adjudication to include, *inter alia*, establishment of the Compensation Review Board (CRB) in implementation of the D.C. Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, D.C. Official Code § 32-1521.01. In accordance with the Director's Directive, the CRB replaces the Office of the Director in providing administrative appellate review and disposition of workers' and disability compensation claims arising under the D.C. Workers' Compensation Act of 1979, as amended, D.C. Official Code §§ 32-1501 to 32-1545 (2005) and the D.C. Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Official Code §§ 1-623.1 to 1-643.7 (2005), including responsibility for administrative appeals filed prior to October 1, 2004, the effective date of the D.C. Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004.

BACKGROUND

This appeal follows the issuance of a Compensation Order by an Administrative Law Judge (ALJ) of the Office of Hearings and Adjudication's Administrative Hearings Division (AHD). In that Compensation Order, (CO) which was filed on September 27, 2007, the ALJ, determined Petitioner failed to cooperate in vocational rehabilitation efforts as required by D.C. Code §1-623.04, but found Respondent was not authorized by the Act to terminate Petitioner's disability benefits for such failure as the sanction for such failure is to prospectively reduce monetary compensation in accordance with D.C. Code §1-623.13(b).

Claimant – Petitioner (Petitioner), filed an Application for Review (AFR) of the September 27, 2007 Compensation Order (CO) on October 18, 2007, asserting the ALJ's finding that Petitioner had failed to cooperate in vocational rehabilitation is not supported by substantial evidence and is not in accordance with the law. Petitioner asserts, however, that the CO properly ordered her disability benefits reinstated retroactively and she does not appeal that determination. Employer – Respondent (Respondent), has not filed a response to the AFR.

ANALYSIS

As an initial matter, the scope of review by the Compensation Review Board (CRB) and this Review Panel (the Panel) as established by the Act and as contained in the governing regulations is 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. Comprehensive Merit Personnel Act of 1978, as amended, D.C. Official Code §1-623.01, *et seq.*, at §1-623.28 (a). “Substantial evidence”, as defined by the District of Columbia Court of Appeals, is such evidence as a reasonable person might accept to support a particular conclusion. *Marriott Int'l. v. District of Columbia Department of Employment Services* 834 A.2d 882 (D.C. App. 2003). Consistent with this scope of review, the CRB and the Panel are bound to uphold 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 the reviewing authority might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

Turning to the case under review herein, in support of its allegation that the ALJ erred in finding that Petitioner failed to cooperate with Respondent's vocational rehabilitation efforts, Petitioner asserts Respondent did not produce a *prima facie* case of failure to cooperate with her vocational services obligations. Petitioner discusses at length the fact that Petitioner went to California for a vacation but that she did attempt to contact the vocational services counselor upon her return, and, according to Petitioner, taking a vacation is not a failure to cooperate with vocational rehabilitation.

Respondent conceded at the Formal Hearing that a “claimant” can take a vacation just as an “employee” can take a vacation, but Respondent argued that the “claimant” retains the obligation

to cooperate and to tell employer when he will return just as if he/she was working. Respondent specifically asserted:

In this instance, [Petitioner] acknowledges that she was asked about her return date, and she also acknowledges that not only did she not know, but she didn't make an attempt to find out. With that, the office of risk management didn't know whether or not she was going to be gone one week, two weeks two months, six months or a year.

Nevertheless, having reviewed the hearing transcript as well as the Compensation Order the Panel does not agree that the ALJ found Petitioner had failed to cooperate merely by going on vacation. The ALJ further found:

As a result of [Petitioner's] notice of her vacation plans, DCP placed Petitioner's vocational rehabilitation case on hold on September 3, 2004 rendering it inactive. On October 25, 2004, DCP re-initiated case activity. Ms Hall attempted contact with [Petitioner] via voicemail on October 25, 2004, October 25, 2004 and October 29, 2004 and mailed correspondence to [Petitioner] on October 25, 2004.

CO at 3. The Panel notes particularly Petitioner's own testimony at the Formal Hearing regarding the California trip that when she left she did not know how long she was going to be there and when the vocational counselor asked her how long she would be gone she did not know and she did not follow up with her daughter to find out how long she would be out of town. HT at 70, 71.

The ALJ further found that DCP terminated Petitioner's benefits on July 7, 2006 citing failure to participate in vocational services but that DCP did not conduct a review of Petitioner's wage earning capacity or determine whether Petitioner would have the capacity to earn more wages if she did not fail to attend vocational rehabilitation counseling, citing to D.C. Code §1-623.13. As Petitioner correctly asserts, the ALJ properly ordered Petitioner's disability benefits reinstated retroactively. We conclude the ALJ's finding that Petitioner had failed to cooperate with Respondent's vocational services is supported by substantial evidence. We however must conclude the ALJ erred in remanding this matter to the Disability Compensation Program for a determination of Petitioner's potential wage-earning capacity, if any, as a result of the failure to cooperate, in accordance with D.C. Code §1-623.13(b). This conclusion is premised solely on this agency's lack of authority to remand any matter to another government agency. What action, if any, DCP takes upon issuance of the Compensation Order on Remand is for it to decide.

While it is true that there is other evidence in the record that could have supported a contrary result, we may not substitute our judgment for that of the ALJ, whose decision is supported by substantial evidence and consistent with the language of the statute. *See Marriott*, 834 A.2d at 885; *Shelda Kralick v. Dist. Of Columbia Dep't of Employment Services*, 842 A.2d 705 (February 26, 2004).

CONCLUSION

The ALJ's findings of fact and conclusions of law, contained in the September 27, 2007 Compensation Order, are supported by substantial evidence and are in accordance with the law.

ORDER

The Compensation Order of September 27, 2007 June 2, 2006 is hereby **AFFIRMED** in part and **VACATED** in part. That portion of the ALJ's Order which remands this matter to the Disability Compensation Program for a determination of Claimant's potential wage-earning capacity in accordance with D.C. Code §1-623.13(b) is hereby **VACATED**. That portion which Orders Petitioner's disability benefits including her medical benefits shall be reinstated effective July 7, 2006 which monetary compensation amount may be reduced as authorized by D.C. Code §1-623.13(b), is hereby **AFFIRMED**.

FOR THE COMPENSATION REVIEW BOARD:

LINDA F. JORY
Administrative Appeals Judge

December 7, 2007
