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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	OEA Matter No.: 1601-0032-14R17
SAMUEL MURRAY,)	
Employee)	
)	Date of Issuance: October 25, 2017
v.)	
)	
DEPARTMENT OF YOUTH)	Arien P. Cannon, Esq.
REHABILITATION SERVICES,)	Administrative Judge
Agency)	
)	
)	
)	
_____)	
Johnnie Louis Johnson, III, Esq., Employee Representative		
Frank McDougald, Esq., Agency Representative		

INITIAL DECISION ON REMAND

INTRODUCTION AND PROCEDURAL BACKGROUND

An Initial Decision was issued by the undersigned on September 18, 2015, reversing the Department of Youth Rehabilitation Services' ("Agency" or "DYRS") decision to remove Employee from his position for incompetence and inability to perform the essential functions of the job. Agency filed a Petition for Review with the Office of Employee Appeal's ("OEA") Board on October 23, 2015, asserting that the Initial Decision was based on an erroneous interpretation of statute. The Board issued an Opinion and Order on Petition for Review on March 7, 2017, which remanded this matter to the undersigned to make further determinations.

On June 6, 2017, a Status Conference was convened to address the Board's Opinion and Order. Subsequently, an Order was issued which required the parties to address the issues raised by the OEA Board. Both parties have submitted their briefs accordingly. The record is now closed.

JURISDICTION

This Office has jurisdiction in this matter pursuant to D.C. Official Code § 1-606.03 (2001).

ISSUE

1. Whether evidence exists to establish that Employee was medically cleared or deemed to have overcome his disability; and
2. Whether evidence exists to establish that necessary medical treatments were performed to lessen Employee's disability.

FINDING OF FACTS, ANALYSIS AND CONCLUSIONS OF LAW

Employee began working with Agency on February 25, 2002, as a Motor Vehicle Driver. Throughout the course of his employment, Employee filed two separate workers' compensation claims as a result of two separate incidents.¹ On July 30, 2010, Employee sustained an on-the-job injury, and filed a workers' compensation claim, which is the relevant claim in the instant matter. Employee returned to work for a brief period of time after his injury from November 5, 2012, through December 17, 2012. On September 23, 2013, Agency issued an Advance Written Notice of Proposed Removal. On November 15, 2013, after an administrative review, Agency issued a Notice of Final Decision on Proposed Removal for Employee.

Agency's removal of Employee was based on: (1) Any on-duty on employment related act or omission that interferes with the efficiency and integrity of government operations: incompetence²; and (2) Any other on-duty or employment-related reason for corrective or adverse action that is not arbitrary or capricious³: inability to perform the essential functions of the job.

In the Board's Opinion and Order, issued March 7, 2017, it remanded this matter to the undersigned to make further determinations. Specifically, the Board's remand sought to have the undersigned determine whether evidence exists to establish that Employee was medically cleared or deemed to have overcome his disability. Additionally, the remand sought to have the undersigned determine whether evidence exists which establish that necessary medical treatments were performed to lessen Employee's disability.

¹ Agency asserts in its November 10, 2014, brief that Employee sustained "a number of on-the-job injuries resulting in him filing workers' compensation claims." Agency points to Tab 2 of its Answer in support of this assertion. There are only two attachments under Tab 2 which indicate that Employee suffered an on-the-job injury. The other attachment under Tab 2 is a letter from Agency to Employee requesting medical documents from his doctor, which appear unrelated to the instant case.

² DPM § 1603.3(f)(5) (August 27, 2012).

³ DPM § 1603.3(g) (August 27, 2012).

Along with Employee's brief, in response to the Post Status Conference Order on Remand, he includes a Disability Certificate ("D.C."), dated October 26, 2012, from his physician, Dr. Sankara Rao Kothakota.⁴ The Disability Certificate provided that Employee "[m]ay return to regular duty: Van Driver." Employee's physician does not list any restrictions on his return to work. Thus, it is clear that Employee was medically cleared and deemed to have overcome his disability by his physician. It is also apparent that Agency accepted Employee's physician's determination that Employee was medically cleared to return to work. Agency allowed Employee to return to work on November 5, 2012, after being out on workers' compensation, based on the Disability Certificate signed by Employee's physician on October 26, 2012.

In Agency's Brief on Remand, filed August 3, 2017, Agency asserts that "commencement of payment of compensation" for Employee's injury occurred on or around August 26, 2010, and again on or around October 30, 2010.⁵ The undersigned addressed this argument in the Initial Decision, issued September 18, 2015. Two checks were issued to Employee for compensation of his temporary total disability. One check was dated November 18, 2010, which covered the time period of October 30, 2010, through November 2, 2010.⁶ The second check was dated July 18, 2013, which covered the time period of August 26, 2010, through November 2, 2010. The time period covered is not the same as "commencement of payment." The check date is the best indication for the "commencement [date] of payment of compensation." Thus, Agency's argument that Employee is required to present evidence that he overcame his injury no later than October 29, 2012—two years after the time period covered by the November 18, 2010 check—is misplaced. The two year grace period began to run once commencement of compensation payments began: November 18, 2010. As such, I find that the Disability Certificate issued by Employee's physician on October 26, 2012, and Employee's return to work on November 5, 2012, clearly demonstrate that Employee overcame any impairment to return to work within two (2) years of the commencement of payment of compensation, albeit for a brief period of six (6) weeks.

Agency argues that because the Disability Certificate of Employee's physician was not a part of the record prior to the undersigned's Initial Decision being issued, that Employee failed to demonstrate that he had overcome his injury. Agency seems to suggest that because the Disability Certificate was not a part of the record prior to the issuance of the Initial Decision, that it should not be considered on remand. The Board's Opinion and Order clearly remanded this matter back to the undersigned to make further determinations. If the Board did not intend for the undersigned to seek whether such documentation existed to demonstrate whether Employee overcame his disability, then it would have made a determination based on the record at the time in its Opinion and Order.

Agency further asserts that even if it is appropriate to consider the Disability Certificate, it does not demonstrate that Employee overcame his injury as of November 5, 2012. Agency attempts to bolster its argument based on the fact that the record contains a letter dated December

⁴ Employee's Brief on Remand, Exhibit A (July 10, 2017).

⁵ See Agency Brief on Remand, at 6 (August 3, 2017).

⁶ Agency Brief on Remand, Attachment 5 (August 3, 2017). (It is noted that there are two Attachment 5's with Agency's Brief on Remand. This is presumably in error.)

17, 2012, which states, “patient cannot go back to his regular work until problems with neck and shoulder are resolved...” It is further averred that Dr. Kothakota issued the D.C. despite ongoing problems Employee was experiencing with his shoulder. Agency maintains that the D.C. does not demonstrate that Employee overcame his injury but instead, the D.C. was “merely giving Employee an opportunity to determine whether he could manage full duty with the problems he was experiencing with his shoulder.” Agency further notes that Employee’s doctor indicated that Employee “needs arthroscopy subacromial decompression of the shoulder” and as such, contends that the shoulder problems that Employee experienced on December 17, 2012, and thereafter, were present on November 5, 2012, when Employee returned to work. Thus, Agency contends that Employee had not overcome his July 30, 2010 injury as of November 5, 2012. I disagree with this assertion.

The Disability Certificate presented by Employee, which Agency was undoubtedly aware of at the time of his return to work on November 5, 2012, unequivocally establishes that Employee was medically cleared and deemed to have overcome his disability at the time of his return to work. Employee’s doctor placed no restrictions or limitations on his return to work as a van driver. Although Employee was cleared to return to work as a van driver, Agency felt it was appropriate to place Employee in a position in its Mail Room. While Agency contends that Employee had not truly overcome his disability when he returned to work, this contention is undermined by the fact that Agency accepted the Disability Certificate signed by Employee’s doctor, and permitted Employee to resume work after being out on workers’ compensation leave.

Agency relies on a medical report by Dr. Kothakota, dated December 17, 2012, to assert that Employee had not overcome his injury when he returned to work on November 5, 2012.⁷ In this medical report, Employee’s doctor instructs that Employee should not return to work until problems with his neck and shoulder are resolved. This December 17, 2012, report does not make any indication that Employee was experiencing these symptoms upon his return to work on November 5, 2012. In fact, the Disability Certificate by Dr. Kothakota, dated, October 26, 2012, states Employee was medically cleared to return to work on November 5, 2012, without any restrictions.

Agency’s assertion that Employee had not overcome his disability upon his return to work seems to ignore the fact that once Employee was medically cleared to return to work that the possibility of re-aggravating or reinjuring himself existed. Here, based on the medical documentation provided, it appears that this is the very scenario that occurred. The D.C. unquestionably provides that Employee had received medical treatment since his injuries, which lessened his disability, and ultimately Employee reached a point where his doctor felt that he could return to work to his previous position without any limitations. Employee returned to work for a brief period of six weeks before his doctor noted in the December 17, 2012, report that Employee cannot return to work until the problems with his neck and shoulder are resolved. The December 17, 2012, report does not negate the fact that Employee was deemed to have overcome his disability and cleared to return to work on November 5, 2012. As such, I find, based on the D.C., that Employee was medically cleared or deemed to have overcome his disability. I further find that the D.C. establishes that Employee received the necessary medical

⁷ See Agency’s Brief on Remand, Attachment 5 (August 3, 2017).

treatments to lessen his disability, thereby enabling him to return to work within two (2) years, pursuant to D.C. Code § 1-623.45, after being out on workers' compensation leave.

ORDER

Accordingly, it is hereby **ORDERED** that:

1. Agency's termination of Employee is **REVERSED**; and
2. Agency shall reinstate Employee to the same or comparable position prior to his termination;
3. Agency shall immediately reimburse Employee all back-pay and benefits lost as a result of his removal; and
4. Agency shall file with this Office, within thirty (30) days from the date on which this decision becomes final, documents evidencing compliance with the terms of this Order.

FOR THE OFFICE:

Arien P. Cannon, Esq.
Administrative Judge