# GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR

F. THOMAS LUPARELLO
ACTING DIRECTOR

DEPT. OF EMPLOYMENT SERVICES
COMPENSATION REVIEW BOARD
2014 MAY 30 AM 8 57

## COMPENSATION REVIEW BOARD

**CRB No. 14-017**

**ROBERT S. BRUNO,**
**Claimant–Respondent,**

**v.**

**PROVIDENCE HOSPITAL**
**and SEDGWICK CMS,**
**Employer/Carrier-Petitioners.**

Appeal from a January 28, 2014 Compensation Order by
Administrative Law Judge Karen R. Calmeise
AHD No. 11-054B, OWC No. 659159

Eric M. May for the Respondent
Todd S. Sapiro for the Petitioners[1]

Before: HENRY W. MCCOY, JEFFREY P. RUSSELL, and HEATHER C. LESLIE, *Administrative Appeals Judges*.

HENRY W. MCCOY, for the Compensation Review Board; JEFFREY P. RUSSELL, *dissenting*.

## DECISION AND REMAND ORDER

### FACTS OF RECORD AND PROCEDURAL HISTORY

Claimant was working for Employer as an operations manager responsible for cafeteria services when he suffered an injury to his lumbar spine while in the course of employment on March 17, 2009. Claimant received medical treatment including a discectomy and fusion on

[1] Lisa A. Zelenak appeared on behalf of the Employer/Carrier at the Formal Hearing in this matter.

October 15, 2009 and has been restricted from returning to his pre-injury work duties. Following surgery, Claimant received physical therapy and began participating in vocational rehabilitation.

Employer voluntarily paid wage loss benefits and medical expenses until an issue arose regarding whether a right knee condition that Claimant developed was medically causally related to the March 2009 work injury. In addition, Employer sought to suspend wage loss payments for the period from May 2012 to February 2013 for Claimant's failure to participate in vocational rehabilitation. Both issues were litigated at a formal hearing on January 25, 2013.

In a January 28, 2014 Compensation Order (CO), an Administrative Law Judge (ALJ) determined that Claimant's right knee condition is medically causally related to the March 2009 work injury and that Claimant did not unreasonably fail to cooperate with vocational rehabilitation for the contested period. The ALJ denied Employer's request to suspend the payment of wage loss benefits and granted Claimant's claim for temporary total disability benefits from May 4, 2012 to the present and continuing and the payment of causally related medical expenses. While Employer filed a timely appeal, there is no record of Claimant filing an opposition.

On appeal, Employer only takes issue with the ALJ's decision that Claimant did not unreasonably refuse to cooperate with vocational rehabilitation.[2] It is Employer's contention that the ALJ's findings on this issue are not supported by substantial evidence and should be reversed.

## STANDARD OF REVIEW

The scope of review by the CRB, 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.[3] *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 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.

Employer argues that the ALJ's decision that Claimant did not unreasonably refuse to participate in vocational rehabilitation is not supported by substantial evidence because Claimant was experiencing the same level of pain and discomfort during the period he did not participate

---

[2] Employer specifically noted in its Application for Review that "[T]he Employer/Carrier is not appealing the causal relationship of the right knee." *Employer's Application for Review and Supporting Memorandum*, fn. 2.

[3] "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 International v. DOES,* 834 A.2d 882 (D.C. 2003).

as when he resumed participation. The period in contention is from May 4 2012 to February 3, 2013. It is for this period that Employer seeks to suspend Claimant's wage loss benefits.

Under the Act, an employer is required, pursuant to D.C. Code § 32-1507(a), to provide to an employee who sustains a work-related injury "such medical, surgical, and vocational rehabilitation services…for such period as the nature of the injury or the process of recovery may require." The vocational rehabilitation provided "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 injury." D.C. Code § 32-1507(c).

Given the requirement that an employer must provide vocational rehabilitation, there is a concomitant requirement placed upon the injured employee to participate and a sanction for failing to do so. Pursuant to D.C. Code § 32-1507(d):

> If at any time during such period the employee unreasonably refuses to submit to medical or surgical treatment or to an examination by 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.

Employer argues that Claimant elected to stop participating in vocational rehabilitation in May 2012 ostensibly due to increased pain but the treating physician, Dr. Joshua Ammerman, determined that Claimant was capable of doing computer job searches. In this posture and given Claimant's testimony that he was experiencing the same level of pain when he stopped participating in May 2012 as when he resumed in February 2013, Employer argues this "belies logic" and that these facts supported a finding of a failure to cooperate and that it was error for the ALJ to find otherwise. We agree.

There is no dispute and in fact Claimant testified that due to increased pain and increased medication to abate that pain, Claimant stopped participating in vocational rehabilitation job search activities. The record evidence also shows that Claimant's treating physician, Dr. Joshua Ammerman, while deeming Claimant capable of doing computer job searches, considered him incapable of driving long distances and walking and standing around at job fairs when looking for a job.

In addressing Employer's argument that Claimant was deemed capable by his treating physician of participating in job search activities, the ALJ determined that "there is no evidence of unreasonable failure or refusal to accept vocational rehabilitation." To support this conclusion, the ALJ reasoned:

> It is clear from the record evidence that Claimant fully cooperated with the vocational rehabilitation process in 2010 and 2011. (HT 47-49) However, in early 2012 Claimant testified he did not participate in vocational rehabilitation because of his increased leg and back pain symptoms from standing at job fairs, sitting at computers, driving to different locations,

> and he took increased levels of pain medications. (HT 51, 55) Claimant reported the increased symptoms to the treating surgeon and by April 2012 the physician had retracted his recommendation that he continue with job search activities. (CE 2, p. 11) In a December 19, 2010 [sic] deposition the treating surgeon clarified his opinion as to whether Claimant should, or could, participate in job search activities.
>
> > Q. Since April 27, 2012, and considering Mr. Bruno's medical condition, do you believe that vocational rehabilitation, including job searches, are reasonable to return him to gainful employment?
> >
> > A. Well, a job search is not going to get him back to work because he's not able to work at this time…Do I think he can sit in front of a computer and look at the sites, sure. But by no means do I think he can be out driving distance, spending lots of time in a car, out walking around, standing for prolonged periods of time, things I would anticipate one would need to do when looking for a job.[4]

The ALJ went on to further conclude:

> Although Claimant complied with Employers earlier efforts of vocational rehabilitation, Claimant's condition deteriorated and the conditions under which he could participate in job search activities became more limited. As of April, 2012 the treating physician recommended that the Claimant refrain from vocational rehabilitation due to Claimant's changed physical condition. (CE 4 panel 24-26)[5]

The ALJ is correct that the record evidence supports Claimant's contention that his condition deteriorated as of April 2012 and this restricted his ability to participate in vocational rehabilitation services. In addition, this limited participation was endorsed by his treating physician; but it was not a total restriction. As the ALJ stated, Claimant's ability to "participate in job search activities became more limited."

Contrary to the ALJ's assessment of Dr. Ammerman's opinion in his deposition, there was no blanket recommendation that Claimant refrain from all vocational rehabilitation due to Claimant's changed physical condition. Twice during the deposition, Dr. Ammerman agreed that Claimant could sit in front of a computer and search for jobs because he would be able to stand up and move around as needed.

Claimant testified that he stopped participating in vocational rehabilitation in May 2012 when his pain became worse. When he resumed participating in February 2013, he testified that his pain level was the same as when he stopped, but the record contains no explanation for this decision.

---

[4] CO at 6, citing Ammerman Deposition, CE 4, p. 19, panel [pages] 15-16.

[5] CO at 6.

The ALJ relied upon the treating physician's opinion that Claimant's condition had deteriorated and he should not participate in those job search activities that required him to drive long distances and walking and standing for long periods of time. However, it appears the ALJ misinterpreted Dr. Ammerman's opinion that clarified what Claimant was capable of doing with regard to job search activities. In his December 19, 2010 deposition, Dr. Ammerman restricted Claimant from driving long distances and walking around and standing for prolonged periods of time but specially stated that Claimant was capable of sitting in front of a computer and looking at job sites. While acknowledging this clarification, the ALJ concluded:

> Although Claimant complied with Employers [sic] earlier efforts of vocational rehabilitation, Claimant's condition deteriorated and the conditions under which he could participate in job search activities became more limited. As of April, 2012 the treating physician recommended that the Claimant refrain from vocational rehabilitation due to Claimant's changed physical condition. (CE 4 panel 24-26).[6]

The ALJ's conclusion is at odds with the facts. By her own finding, Claimant's ability to participate in job search activities "became more limited" because his condition deteriorated. Claimant's changed physical condition, as assessed by his treating physician, did not prevent him from participating in all job search activities. However, Claimant ceased all such participation.

In addition, it is a misstatement of the treating physician's opinion to say he recommended that Claimant "refrain from vocational rehabilitation" because of Claimant's changed condition, when a specific exception was made that Claimant was able to do computer job searches. There is also record evidence, elicited by the ALJ (Hearing Transcript at 54), that Claimant's physical condition was the same at the time he resumed participating in vocational rehabilitation as when he ceased.

The ALJ's determination that Claimant's decision to stop participating in vocational rehabilitation was not unreasonable is not supported by substantial evidence in the record as it is premised on two erroneous factual findings: an incorrect reading and interpretation of the treating physician's opinion, and the evidence elicited on the record that Claimant's condition was the same when he resumed participation as when he stopped participating in all vocational rehabilitation activities.

Section 32-1507(d) allows the suspension of disability benefits if the Claimant unreasonably refuses to participate in vocational rehabilitation, unless circumstances justify the refusal. As the record appears to demonstrated that Claimant's treating physician deemed him capable of participating in certain "limited" job search activities and Claimant's physical condition was ostensibly the same when he stopped participating as when he resumed, we return this matter for a determination as to whether these circumstances justify Claimant's refusal to participate for the period in question.

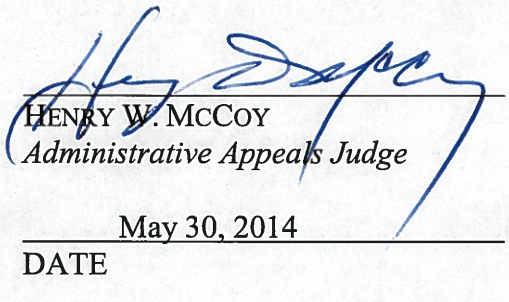
---

[6] *Id.*

## CONCLUSION AND ORDER

The ALJ's determination that Claimant did not unreasonably fail to cooperate with vocational rehabilitation for the period May 2012 to February 2013 is not supported by substantial evidence in the record and is VACATED. The January 28, 2014 Compensation Order is VACATED IN PART and REMANDED for further consideration consistent with the above discussion.

FOR THE COMPENSATION REVIEW BOARD:



HENRY W. MCCOY
*Administrative Appeals Judge*

May 30, 2014
DATE

Jeffrey P. Russell, *dissenting*:

The ALJ relies largely upon the deposition of Dr. Ammerman. I believe it is useful to review the specific passages to which the ALJ refers. The first is quoted in the Compensation Order, and reads as follows:

> Q. Since April 27, 2012, and considering. Mr. Bruno's medical condition, do you believe that vocational rehabilitation, including job searches, are reasonable to return him to gainful employment?
> A. Well, a job search is not going to get him back to work because he's not able to work at this time...Do I think he can sit in front of a computer and look at the sites, sure. But by no means do I think he can be out driving distance, spending lots of time in a car, out walking around, standing for prolonged periods of time, things I would anticipate one would need to do when looking for a job.
> Q. Since April 27, 2012, do you believe he has been able to return to any type of employment?
> A. No.

The second, although not quoted, is referred to specifically by the ALJ by deposition page numbers, and they read as follows:

> Q. [by Employer's counsel] Has Mr. Bruno's condition changed between January, 2012 and April of 2012?
>
> MR. MAY: January of 2012, by the way, is when your first deposition was taken.

THE WITNESS: Fair enough. I gathered as much. I don't know if it changed between January and April. And, of course, all of my opinions are clouded by the fact -- they're colored by the fact that I've seen him a bunch of times since April as well. Robert is getting worse. He's having more trouble globally. Can I give a specific objective point, no. But I have watched him decline. I think between the last time we talked and this time, he's gotten worse.

Q. But did you testify that he could sit in front of a computer and do the job search type –

A. He certainly can. He can sit in front of a computer because he can stand up and move and do all that kind of stuff. He can certainly use a laptop. Yes.

Q. So if I could get him a job sitting in front of a computer, could he do that job?

A. So, again, it's a bit of a loaded question. I don't like to talk in just hypotheticals about things that don't really exist. I can't think of a job -- it's not just sitting in front of a computer. Because he can't sit there for long periods of time. Right. If he's at home and he's got a laptop in front of him and he's searching for things, he can lay down on the couch. He can walk around. He can stop. He can walk away. So there is variability.

In the workplace, I don't think that would work, that would be acceptable. So if all the parameters I previously discussed could somehow be magically met, he might be able to do that if such a position existed. I just don't know of any job like that.

Q. And you're not trained in vocational rehabilitation, Doctor, are you?

A. No ma'am.

Q. Let me ask you this. What work restrictions does he currently have?

A. Based upon my observations – not what the patient tells me but with my observations, he can't stand for more than about ten minutes without sitting down. And I see him usually pop up from the seated position ten to fifteen minutes and try to move around.

He struggles walking from my waiting room to where you're sitting to back in my office. I'm not quite sure the distance there, but that's not very far.

Lifting-wise -- we can all lift certain things under five pounds. He's severely limited by his neurological problems.

Q. And I know in January I asked you about a functional capacity evaluation. And I believe you didn't think it was appropriate then.

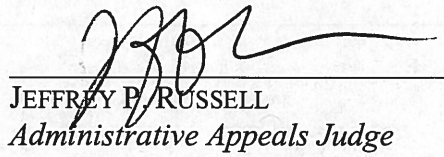
Do you think it's appropriate now?

A. And I don't mean this to be funny. I think it would be torturing Mr. Bruno with an FCE.

CE 4, pages 25 – 27.

I believe that a reasonable person could accept the testimony of Dr. Ammerman that Mr. Bruno's condition so limited his capacity to engage in activities commonly associated with job searches and employment (such as driving, walking to and from and standing and waiting at job interviews, etc.), and conclude that his declining to participate in vocational rehabilitation was not unreasonable. This is particularly true in the absence of any testimony or evidence that all that was required of Mr. Bruno in this particular case was that he sit in his apartment and use a

laptop. That is essentially all that the doctor testified he could do. I am aware of nothing in this record that suggests that that is all he would be required to do in vocational rehabilitation. In other words, although I might have found otherwise, I believe the ALJ's decision is supported by substantial evidence, and would affirm. Thus, I must respectfully dissent.



JEFFREY P. RUSSELL
*Administrative Appeals Judge*