

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services
Labor Standards Bureau

Office of Hearings and Adjudication
COMPENSATION REVIEW BOARD



(202) 671-1394-Voice
(202) 673-6402-Fax

CRB No. 05-220

DONA BURNEY,

Claimant – Petitioner

v.

D.C. PUBLIC SERVICE COMMISSION,

Employer – Respondent.

Appeal from a Final Compensation Order of
Administrative Law Judge Fred D. Carney, Jr.
OHA No. PBL 97-016A; DCP No. 354126

Robert A. Taylor, Jr., Esq., for the Petitioner

Kevin J. Turner, Esq., for the Respondent

Before SHARMAN J. MONROE and LINDA F. JORY, *Administrative Appeals Judges* and FLOYD LEWIS, *Acting Administrative Appeals Judge*.

SHARMAN J. MONROE, *Administrative Appeals Judge*, on behalf of the Review Panel:

DECISION AND ORDER

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board pursuant to D.C. Official Code §§ 32-1521.01 and 32-1522 (2004), 7 DCMR § 230, and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005).¹

¹ Pursuant to Administrative Policy Issuance No. 05-01, dated February 5, 2005, the Director of the Department of Employment Services realigned the Office of Hearings and Adjudication to include, *inter alia*, establishment of the Compensation Review Board (CRB) in implementation of the District of Columbia Fiscal Year 2005 Budget Support Act of 2004, Title J, the D.C. Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, sec. 1102 (Oct. 1, 1994), *codified at* D.C. Code Ann. § 32-1521.01 (2005). In accordance with the Director's Policy Issuance, the CRB replaces the Office of the Director in providing administrative appellate review and disposition of workers' and disability compensation claims arising under the D.C. Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §§ 32-1501 to 32-1545 (2005) and the D.C. Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Code Ann. §§ 1-623.1 to 1.643.7 (2005), including responsibility for

BACKGROUND

This appeal follows the issuance of a Final Compensation Order by the Assistant Director for Labor Standards of the District of Columbia Department of Employment Services, approving and adopting a Recommended Decision from the Office of Hearings and Adjudication (OHA).² In that Recommended Decision which was filed on February 23, 2005, the Administrative Law Judge (ALJ) granted the Petitioner's request for temporary total disability benefits from November 18, 1996 to February 3, 1997 and reasonably related medical expenses. The ALJ denied her request for permanent total disability benefits. The Petitioner now seeks review of the Final Compensation Order.

As grounds for this appeal, Petitioner alleges as error the ALJ's failure to decide the Petitioner's entitlement to temporary partial and temporary total disability benefits from January 14, 1997 to September 30, 1998 and to permanent total disability benefits from September 30, 1998 to the present and continuing.

ANALYSIS

As an initial matter, the standard of review for the Compensation Review Board (CRB) and this Review Panel, as established by the Act and as contained in the governing regulations, is substantial evidence, i.e., 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. D.C. Workers' Compensation Act of 1979, as amended, D.C. Official Code §32-1501 *et seq.*, at §32-1522(d)(2)(A). "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 Int'l. v. Dist. of Columbia Dep't. of Employment Servs.*, 834 A.2d 882 (D.C. 2003). 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.

Turning to the case under review, the Petitioner alleges that the ALJ should have exercised jurisdiction over her claims for additional temporary partial, temporary total and for permanent total disability benefits because they were ancillary to her claim for reinstatement of the benefits terminated via the November 18, 1996 Denial of Award for Compensation Benefits from the Office of Benefits Administration (OBA), the predecessor to the Third Party Administrator (TPA). She avers that ancillary jurisdiction should have been exercised given the length of time that her case was before AHD. Other than citing to a federal court case defining the concept of

administrative appeals filed prior to October 1, 2004, the effective date of the D.C. Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004.

² Pursuant to the Director's Directive, Administrative Policy Issuance 05-01, the functions of the Office of Hearings and Adjudication have been assigned to the Administrative Hearings Division (AHD). Throughout this decision, the new office names, CRB and AHD, will be used.

ancillary jurisdiction, the Petitioner cites no authority under the Act for invoking ancillary jurisdiction. The Respondent did not file a timely Opposition.³ The Petitioner also argues that, although she did not make formal claims to the OBA for temporary partial and temporary total disability benefits from January 14, 1997 to September 30, 1998, and for permanent total disability benefits from September 30, 1998 and continuing, the OBA and the Respondent should have known that she intended to pursue such claims and taken action, without prompting, on the claims. She avers that the Respondent knew she continued to miss time from work and was forced into early retirement due to her work injuries.

A review of the record reveals that, effective November 18, 1996, the OBA terminated the Petitioner's temporary partial disability benefits related to her June 6, 1996 work injury based upon the medical opinions of the independent medical examiners, Drs. John Cohen and Louis Levitt. The Petitioner thereafter timely filed an Application for Formal Hearing with AHD requesting reinstatement of her terminated benefits, and also requesting additional total disability and medical benefits from November 18, 1996 to the present and continuing.⁴ The ALJ, after reviewing the evidence, awarded temporary total disability benefits from November 18, 1996 to February 3, 1997 and reasonably related medical benefits.

In this jurisdiction, once the OBA pays disability benefits due to a work-related injury, the OBA must present substantial and recent medical evidence to support a modification or termination of benefits. See *Toomer v. D.C. Dep't. of Corrs.*, CRB No. 05-202, OHA No. PBL 98-048A, DCP No. LT5-DOC001603 (May 2, 2005); *Jones v. D.C. Dep't. of Corrs.*, Dir.Dkt. No. 07-99, OHA No. PBL No. 97-14, ODC No. 312082 (December 19, 2000); *Robinson v. D.C. Gen. Hosp.*, ECAB No. 95-8, ODCVC No. 302585 (July 8, 1997). The ALJ found that since the Respondent's independent medical examiners did not agree, the Respondent had not met its burden of showing, via substantial evidence, that there had been a change in the Petitioner's condition to warrant a termination of her benefits. The record reveals that the Respondent submitted the September 6, 1996 of Dr. Cohen who opined that the Petitioner was fit for light duty, but needed additional medical treatment. Employer Exhibit No. 3. The Respondent also submitted the October 10, 1996 of Dr. Levitt who opined, contrary to Dr. Cohen, that the Petitioner had reached maximum medical improvement and was able to return to work without limitations. Employer Exhibit No. 4. With respect to the date the ALJ ended benefits, the record shows that the Petitioner conceded she was released to return to work by her treating physician on January 14, 1997 and that she returned to work on February 3, 1997. Given the state of the evidence, the Panel determines that the ALJ's finding is supported by substantial evidence and will not disturb it.

Nevertheless, the Panel rejects the Petitioner's argument that the ALJ could have exercised ancillary jurisdiction over her claims for additional temporary partial, temporary total and for permanent total disability benefits because they were supplementary to her claim for

³ By letter and Notice of Application for Review dated April 5, 2005, the Respondent was notified that it had fifteen (15) calendar days from the date of Notice to file an Opposition. The Respondent did not file any response to the Notice of Application for Review.

⁴ The record indicates that much of the delay between filing of the Application for Formal Hearing and the issuance of the Final Compensation Order was due to requests for continuances from the Petitioner.

reinstatement of the benefits. The Petitioner's primary basis for advocating the use of ancillary jurisdiction is the passage of time between the termination of her benefits and the issuance of the Final Compensation Order.

While the courts have broad grants of authority to adjudicate matters, the adjudicatory authority of an administrative agency is limited by an enabling act. Under the Act governing this matter, a claim for benefits for a work-related injury must first be made to the Public Sector Division of the Office of Workers' Compensation, that is, the OBA. *See* D.C. Official Code § 1-623.24 (a); 7 DCMR §§ 104, 105, 106, 199. The OBA, now the TPA, is responsible for conducting necessary investigations into an injured worker's claim and then making an initial determination either to award or deny disability compensation benefits for that claim. It is only if the injured worker is dissatisfied with the determination the worker can request a hearing before the ALJ. *See* D.C. Official Code § 1-623.24 (b)(1). Thus, an ALJ is without ancillary authority to adjudicate claims for compensation that have not been first presented to the OBA, or the TPA, for investigation and resolution.

For similar reasons, the Panel rejects the Petitioner's alternative argument to direct an amendment to the Final Compensation Order to find the Respondent had notice of her claims for additional temporary partial, temporary total and permanent total disability benefits, and to direct the TPA to decide the merits of her claims without regard to notice issues or limitation periods. The TPA is responsible for conducting necessary investigations into the legal and the factual validity of a claim. The Panel is without authority to direct the TPA to abrogate its responsibility under the Act.

The Panel also rejects the Petitioner's argument that the Respondent should have known that she intended to pursue additional claims for benefits and taken action, without prompting, on the claims. The regulations governing the Act define "claim" as "an assertion properly filed and otherwise made in accordance with the provisions of this chapter that an individual is entitled to benefits under the Act." 7 DCMR § 199. An "assertion" is defined "as a declaration, an affirmation." Merriam-Webster's Collegiate Dictionary (10th ed. 2002). Consequently, a claim requires a declaration, and affirmative statement, from the injured worker to the employer notifying the employer of the injury and requesting concomitant disability benefits. It is clear, therefore, that the Act puts the onus on the injured worker to affirmatively request benefits from the employer for a work injury. Otherwise, the employer would be placed in the untoward position of surmising, perhaps to its detriment, the type of benefits to pay to an injured worker or the length of time to pay those benefits and acting accordingly. Placing the onus on the injured worker is not only fair, but also reasonable given that an injured worker may request only some, or perhaps none, of the disability or medical benefits to which he or she may be entitled.

CONCLUSION

The Final Compensation Order of February 23, 2005 is supported by substantial evidence in the record and is in accordance with the law.

ORDER

The Final Compensation Order of February 23, 2005 is hereby AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

SHARMAN J. MONROE
Administrative Appeals Judge

June 1, 2005

DATE