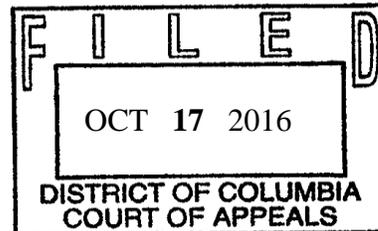


DISTRICT OF COLUMBIA COURT OF APPEALS

No. 15-AA-615

MARYANNE TAGOE, PETITIONER,

v.



DISTRICT OF COLUMBIA DEPARTMENT OF EMPLOYMENT SERVICES, RESPONDENT,

and

HOWARD UNIVERSITY HOSPITAL, *et al.*, INTERVENORS.

Petition for Review of a Decision of the Compensation Review Board
of the District of Columbia Department of Employment Services
(CRB-133-14)

(Submitted September 21, 2016)

Decided October 17, 2016)

Before FISHER and BLACKBURNE-RIGSBY, *Associate Judges*, and NEBEKER,
Senior Judge.

MEMORANDUM OPINION AND JUDGMENT

PER CURIAM: Maryanne Tagoe petitioned this court to address two questions of statutory interpretation relating to her workers’ compensation case against Intervenor Howard University Hospital (the “Employer”): (1) whether, under D.C. Code § 32-1519 (2012 Repl.), the Compensation Review Board (“CRB” or “Board”) had jurisdiction to consider Employer’s appeal from the administrative law judge’s (“ALJ”) order finding that Employer had defaulted on \$505.29 in mileage reimbursement payments and, if so, (2) whether, under D.C. Code § 32-1515 (f) (2012 Repl.), the CRB erroneously affirmed the ALJ’s denial of a twenty percent penalty on the defaulted amount. We remand to the CRB for further consideration in light of this opinion.

I. Procedural History

This dispute relates to petitioner’s workers’ compensation case spanning more than ten years and involving numerous appearances before the Office of

Administrative Hearings, the CRB, and this court. Because this procedural history is described in detail in ALJ Amelia Govan's order, we include here only the facts most relevant to this appeal.

On July 10, 2012, ALJ Govan issued a Compensation Order on Remand ("2012 COR"). The 2012 COR determined, among other things, that Employer owed petitioner \$505.29 in mileage reimbursements for 2000 through 2008 and that two percent interest applied to all reimbursements of petitioner's out-of-pocket expenses. Petitioner appealed to the Board. On August 14, 2012, petitioner also filed a Motion for a Supplementary Order of Default and Penalties with the ALJ, seeking unpaid reimbursements, including the \$505.29 for mileage, and a twenty percent penalty. During 2012 and 2013, the case was volleyed between the ALJ and the CRB to address the correct mileage reimbursement for 2009. The \$505.29 in reimbursements for 2000 to 2008 remained the same throughout.¹

Petitioner filed a second Motion for a Supplementary Order of Default and Penalties on June 21, 2013, requesting an order of default, six percent pre-judgment interest, and a twenty percent penalty. On September 8, 2014, ALJ Govan issued an Order to Show Cause, instructing both parties "to submit documentation to support their respective positions." Petitioner would have needed to show which amounts were outstanding or had been received late and thus were subject to the twenty percent penalty and accrued interest. Employer would have needed to show that it had timely paid the amounts. ALJ Govan cautioned that "[i]n the absence of valid and appropriate documentary submissions, no Order on Default or for Penalties will issue."

Neither party submitted additional documentary evidence with its initial responses to the Order to Show Cause. Instead, petitioner requested a hearing. Employer alleged that it had voluntarily paid petitioner \$566.69 on March 22, 2011, and it resubmitted a check register which purported to show this payment and others to petitioner.

¹ On December 13, 2013, Dr. Tagoe petitioned this court for review of orders issued by the CRB in 2012 and 2013 regarding medical and mileage reimbursements. We affirmed in an unpublished Memorandum Opinion and Judgment. *Tagoe v. District of Columbia Dep't of Emp't Servs.*, No. 13-AA-1421, Mem. Op. & J. (Sept. 3, 2015).

Petitioner moved to strike Employer's response. With its opposition to petitioner's motion, Employer submitted a new chart purportedly listing all payments it had made to petitioner since 2006 and noted that petitioner had not denied receiving the checks listed in its previously submitted register. Employer also alleged that it had paid the \$566.69 "in anticipation of the increase of the mileage award" that was actually ordered in the 2012 COR. Adding that amount to other alleged payments, Employer contended that petitioner actually had been overpaid by \$939.59. In her October 23, 2014, order deciding petitioner's motion, ALJ Govan noted that Employer's new chart was "helpful with regard to the timeline and delineation of payments made. However, the check register submitted is insufficient as documentary proof"

ALJ Govan found that "[petitioner] was awarded a travel reimbursement of \$505.29, at two percent interest, in the July 10, 2012 Compensation Order. There is no evidentiary proof that the award was timely paid by Employer." She also noted that "[n]either party has substantiated its position," and she decided that an evidentiary hearing would not be beneficial given the parties' failures to produce satisfactory evidence. The ALJ found that "Employer is in default of the Compensation Order dated July 10, 2012[.]" and she ordered Employer to "pay [petitioner] \$505.29, with two percent (2%) interest on that amount" (emphasis omitted). However, despite finding that the Employer was in default, the ALJ made no explicit finding regarding penalties. Instead, she merely denied "all other claims for relief," which presumably included petitioner's claim for a twenty percent penalty on the award.

Employer filed an application for review with the CRB, attaching copies of nine checks issued to and apparently cashed by petitioner. In an order dated March 16, 2015, the CRB affirmed the ALJ's finding of a default. The CRB held that Employer had not established "reasonable grounds for the failure to present the evidence" to the ALJ. In addition, the Board agreed with the ALJ that petitioner had not carried her burden to prove she was entitled to the twenty percent penalty under D.C. Code § 32-1515 (f) (2012 Repl.).

Employer filed a motion for reconsideration with the CRB. In response, petitioner argued that the CRB lacked jurisdiction to review the ALJ's order of October 23, 2014, because the order concerned a default under D.C. Code § 32-1519 (a) (2012 Repl.). In its order denying reconsideration, the CRB asserted, after a brief discussion, that it had "jurisdiction to review the supplemental order for default in order to render it final." The CRB compared the statutory language of the D.C. Workers' Compensation Act ("DCWCA") with the wording of the

DCWCA's predecessor, the federal Longshore and Harbor Workers' Compensation Act ("LHWCA"). The CRB noted that, unlike the LHWCA, the "DCWCA's language lacks any remedy in the event the ALJ has erred[.]" The CRB "therefore" looked to 7 DCMR § 261.5 (2006), which states:

The Board shall have power to preserve and enforce order during any proceedings for determination or adjudication of entitlement to compensation or benefits or for liability for payment thereof, and to do all things in accordance with law which may be necessary to enable the Board to effectively discharge its duties.

The CRB also noted that this court has questioned whether the CRB would have jurisdiction over supplementary orders declaring a default, but rather than analyzing the issue, it continued to the merits of Employer's arguments while seemingly relying on 7 DCMR § 261.5 (2006) as the basis for its jurisdiction. The CRB then denied Employer's request for reconsideration.

II. Standard of Review

We defer to an agency's decision "unless it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Marriott Int'l v. District of Columbia Dep't of Emp't Servs.*, 834 A.2d 882, 885 (D.C. 2003). The decision must "flow[] rationally from facts supported by substantial evidence in the record." *Id.* "Although in a workers' compensation case, we review the decision of the CRB, not that of the ALJ, we cannot ignore the compensation order which is the subject of the Board's review." *Hensley v. District of Columbia Dep't of Emp't Servs.*, 49 A.3d 1195, 1200 (D.C. 2012) (internal quotation marks omitted).

On "questions of law, our review is de novo." *Id.* at 1199. When reviewing questions of statutory interpretation, we "must give weight to any reasonable construction of a regulatory statute that has been adopted by the agency charged with its enforcement. Unless the agency's interpretation is plainly wrong or inconsistent with the statute, we will sustain it even if there are other constructions which may be equally reasonable." *Nat'l Geographic Soc'y v. District of Columbia Dep't of Emp't Servs.*, 721 A.2d 618, 620 (D.C. 1998) (internal quotation marks and citation omitted).

However, "[a]lthough our review of agency decisions is deferential, . . . [o]ur principal function 'in reviewing administrative action is to assure that the

agency has given full and reasoned consideration to all material facts and issues.” *Georgetown Univ. Hosp. v. District of Columbia Dep’t of Emp’t Servs.*, 916 A.2d 149, 151 (D.C. 2007) (quoting *Dietrich v. District of Columbia Bd. of Zoning Adjustment*, 293 A.2d 470, 473 (D.C. 1972)). We “can only perform this function when the agency discloses the basis of its order by an articulation with reasonable clarity of its reasons for the decision.” *Id.* (quoting *Dietrich*, 293 A.2d at 473).

III. Analysis

A. The CRB’s Analysis of Its Jurisdiction

Petitioner argues that the CRB lacks jurisdiction to review the ALJ’s October 23, 2014, order because it was a supplementary order of default under D.C. Code § 32-1519 (a) (2012 Repl.). Under that statute, when a supplementary order declaring a default is issued, the “applicant may file a certified copy of such supplementary order with the Clerk of the Superior Court of the District of Columbia.” D.C. Code § 32-1519 (a) (2012 Repl.). The statute states that “[s]uch supplementary order . . . shall be final, and the [Superior] Court shall, upon the filing of the copy, enter judgment for the amount declared in default by the supplementary order.” *Id.* The statute does not explicitly address appeals to the CRB. Petitioner reads the language as denying the CRB jurisdiction to review supplementary orders of default, arguing that the adversely affected party can seek relief from the Superior Court if necessary.

In assessing petitioner’s challenge, the CRB relied almost exclusively on 7 DCMR § 261.5 (2006). However, that regulation (one of several “Compensation Order Review Board Rules of General Application”) is not relevant to jurisdiction. It appears simply to allow the CRB to ensure that all parties behave appropriately before it—in other words, “to preserve and enforce order during any proceedings,” *id.*—rather than provide an independent grant of jurisdiction to the CRB. Indeed, 7 DCMR § 261.1 (2006) introduces that section of the regulations by warning that “[t]hese Rules shall not be construed to extend or limit the jurisdiction or authority of the Board.” Instead, the most relevant provisions concerning the CRB’s jurisdiction, as the CRB appears previously to have recognized, are D.C. Code §§ 32-1521.01, -1522 (2012 Repl.), and 7 DCMR §§ 251, 255, 258 (2006). *See Johnson v. Howard Univ.*, CRB No. 09-081 (July 7, 2009). Given that 7 DCMR § 261.5 (2006) does not seem to have any relevance to jurisdiction, we cannot say that the CRB’s opinion “flows rationally” from governing legal principles and the facts established by the record. *Marriott Int’l*, 834 A.2d at 885.

Nor does the CRB present enough reasoning independent of 7 DCMR § 261.5 (2006) to overcome its misplaced reliance. The remainder of the CRB's analysis compares the DCWCA with its federal counterpart and notes that the DCWCA "lacks any remedy" in case the ALJ has erred or abused her discretion. The CRB does not attempt to incorporate this observation into any holding or weigh it against any other factors relevant to jurisdiction. The CRB also does not attempt to incorporate our observations in *Hensley*, 49 A.3d at 1206 n.10, into its reasoning despite acknowledging their potential relevance to the issue. In short, the CRB did not squarely address the jurisdictional issue.

Under these circumstances, we must remand to the CRB for a fuller and clearer discussion of the jurisdictional issue. *See, e.g., Georgetown Univ. v. District of Columbia Dep't of Emp't Servs.*, 971 A.2d 909, 915 (D.C. 2009) (remanding to the agency because the CRB "le[ft] this court to guess as to the basis for its decision," the CRB's examination of the circumstances surrounding the incident was "too perfunctory to warrant deference by this court," and the CRB's compensation order "lack[ed] the necessary clarity"); *Georgetown Univ. Hosp.*, 916 A.2d at 152 (remanding to the agency because "the overall confusion in the compensation order prevents us from performing our reviewing function"); *Mushroom Transp. v. District of Columbia Dep't of Emp't Servs.*, 698 A.2d 430, 431 (D.C. 1997) (remanding to the agency for an "authoritative interpretation" of "ambiguous language" in the DCWCA because the prior agency interpretation was "inadequate to serve our purposes"). On remand, the CRB should examine the issue without regard to 7 DCMR § 261.5 (2006), which we do not believe is relevant. We express no other views about the proper resolution of the issue.

B. Petitioner's Claim for Penalties

Petitioner also asserts that she was entitled to a penalty because Employer did not timely pay her mileage reimbursements for 2000 through 2008. Because we remand to the CRB for further consideration of the jurisdictional issue, we do not reach the question of whether petitioner is entitled to penalties.

We do note, however, that the two rulings of the October 23, 2014, order appear to be contradictory. The ALJ found Employer to be in default but denied petitioner's claims for penalties that would seemingly be triggered by that default. *See* D.C. Code § 32-1515 (f) (2012 Repl.) ("If any compensation, payable under the terms of an award, is not paid within 10 days after it becomes due, there shall be added to such unpaid compensation an amount equal to 20% thereof . . .").

Given this apparent contradiction, we also remand for the CRB to revisit this issue and clarify its ruling, should it determine that it has jurisdiction.²

IV. Conclusion

We remand for further proceedings not inconsistent with this opinion.

ENTERED BY DIRECTION OF THE COURT:



JULIO A. CASTILLO
Clerk of the Court

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² Nothing in this opinion is meant to preclude the Board from addressing Employer's assertion that it has not in fact defaulted because it has paid petitioner more than ordered.