

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

Department of Employment Services

MURIEL BOWSER  
MAYOR



DEBORAH A. CARROLL  
DIRECTOR

**CRB No. 15-120**

**WALTER JACKSON,  
Claimant-Petitioner,**

v.

**TRULAND SYSTEMS CORPORATION and  
HARTFORD INSURANCE COMPANY,  
Employer/Carrier-Respondents.**

DEPT. OF EMPLOYMENT  
SERVICES  
COMPENSATION REVIEW  
BOARD  
2015 DEC 8 PM 1 19

Appeal from a June 26, 2015, Compensation Order by  
Administrative Law Judge Donna J. Henderson  
AHD No. 12-127A, OWC No. 679948

(Issued December 8, 2015)

Justin M. Beall for the Claimant  
Gerard J. Emig for the Employer

Before HEATHER C. LESLIE, JEFFREY P. RUSSELL, *Administrative Appeals Judges* and LAWRENCE  
D. TARR, *Chief Administrative Appeals Judge*.

HEATHER C. LESLIE for the Compensation Review Board.

**DECISION AND ORDER**

**FACTS OF RECORD AND PROCEDURAL HISTORY**

Claimant was employed as an Electrician by Employer. On April 29, 2011, Claimant injured his right shoulder, low back, left foot and left lower extremity when fifteen sheets of drywall fell on him while working. Because of this injury, Claimant has undergone multiple surgeries to his right shoulder, low back and left foot. Claimant is unable to return to his former employment as a result of his injuries.

Dr. Richard S. Meyer, Claimant's treating physician, has opined Claimant is not a candidate for vocational rehabilitation.

Employer sent Claimant for an independent medical evaluation (IME) with Dr. Louis Levitt on July 15, 2014. Dr. Levitt took a history of Claimant's injury, treatment, and performed a

physical examination. Dr. Levitt opined Claimant's back condition was no more than a sprain and needed no further treatment. Dr. Levitt also opined Claimant's right shoulder treatment to date had been appropriate and necessary as it related to the work injury and that Claimant was at maximum medical improvement and needed no further treatment. Dr. Levitt assigned a 25% permanent partial impairment rating to the right upper extremity and restricted his usage of the right arm to below shoulder level, with a lifting limitation of 35-50 pounds. With respect to the treatment of the left foot, Dr. Levitt did express reservations regarding the treatment received. However, Dr. Levitt did assign a rating of 10% permanent partial impairment to Claimant's left lower extremity and recommended accommodations be made so that Claimant would "avoid extended walking, ladder climbing and working in awkward postures. Even when considering his foot pathology on the left and shoulder pathology on the right, he is employable with certain accommodations." Employer's exhibit 2 at 26.

Based on Dr. Levitt's IME, Employer has not authorized any further medical treatment after July 15, 2014.

Claimant subsequently began vocational rehabilitation on September 4, 2014. Vocational counselor Tracey Rosa-Pinero utilized the physical restrictions placed upon Claimant by Dr. Levitt in her assessment of Claimant's employability. On November 21, 2014, Employer suspended temporary total disability benefit payments due to alleged non-cooperation with vocational rehabilitation.

A full evidentiary hearing occurred on March 10, 2015. Claimant sought an award of reasonable and necessary medical care as well as temporary total disability benefits from November 22, 2014 to the present and continuing. The issues to be adjudicated were the nature and extent of Claimant's disability, whether Claimant failed to cooperate with vocational rehabilitation between September 4, 2014 and November 21, 2014, and whether Claimant's request for additional medical care after July 15, 2014 is reasonable and necessary.

A Compensation Order (CO) was issued on June 26, 2015 which ordered:

It is **ORDERED** Claimant's claim for relief be, and hereby is, **GRANTED in part** and **DENIED in part**. Employer's claim for relief is **GRANTED in part** and **DENIED in part**. Claimant's temporary total disability benefits are suspended from November 21, 2014 until he cures his failure to cooperate with vocational rehabilitation. Claimant is entitled to additional medical treatment including consultations with Drs. Ducic, Magur and a shoulder specialist.

CO at 13.<sup>1</sup>

Claimant appealed. Claimant argues that the ALJ erred in concluding Claimant failed to cooperate with vocational rehabilitation. Claimant argues the conclusion that Claimant did not cooperate does not flow rationally from the facts presented when considering the totality of the circumstances. Claimant also argues even if the ALJ was correct in concluding that Claimant failed to cooperate with vocational rehabilitation, the ALJ erred in not determining whether

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<sup>1</sup> Employer did not appeal the finding that Claimant was entitled to additional medical treatment.

Claimant cured his suspension by expressing a willingness to cooperate after the suspension of Claimant's benefits.

Employer opposed the appeal, arguing that the ALJ's conclusion that Claimant failed to cooperate with vocational rehabilitation is supported by the substantial evidence in the record and in accordance with the law.

#### STANDARD OF REVIEW

The scope of review by the CRB 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. Workers' Compensation Act of 1979, as amended, D.C. Code §§ 32-1501 to 32-1545 (2005) at § 32-1521.01(d)(2)(A). Consistent with this standard of review, the CRB and this Review Panel are constrained to uphold a Compensation Order (CO) 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 Int'l. v. DOES*, 834 A.2d 882, 885 (D.C. 2003).

#### ANALYSIS

The law is clear that vocational rehabilitation involves mutual obligations. Employers begin vocational rehabilitation in an effort to return claimant's to employment at a wage as close as possible to the wage that the claimant earned at the time of the injury. D.C. Code § 32-1507(c). Claimants, in turn, are tasked with cooperating with vocational rehabilitation. D.C. Code § 32-1507(d) states:

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.

With the above in mind, we turn to Claimant's first argument, that the ALJ erred in determining Employer gave sufficient knowledge to Claimant of his responsibilities and obligations. The ALJ stated:

The VC initially met with Claimant at his attorney's office for the purpose of conducting the initial assessment. At that meeting on September 19, 2014, she collected information concerning his education, vocational training, and employment history. The VC testified that she explained the vocational plan and what her expectations of him were in the process. HT at 90 - 92, 94, 97, 99-100, 102, 110 - 111, and 117-18. Claimant was also aware of his responsibility to attend VR meetings EE 1, pp. 7, 9, 10, 13, 15, 16, and 19. Claimant was also aware of his responsibility to apply for the positions which the VC recommended for him. HT at 97 - 98, 98-99, and 99-100 and EE 1, p. 10, 13. Claimant was given job

logs "to complete on a daily basis to document his vocational efforts." HT at 94 and EE 1, p. 7. Claimant was aware of his responsibilities in the VR process.

CO at 7.

In arguing that the above analysis is wrong, Claimant points to Claimant's testimony at the Formal Hearing where he testified he was never informed of his obligations, including his need to submit job logs, or of the consequences of his failure to cooperate. We disagree.

What is problematic with Claimant's argument is that the ALJ found the Claimant to be an incredible witness. Specifically, in the finding of facts, the ALJ stated:

I find that Mr. Jackson's testimony concerning the extent of his disability, his physical limitations and his efforts to cooperate with vocational rehabilitation to lack credibility. I also find his demeanor and the tenor of his voice when he testified that he does not know what job logs are to lack credibility. HT 82 and 94. I make this finding based upon his demeanor and appearance at the hearing and the reports and testimony of the VC. In addition, Claimant's testimony was inconsistent with the medical records.

CO at 3.

Having found Claimant an incredible witness, the ALJ credited the testimony of Ms. Rosa-Pinero and concluded that Claimant knew of his responsibilities and obligations. The ALJ referred to Ms. Rosa-Pinero's testimony wherein she advised Claimant of the expectations, purpose and goal of vocational rehabilitation, as well as his responsibility to attend meetings, apply for jobs, and keep a job log. The ALJ's conclusion that Claimant knew of his responsibilities and obligations is supported by the substantial evidence in the record.

Claimant also argues, citing *Epstein, Becker & Green v. DOES*, 812 A.2d 901 (D.C. 2002), that Employer, by failing to notify Claimant that his alleged noncooperation would result in his benefits being terminated, denied Claimant the opportunity to cure. We have rejected this argument in *Al-Khatawi v. Hersons Glass Co.*, CRB No. 15-032, AHD No. 11-231 (August 3, 2015), stating:

At this time it is appropriate to address the validity or vitality of what we shall call the "notice and cure" rule, that being the argument that there is an obligation upon the employer to specifically advise an allegedly non-cooperative vocational rehabilitation recipient that (1) it views the claimant's conduct to constitute non-cooperation under the Act, and (2) if the non-cooperation continues, it will suspend ongoing benefits (if being paid voluntarily) or seek modification of any order under which benefits are being paid to suspend those benefits for the duration of the non-cooperation.

The rule was first announced by the Director of Department of Employment Services (DOES) when review authority over Compensation Orders vested in that

office. The history of the case is somewhat lengthy, but a short recital of that history is useful in considering its value.

The claimant in that case, a legal secretary for the firm Epstein, Becker, was receiving benefits for a work related disability. The employer moved to suspend the employee's workers' compensation benefits because she failed to cooperate with vocational rehabilitation services offered by the employer. A DOES hearing examiner agreed, but the Director reversed that decision, concluding the employee cooperated. The D.C. Court of Appeals reversed the Director's decision and remanded because there was not substantial evidence justifying the basis for the decision. On remand, the Director essentially held that the employer failed to provide the employee with notice of alleged failures to cooperate and an opportunity to cure those failures, so benefits would not be suspended. The employer again appealed. The court found the director could not retroactively apply the novel "notice and opportunity to cure" requirement to the employer's case because that deprived the employer of basic procedural fairness. The court again reversed and ordered a remand for the director to make a proper finding of whether the employer's actions, or inaction, might have led the employee to believe that her cooperation was not in question. However, the Director could not retroactively impose a notice and opportunity to cure requirement on the employer. *See Epstein v. DOES*, 850 A.2d 440 (D.C. 2004).

What happened thereafter is immaterial to our present discussion. What is noteworthy, though, is that the court wrote rather skeptically about the validity of such a rule, and "assumed" its validity for the purposes of the case, since it also ruled that the rule could not be applied in this case. It is equally noteworthy that the Director never again, to our knowledge, applied the rule, and the CRB has likewise never been called upon to address it.

7 DCMR § 255.7 provides "Decisions issued by the Director prior to the establishment of the Board [CRB] shall be accorded persuasive authority by the Board." Thus, while we owe some deference to Director's decisions, we are not bound by them except to the extent that we deem them to be persuasive.

The Decision of the Director in which the rule was enunciated is *Johnson v. Epstein, Becker, and Green*, Dir. Dkt No. 01-11, OHA No 98-273B, OWC No. 519621 (January 30, 2003). Although the Director required Epstein, Becker notify the claimant of her failure to cooperate and offer her an opportunity to cure that failure before any suspension could be imposed, the Act has numerous provisions requiring that one party give specific notice of certain facts in order to be in compliance with the Act, and none of these provisions are contained in the law or regulations governing the provision of vocational rehabilitation, and most notably, no such requirement is included in the suspension of benefits provision.

While a claimant is certainly permitted to argue that under the facts of a given case, the failure of someone to advise the claimant that the level of cooperation

constitutes a threat to continuing to receive benefits should be a factor in deciding whether the claimant's conduct was unreasonable, the relevance of that fact and the significance that it has on a particular set of facts is a matter best and properly left to the sound discretion of the fact finder.

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.

*Al-Khatawi, supra*, at 8-10.

Claimant's next argument is that the ALJ erred in finding Claimant failed to apply to appropriate job opportunities. Claimant argues that the jobs provided by Ms. Rosa-Pinero were not available or were not physically suitable. Claimant points to his testimony in support of this argument. The ALJ, in addressing Claimant's argument, stated:

Claimant's testimony that he tried but could not locate the jobs on the internet is not credible. *Supra*. If Claimant had tried to locate the jobs on the internet but was unable to find them, he did not discuss his difficulty with the VC. Claimant admitted that his VC had provided six job referrals. HT at 53. Claimant applied to one employer. HT at 114. Claimant located that job while at a library and then went home without applying. He saw his attorney the following week and submitted his application while in his attorney's office. HT at 66. The VC offered assistance to Claimant but Claimant's failure to attend the VR meetings, failure to create a resume, failure to apply for jobs, and cooperate with the VC prevented her from providing Claimant with VR services. Claimant never used the computer during the VR meetings, because they "never got that far." HT at 118 - 19. Job opportunities were provided to Claimant but he did not apply for the positions.

CO at 7.

The ALJ found Claimant's testimony that he tried to locate the jobs provided to him, not to be credible. The ALJ considered not only his testimony, but also the reports of the vocational counselor to come to her conclusion. This conclusion is supported by the substantial evidence in the record and is affirmed.

Addressing Claimant's argument that the jobs provided were not within his physical capabilities and that the vocational rehabilitation process was flawed because Ms. Rosa-Pinero did not have his medical reports or current restrictions, we note the ALJ rejected the medical restrictions and opinions placed upon Claimant by Dr. Meyer, his treating physician, and credited the opinion of Dr. Levitt, Employer's IME physician who opined Claimant could work, albeit with restrictions.

After acknowledging that Dr. Meyer did not release Claimant to participate in vocational rehabilitation, the ALJ analyzed Dr. Meyer's medical records in light of Claimant's testimony, and concludes:

Dr. Meyer's opinion regarding Claimant's ability to participate in vocational rehabilitation is rejected because it is based primarily on Claimant's statements concerning what he can and cannot do and Claimant's statements are not credible. In addition to his demeanor and the tenor of his voice while on the stand, Claimant's testimony was inconsistent with the medical records he submitted as exhibits. For instance, Claimant testified that he saw two doctors, a dentist and Dr. Meyers, during the week of October 28, 2014. HT at 78. Claimant testified he could not attend VR because the doctors' visits were on the same day as the VR meeting. HT at 79. Claimant's VR meeting was on October 29, 2014. EE 1, p. 9. Claimant's dental visit was not during the week of October 28, 2014 but was on December 4, 2014. CE 9. Claimant's doctor's visit was on October 31, 2014. CE 1, p. 147. Claimant told the VC that he was unable to walk and that he would be visiting the doctor on Friday. Claimant's medical records show visits on October 3, 2014 and October 31, 2014. The medical report of October 31, 2014, does not report any significant difference in his symptoms since the October 3, 2014 visit. Claimant had an antalgic gait but Dr. Meyer did not report that he could not walk. CE 1, p. 147.

CO at 6.

The ALJ recited sufficient reasons to reject the opinion of the treating physician. While the treating physician preference was not explicitly stated by the ALJ, it is clear that the ALJ knew Dr. Meyer was a treating physician, and enunciated persuasive reasons to reject his opinion in favor of Dr. Levitt. *Stewart v. DOES*, 606 A.2d 1350 (D.C. 1992).

After having found Dr. Levitt's medical opinion and the restrictions he placed upon Claimant's ability to work more persuasive, the ALJ concluded Claimant's back, left foot and right shoulder conditions did not prevent Claimant from participating in vocational rehabilitation, stating:

Claimant is physically capable of attending and cooperating with VR. Claimant is capable of driving. He lives in Baltimore and drove to the Formal Hearing on March 10, 2015. HT at 28 and 64. He returns for doctor's visits in the District and Silver Spring. CE 1. To date, he has not been asked to stand for prolonged periods of time or drive any further than the location of the Formal Hearing. Even if Claimant requires additional medical treatment and/or is not at maximum medical improvement, this would not prevent Claimant from participating in and cooperating with VR.

CO at 11.

Claimant argues that this is in error, arguing Dr. Levitt's exam was brief and that the lack of any communication or discussion with Claimant's treating physicians is in error, relying upon *Scott v. Mushroom Transportation*, Dir. Dkt. 88-77, H&AS No. 88-44 (June 6, 1990). In *Scott*, the Director expressed concerns that since the vocational counselor in that case did not speak to the treating physician some of the jobs found by the counselor may be inappropriate. In the case at bar, Ms. Rosa-Pinero did have medical restrictions to guide her when searching for jobs. The ALJ took this into consideration and found Dr. Levitt's opinion to be more consistent with the

medical records and history of the injury. We affirm the ALJ's conclusion that Claimant could participate in vocational rehabilitation utilizing Dr. Levitt's restrictions.

Claimant also makes other arguments, including that the ALJ erred in determining Claimant refused to utilize resume writing services, failed to attend meetings, and failed to address the counselor's missed meetings as support for argument that Claimant did not cooperate with vocational rehabilitation is not supported by the substantial evidence in the record. The ALJ reviewed the evidence and testimony, and supported her conclusions. In making these arguments, Claimant points to selective testimony of the Claimant. In so doing, Claimant is asking us to reweigh the evidence in his favor, a task we are prohibited from doing. As we stated above, the CRB and this Review Panel are constrained to uphold a CO 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.

Claimant further argues the ALJ erred when stating that Claimant's language was not caused by pain or frustration, but by his insistence on controlling the vocational rehabilitation process. The ALJ noted:

The tenor of the VR relationship was established early. At the first meeting, the VC noted, "Claimant talks excessively and does not allow himself to hear. Claimant continued as stated become [sic] aggressive and or irritated when asking questions he does not want to answer." EE 1, p. 3. On September 23, 2014, Claimant telephoned the VC "very angry and aggressive" stating that "he knows the insurance company is his enemy and was unsure if [she] was his enemy as well." The VC assured him that he could ask questions at their next meeting the following day. EE 1, p. 6.

Claimant's attitude toward the VC was also demonstrated at the Formal Hearing when he testified:

I attended several sessions with Ms. Pinero, but they-I wouldn't consider them vocational - not being a professional vocational specialist, but as a patient or a Claimant, however, you want to consider me, they were just meetings in the library with someone with an ulterior motive.

HT at 43. Although Claimant describes Ms. Pinero's attitude and treatment of him as sarcastic, Claimant's refusal to provide or work with Ms. Pinero to create a resume constitutes a refusal to partake of the most basic of job search services. HT at 55. Claimant's behavior was disruptive inside the library caused VR sessions to be terminated prematurely. HT at 96, 97, and 118 - 19. Claimant is correct in stating that the VC did not have his medical records. She admitted that all she had was Employer's report from Dr. Levitt (HT at 104); however, this was evident at his first meeting in his attorney's office and neither provided her with records that might have been helpful in determining his physical limitations.

Claimant's offense to the VC's questioning of his use of the cane did not prompt him or his attorney to provide any other evidence of limitations. HT at 44.

Claimant claims to be looking for jobs which he believes are "commensurable" jobs. HT at 65. Claimant's behavior is not caused by his pain or frustration. Claimant was insistent on controlling the vocational rehabilitation process by his inappropriate, loud and abusive behavior.

CO at 7-8.

A review of the evidence supports the ALJ's conclusion. Regardless of the basis of the Claimant's behavior, the ALJ's conclusion is supported by the substantial evidence in the record. In arguing these points, Claimant again is asking us to reweigh the record in his favor, a task we cannot do.

Claimant argues next that the ALJ failed to consider the totality of the circumstances surrounding the vocational rehabilitation process and Claimant's participation, including whether any uncooperativeness by the Claimant was reasonable, citing *Ford v. Allglass Systems*, CRB No. 12-158, AHD No. 08-342B (March 18, 2014). In *Ford*, we stated:

[T]here 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.

*Ford*, *supra* at 3.

As we have discussed above, the ALJ considered all the evidence and testimony submitted in the case at bar, and concluded that Claimant had failed to cooperate with vocational rehabilitation. It is important to note, as held previously:

It is useful to remember that the failure to cooperate provisions incorporate a standard of "reasonableness", thereby imbuing an ALJ with a greater degree of discretion and judgment than might otherwise be the case. We find the ALJ properly considered the evidence and her finding that Claimant did not fail to cooperate is supported by substantial evidence.

*Fuller v. WMATA*, CRB No. 14-089, AHD No. 12-147A, at 5-6 (January 27, 2015).

The ALJ's determination that Claimant failed to cooperate with vocational rehabilitation is supported by the substantial evidence in the record and is in accordance with the law.

We next address Claimant's argument that Claimant has cured any alleged non-cooperation several times in the months preceding the Formal Hearing and at the Formal Hearing in March of

2015, that it was in error for the ALJ to fail to address this cure and that a remand for a new evidentiary hearing is warranted for the ALJ to address these attempts to cure.. Although it would have been preferable for the ALJ to have made a specific finding, since the ALJ took into consideration all the evidence presented on March 10, 2015 as well as Claimant's testimony quoted above in granting Employer's request to suspend benefits, it is reasonable to infer that the ALJ did not find credible Claimant's statements that he wanted to cure his refusal. Claimant may avail himself to the modification provision in D.C. Code § 32-1524 if and when appropriate.

Finally, Claimant invokes the "humanitarian purposes of the statute" in support of his argument that the ALJ ignored the "strong legislative policy favoring awards in close or arguable cases" quoting *Parodi v. DOES*, 560 A.2d 524, 525-26 (D.C. 1989). We cannot agree that the case at bar is a close or arguable case. The ALJ listed numerous reasons supported by the evidence in the record, to conclude that Claimant did not cooperate with vocational rehabilitation.

There is a strong humanitarian purpose to our Act, one which we are aware of in all our decisions and do not take lightly. However, we are also aware of the District of Columbia's Court of Appeals language *Joyner v. DOES*, 502 A.2d 1027, 1031 (D.C. 1986), wherein the Court expressed concern over claimant's adopting a passive or negative attitude in pursuing re-employment, stating:

It is significant, as the agency emphasizes, that petitioner's interpretation of § 36-308(c) would invite at least some claimants to adopt a passive, or even negative, attitude about pursuing re-employment, since workers' compensation benefits could be terminated only after the claimant refused a specific offer. There might be no specific offer if the claimant failed to take the steps usually necessary to procure offers (*e.g.*, investigating job opportunities, circulating resumes, interviewing, etc.)

While the court was discussing a too narrow interpretation put forth by Claimant of D.C. § 32-1508(c), we find the concerns expressed to be applicable to a claimant's non-cooperation of vocational rehabilitation. As § 32-1507(c) states:

Vocational rehabilitation shall be designed, within reason, to return the employee to employment at a wage as close as possible to the wage that the employee earned at the time of the injury.

When claimants fail to cooperate with vocational counselors, a suspension of disability benefits is warranted.

CONCLUSION AND ORDER

The June 26, 2015 Compensation Order is supported by the substantial evidence in the record and is in accordance with the law. It is AFFIRMED.

*So ordered.*