

VIRGINIA:
IN THE WORKERS' COMPENSATION COMMISSION

Opinion by RAPAPORT
Commissioner

May 26, 2021

CECILE MCCUSKER v. VDOT NORTHERN VIRGINIA DIST WIDE
COMMONWEALTH OF VIRGINIA, Insurance Carrier
YORK RISK SERVICES GROUP, Claim Administrator
Jurisdiction Claim No. VA00001130159
Claim Administrator File No. 5944534
Date of Injury: October 26, 2015

Cecile E. McCusker
Claimant, pro se.

Emily O. Sealy, Esquire
For the Defendant.

REVIEW on the record by Commissioner Marshall, Commissioner Newman, and Commissioner Rapaport at Richmond, Virginia.

The claimant requests review of the Deputy Commissioner's December 30, 2020 Opinion suspending temporary total disability benefits based upon the finding that she unjustifiably refused to cooperate with vocational rehabilitation efforts. We AFFIRM.

I. Material Proceedings

The claimant sustained a compensable injury by accident to her right wrist on October 26, 2015. The defendant has paid medical benefits and periods of wage loss benefits, including temporary total disability benefits beginning July 30, 2016 and continuing. The defendant filed an Employer's Application for Hearing on September 2, 2020 seeking termination of the outstanding award. The defendant alleged that the claimant unjustifiably refused to cooperate with vocational rehabilitation efforts.

Deputy Commissioner Kennard conducted an evidentiary hearing on December 3, 2020.

He found that the defendant proved grounds to grant the application and suspend temporary total disability benefits. He explained:

[I]t is clear that the claimant has frustrated job placement efforts by selectively determining which jobs she wishes to apply for, and those that she does not. The fact that the claimant is of the belief that she does not possess all of the skills or experience necessary for a particular job does not warrant a failure to apply for that job. It is well-recognized that not every job applicant possesses all of the skills and experience desired of an ideal candidate. Here, we find that the claimant's desire to "pick and choose" the jobs she is willing to apply for significantly undermines the vocational rehabilitation process and unfairly subjects the employer to continued liability for the payment of compensation benefits.

For example, on January 29, 2020, the claimant met with Ms. [Eleanor] Fukushima at King George Library and was provided with 3 different job leads. The claimant indicated that she was refusing to apply for work at Truong Rehab because she has previously received treatment there. In regard to work as a title searcher, the claimant concluded that the employer was looking for a "career person" and simply refused to apply. The claimant also refused to apply for a position at a movie theater stating that did not want to work with people. In February of 2020, the claimant refused to apply for work at Alorica, stating that she did not want to work at a call center. While these are just a few examples of the claimant's refusal to apply for work, we find that they are demonstrative of the claimant's unwillingness to engage in a good faith effort to find alternative employment. On a number of occasions, the claimant failed to apply for jobs without offering any reason for her failure to do so. The claimant also continues to state that she does not want to work full-time, further limiting available job opportunities.

We recognize that the claimant is faced with a number of challenges resulting from health conditions that are unrelated to her October 26, 2015 work injury. In regard to a February 14, 2020 vocational meeting with the claimant, Ms. Fukushima wrote:

Mrs. McCusker stated she is not going to apply for anything where they are looking for career people. She is not interested in working, she is on oxygen, she doesn't have any energy and doesn't go out of her house except to go grocery shopping. She knows she is going to die and wants to be left alone.

Although the claimant continues to deal with some serious and unrelated health issues, these unrelated conditions cannot serve as justification for the claimant's failure to engage in a good faith effort to cooperate with vocational rehabilitation services. When an employee cannot cooperate with vocational rehabilitation because of a medical condition not causally related to the work-related accidental injury for which benefits were originally awarded, the employee's refusal to cooperate is "unjustified" for the purposes of Code Section 65.2-603, and the employer is absolved of liability for compensation for the duration of the refusal. *UPS v. Ilg*, 54 Va. App. 366, 374 (2009).

(Op. 11-13.) The claimant timely requested review.

II. Findings of Fact and Rulings of Law

On appeal, the claimant argues against the suspension of her benefits. She makes numerous arguments including that Ms. Fukushima testified to her being receptive to vocational services, that she refused two leads based on her personal beliefs, that her unrelated medical conditions are being used against her, and that according to the Commission's marketing guidelines, a partially disabled claimant with an open award is not required to seek light duty to receive wage loss benefits. We are simply not persuaded.

We have carefully considered the entire record and the claimant's numerous contentions on appeal. We find no error in the suspension of wage loss benefits.¹

At the hearing, Ms. Fukushima, vocational case manager, testified to assisting the claimant with vocational rehabilitation services most recently from June 2019 through July 2020. Ms. Fukushima agreed that overall the claimant was receptive to the services, but she only applied for 8 of 42 leads identified. Ms. Fukushima's reports were accepted into the record. (Def.'s Ex. 1.) The documentation detailed the potential employment and the claimant's reasons for not applying

¹ The Deputy Commissioner thoroughly recited the record in this case, and we only briefly discuss those necessary to illustrate our agreement with the lower determination.

for the jobs. (*Id.*) Ms. Fukushima confirmed that the claimant's reluctance to apply for the jobs hampered the efforts to find employment. Ms. Fukushima said that the claimant's refusals ranged from not having a background/comfort level with medical terminology, denying having the appropriate skills, believing that the employer wanted a younger person, and not wanting to return to a previously contacted employer. Ms. Fukushima understood that the claimant disagreed with the philosophies of Catholic Charities and Weight Watchers so she would not apply with those employers.

The claimant testified to applying for 8 of 25 leads if one omitted the duplicate leads. She said that she lacked experience for some jobs. The claimant perceived her age and health conditions as hinderances to obtaining employment. The claimant expressed that she wanted to return to the work force and maintained that she had been cooperative.

First, we address the claimant's misinterpretation of the Commission's "Guidelines on Looking for Light Duty Work." The guidelines inform that "[a]n employee who is partially disabled . . . is required to seek light duty work in good faith in order to receive disability benefits if he or she is not on an open award." We agree that the claimant had the benefit of an award. Yet, her status poses an entirely different situation. The guidelines are an instructional aid for a partially disabled injured worker who does not have an outstanding award and will need to market her residual work capacity in order to potentially receive temporary total disability benefits. This does not equate to the meaning that a partially disabled claimant, who initially was totally disabled and also had the benefit of an award, does not have to cooperate with vocational rehabilitation services in efforts to return to employment. Under the Virginia Workers' Compensation Act (Act), the defendant may provide an injured employee – who has been released to some level of

employment – with reasonable and necessary vocational rehabilitation services. *See* Va. Code § 65.2-603. When the defendant offers these services, the Act allows for the barring of compensation if the injured worker is found to have unjustifiably refused such. Va. Code § 65.2-603(B). *See City of Salem v. Colegrove*, 228 Va. 290, 294 (1984) (Vocational rehabilitation has dual purposes: returning the injured worker to gainful employment and relieving the defendant’s burden to pay future compensation.). The benefit of an award does not override or negate a duty to cooperate with the offered services.

Next, we turn to the merits. The testimony, plus the written documentation submitted by both parties, substantiated the lower determination that the defendant proved that the claimant unjustifiably refused vocational rehabilitation efforts. We acknowledge the claimant’s rationale and her position regarding her efforts. However, the defendant established that the claimant repeatedly refused to apply for leads and exhibited an overall unwillingness to pursue presented employment options for a myriad of reasons, including for no reason. We also note that the claimant did not put forth any evidence of an attempt to cure the refusal. In summary, the Deputy Commissioner weighed the presented evidence and held that the defendant sustained its burden of proof. We find no reversible error.

III. Conclusion

The Deputy Commissioner’s December 30, 2020 Opinion is **AFFIRMED**.

This matter is hereby removed from the review docket.

APPEAL

You may appeal this decision to the Court of Appeals of Virginia by filing a Notice of Appeal with the Commission and a copy of the Notice of Appeal with the Court of Appeals of

Virginia within thirty (30) days of the date of this Opinion. You may obtain additional information concerning appeal requirements from the Clerks' Offices of the Commission and the Court of Appeals of Virginia.