

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. 03-25

ERIC ROBERTS,

Claimant - Petitioner

v.

ALTMAN COMPANY INC. AND HARTFORD INSURANCE COMPANY,

Employer/Carrier - Respondent

Appeal from a Compensation Order on Remand of
Administrative Law Judge E. Cooper Brown
OHA No. 00-224A, OWC No. 546003

Benjamin T. Boscolo, Esquire for the Respondent

Alexander Francuzenko, Esquire for the Petitioner

Before LINDA F. JORY, JEFFREY P. RUSSELL, *Administrative Appeals Judges* and Floyd Lewis,
Acting Chief Administrative Appeals Judge.

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 § 32-1521.01 and 32-1522 (2004), 7 DCMR § 230, and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005).¹

¹ Pursuant 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 District of Columbia Fiscal Year 2005 Budget Support Act of 20024, Title J, the Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, sec. 1102 (Oct. 1, 1994) *codified at* D. C. Code Ann. §§ 32-1521.01, 32-1522 (2005). In accordance with the Director's Policy Issuance, 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. Code Ann. §§ 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),

BACKGROUND

This appeal follows the issuance of a Compensation Order on Remand from the Administrative Hearings Division (AHD) of the Office of Hearings and Adjudication (OHA) in the District of Columbia Department of Employment Services (DOES). In that Compensation Order on Remand, which was filed on January 13, 2003, the Administrative Law Judge (ALJ), concluded Claimant-Petitioner (Petitioner) had unreasonably failed to cooperate with vocational rehabilitation services after June 26, 2001 and suspended Petitioner's benefits from June 26, 2001 to the present and continuing.

The Compensation Order on Remand followed a Decision and Remand Order issued by the Director of the Department of Employment Services (the Director) on December 3, 2002. In that Decision and Remand Order, the Director affirmed in part and remanded in part, a Compensation Order issued by OHA on February 27, 2002. The Director affirmed the ALJ's conclusion that Petitioner did not voluntarily limit his income by refusing to accept employment commensurate with his physical abilities and that Petitioner did not refuse reasonable and necessary medical treatment. The Director found the ALJ's decision that Petitioner cooperated with vocational rehabilitation efforts after June 26, 2001 was not based upon substantial evidence and the matter was remanded for findings of fact and conclusions of law on this issue.

Petition for Review alleges as grounds for its appeal that the ALJ's decision on remand is arbitrary or capricious, inconsistent with the substantial record evidence and not in accordance with the law. Employer-Respondent (Respondent) has filed a response asserting the ALJ's suspension of benefits is supported by substantial evidence that the Petitioner has in fact, failed to cooperate with the vocational rehabilitation process.

ANALYSIS

As an initial matter, the scope of review by the Compensation Review Board (CRB) and this Review Panel (hereafter, 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. D.C. Official Code § 32-1521.01(d)(2)(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 this 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.

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.

Turning to the case under review herein, Petitioner asserts that the ALJ failed to consider the appropriateness of the jobs presented to Petitioner after June 26, 2001 in concluding that Petitioner unreasonably failed to cooperate with vocational rehabilitation. Counsel asserts that Petitioner specifically told the vocational rehabilitation counselor he was not interested in working as a security guard and that it is impossible to characterize a job in which Petitioner is not interested in as appropriate. Petitioner further alleges that he was not interested in this position because he was afraid he would have to restrain someone with his bad hand.

Respondent's Memorandum in support of its position on appeal refers to the letter sent by claimant's counsel on June 26, 2001 wherein counsel expressed his willingness to cooperate and upon which the ALJ in the original Compensation Order relied on in determining claimant cured his prior failure to cooperate with vocational rehabilitation. Respondent asserts that despite this letter Petitioner continued his pattern of complete non-cooperation with the vocational rehabilitation process, and did not fulfill his attorney's promise "to cooperate effective immediately." Respondent argues that "to permit Claimant to avoid suspension of benefits for non-cooperation with the vocational rehabilitation process solely on the promise of his attorney that he will cooperate, completely diminishes the authority of the Act and permits the claimant to abuse the system." Respondent's Memorandum at 10.

In the Decision and Remand Order of the Director, the Director concluded that the prior ALJ's finding that the Petitioner's failure to cooperate in vocational rehabilitation ceased on June 26, 2001 is not supported by substantial evidence. In concluding that the decision that Petitioner cooperated with vocational rehabilitation efforts after June 26, 2001 is not based upon substantial evidence, the Director explained:

A review of the records shows that although Claimant's counsel, in a letter dated June 26, 2001 expressed his willingness to cooperate, the Claimant continued to not complete job applications and not to appear at interview. After June 26, 2001, the Employer located five (5) jobs for the Claimant. Employer Exhibit Nos. 4 and 6. All, except one, were approved as within the Claimant's physically (sic) restrictions by Dr. Todd Kelmann. by Dr. Todd Kelman. Employer Exhibit No. 6. The Employer scheduled interviews and notified the Claimant and his counsel, via certified mail, of the interviews, but the Claimant did not attend any of them. Employer Exhibit No. 8. At the hearing, the Claimant testified that he received the letters, but did not attend the interviews because he didn't approve of the jobs of the salaries. HT at 148-50 (December 13, 2001). The Claimant also testified he did not inform Terrance Walsh, the vocational rehabilitation counselor, that he would not attend the interviews. HT at 155-6 (December 13, 2001) Given these facts, the ALJ's finding that the Claimant's failure to cooperate in vocational rehabilitation ceased on June 26, 2001 is not supported by substantial evidence.

The Director remanded the matter to the ALJ for findings and conclusion on the issue of whether Petitioner unreasonably refused to cooperate after June 26, 2001 or as he wrote on page 3, "whether the Claimant's conduct after June 26, 2001 was an unreasonable failure to cooperate

with vocational rehabilitation based upon the record evidence as a whole”. Citing D. C. Official Code §32-1507(d).²

On remand, the ALJ found Petitioner through his legal counsel notified Respondent by letter of his willingness to participate in the vocational rehabilitation process. Thereafter, on July 11, 2001, Respondent again referred Petitioner to Mr. Terrence Walsh for the purpose of reinstating vocational rehabilitation services in the form of job development for and on behalf of Petitioner. The ALJ found that between the dates of July 17, 2001 and August 20, 2001, Walsh identified four openings for suitable jobs for Petitioner pursuant to a labor market survey that Walsh had conducted. Walsh notified Petitioner and his attorney by certified and regular mail of each job opening, and set up an interview for Petitioner for each job. The ALJ found with the exception of a cashier's position, the jobs were within Petitioner's physical limitations. The ALJ further found for each of the interviews, Walsh appeared at the designated time and place to assist Petitioner with his job application. The ALJ found Petitioner received the notices scheduling the interviews however he did not attend the interviews nor did he notify Walsh or the prospective employer that he would not be attending. The ALJ found Petitioner failed to attend the job interview due to his disapproval of the jobs and/or the salaries.

In addressing the Director's directive of whether Petitioner's post-June 26th job placement efforts constituted an unreasonable failure and/or refusal to cooperate with Respondent's vocational rehabilitation services, such that his benefits should be suspended the ALJ found:

The evidence of record establishes that following Walsh's resumption of job placement efforts, Claimant's response to Walsh's efforts was no different from his pre-June 26th response - which ALJ Devoe previously held constituted an unreasonable failure to cooperate with vocational rehabilitation services. Indeed, review of Claimant's post-June 26th response to Employer's efforts, the conclusion is inescapable that Claimant's June 26th expression of willingness to participate was illusory, at best. After June 26th, Claimant continued to disregard notices of job opportunities that Walsh sent him, failed to attend scheduled job interviews, did not notify either the prospective employer or Walsh of his decisions not to participate in the interviews, and otherwise demonstrated a total lack of interest in, or regard for, the job placement services he was offered.

The ALJ determined that Petitioner's arguments in support of his lack of cooperation in the post-June 26th period are indistinguishable from his objections to the vocational rehabilitation services earlier provided and explained that Petitioner either didn't like the jobs, or he didn't like the pay that was offered. The ALJ found Petitioner's "argued justifications of no more significance in the evaluation of the reasonableness of his refusal to cooperate in Employer's post-June 26th job placement efforts than they were when argued before ALJ Devoe (at the December 13, 2001

² Where employer alleges a voluntary limitation of income by claimant, the Court of Appeals has held that once the claimant demonstrates an inability to perform his/her usual job, a prima facie case of total disability is established, which the employer may then seek to rebut by establishing the availability of other jobs which the claimant could perform. *Logan v. DC. Dept. of Employment Services*, 805 A.2d 237, 240-243 (D.C. 2002). Where employer meets this evidentiary burden, claimant, in order to sustain a disability finding, must either successfully *challenge* the legitimacy of the employer's evidence of available employment, or demonstrate diligence, but lack of success, in obtaining other employment. *Logan, supra* at 243

formal hearing) in justification of Petitioner's pre-June 26th failure to cooperate. The ALJ further determined "The fact of the matter is, Claimant failed or refused to cooperate even minimally with Employer's vocational rehabilitation services, and has offered no excuse or rationale of consequence February 27, 2002 Compensation Order.

The Panel agrees that the ALJ on remand applied the proper standard pursuant to the Director's order and D. C. Official Code § 32-1507. Section 32-1507 (a) requires an employer to furnish vocational rehabilitation for such period as the nature of the injury or the process of recovery may require. Section 32-1507(d) requires an injured employee to submit to and not to unreasonably refuse to submit to medical or surgical treatment or to an examination by a physical selected by the employer or to accept vocational rehabilitation. The Panel notes, however, that an employee does not have the option to decide if he feels employer's efforts or the jobs are in fact suitable before he decides to cooperate. D.C. Official Code § 32-1507(d)

Inasmuch as the vocational process requires injured workers to not only follow up on job leads but to communicate with the vocational counselor when jobs are provided or communications are received, Petitioner's own determination that a job identified by Respondent is not determinative as the vocational counselors must proceed with the job search process in order to determine if there are any suitable positions in the job market which requires cooperation by the injured worker. The evidence of record supports the ALJ's determination that Petitioner has not proffered a legally sufficient reason for his refusal to even communicate with the vocational counselor. The ALJ's finding that Petitioner's refused to communicate with the vocational rehabilitation counselor is supported by substantial evidence. The ALJ's conclusion that this refusal was not reasonable is in accordance with the law.

Petitioner's remaining argument on appeal, that he cured his failure to cooperate by letter his counsel transmitted on his behalf to employer on October 22, 2002 stating his willingness and ability to participate in vocational rehabilitation services, is also misplaced. Neither the Director nor the ALJ indicate that any additional evidence was requested or found material enough to reopen the record to include. Accordingly, the ALJ was not bound to consider the October 22, 2002 letter and both the letter and the issue of whether claimant cured cannot now be considered. This issue, however, should be considered pursuant to a subsequent request for review of a Compensation Order pursuant to D. C. Official Code § 32-1524.

CONCLUSION

The ALJ's conclusion that Petitioner refused to communicate and cooperate with Respondent's vocational rehabilitation efforts, and that the refusal was unreasonable, is supported by substantial evidence and in accordance with the law.

ORDER

The Compensation Order of January 13, 2003 is hereby AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

LINDA F. JORY
Administrative Appeals Judge

June 23, 2005
DATE