# GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR

LISA MARÍA MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

**CRB No. 13-080**

**PATRICIA CAMP,**
**Claimant–Petitioner,**

**v.**

**D.C. DEPARTMENT OF HEALTH,**
**Employer-Respondent**.

Appeal from a June 21, 2013 Compensation Order by
Administrative Law Judge Joan E. Knight
AHD No. PBL08-096A, DCP No. 761010-0001-1999-0030

Harold L. Levi, Esquire for Petitioner
Kevin Turner, Esquire for Respondent

Before MELISSA LIN JONES, JEFFREY P. RUSSELL, and HEATHER C. LESLIE, A*dministrative Appeals Judges*.

MELISSA LIN JONES for the Compensation Review Board.

## DECISION AND ORDER

### FACTS OF RECORD AND PROCEDURAL HISTORY

In November 1980, Ms. Patricia Camp injured her back, shoulders, knees, and right ankle while working for the District of Columbia Department of Health (Employer) as a histopathology technician. Employer was paying disability compensation benefits, but on March 8, 2012, the Public Sector Workers' Compensation Program issued a Notice of Intent to Terminate Public Sector Workers' Compensation Payments effective April 8, 2012. As a result, Ms. Camp requested reconsideration from the Public Sector Workers' Compensation Program, and on May 3, 2012, the Public Sector Workers' Compensation Program issued a Final Decision on Reconsideration upholding the termination of Ms. Camp's benefits as of April 8, 2012.

Ms. Camp requested a formal hearing to adjudicate her entitlement to temporary total disability compensation benefits from April 8, 2012 to the date of the formal hearing and continuing, and on June 21, 2013, an administrative law judge (ALJ) denied Ms. Camp's claim for relief because Ms. Camp no longer is entitled to temporary total disability compensation benefits as her

condition is permanent. The ALJ did not award Ms. Camp permanent total disability compensation benefits because those benefits had not been requested and because Employer was not on notice of any issue regarding entitlement to permanent total disability compensation benefits.[1]

Ms. Camp appealed the June 21, 2013 Compensation Order on the grounds that the ALJ was not justified in terminating her disability compensation benefits because neither the Notice of Intent to Terminate Public Sector Workers' Compensation Payments nor the Final Decision on Reconsideration raised an issue regarding Ms. Camp's permanent total or permanent partial disability status.[2] Ms. Camp argues the Compensation Order fails to make a finding "on the singular material issue in dispute in this case,"[3] namely when her work-related injury resolved. Ms. Camp asserts she is entitled to her claim for relief, because "Employer failed to show that Petitioner's current conditions are no longer causally related to her injury,"[4]

## ISSUES ON APPEAL

1. Did the ALJ apply the correct burden of persuasion and correct burden of proof?

2. Did the ALJ err by denying Ms. Camp an award of permanent total disability compensation benefits when Ms. Camp had not requested these benefits and when Employer was not on notice of such a claim for relief?

3. Is the June 21, 2013 Compensation Order supported by substantial evidence and in accordance with the law?

## PRELIMINARY MATTER

On August 5, 2013, Ms. Camp filed Petitioner's Opposition to Employer's Late-Filed Motion for Extension of Time to Oppose Application for Review of Compensation Order. The fundamental issue with this submission is that at the time it was filed, Employer had not filed any motions. With nothing to oppose, this filing was premature and inappropriate. Petitioner's Opposition to Employer's Late-Filed Motion for Extension of Time to Oppose Application for Review of Compensation Order is dismissed.

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[1] *Camp v. D.C. Department of Health*, AHD No. PBL08-096A, DCP No. 761010-001-1999-0030 (June 21, 2013).

[2] In a footnote, Ms. Camp raises an issue regarding the neurological nature of her injury. Memorandum in Support of Petition for Review of Compensation Order, p. 7. Any arguments made in footnotes without supporting legal analysis will not be addressed because "issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived." *Enders v. D.C.*, 4 A.3d 457, 471 n. 21 (D.C. 2010) quoting *McFarland v. George Washington University*, 935 A.2d 337, 351 (D.C. 2007); see also *Bardoff v. U.S.*, 628 A.2d 86, 90 n.8 (D.C. 1993) (arguments raised but not argued in briefing are treated as waived).

[3] Memorandum in Support of Petition for Review of Compensation Order, p. 9.

[4] *Id.* at p. 13.

On August 9, 2013, Employer filed Respondent's Request for an Extension of Time to Submit Its Memorandum of Points and Authorities in Opposition to the Application for Review (Request). As grounds for the extension, Employer states, "Notice of Application for Review, Thee [*sic*] Notice was not served on the Counsel of record, instead it was served on the Office of Risk Management."[5] Based upon this mistake, Employer "requests an extension of time through and including August 8, 2013, July 31, 2013, [*sic*] to submit Petitioner's [*sic*] Memorandum of Points and Authorities in Opposition to the Petitioner's Application for Review of the Compensation Order."[6]

Ms. Camp filed Petitioner's Restated Opposition to Employer's Late-Filed Opposition to Application for Review on August 13, 2013. Ms. Camp argues that her Application for Review was filed timely with the Compensation Review Board (CRB) and was served timely on Employer thereby triggering the regulatory deadline for filing an opposition. Ms. Camp further asserts that even if it is the CRB's Notice of Application for Review that triggers the regulatory deadline, Employer's request for an extension and its opposition still were filed late. Ms. Camp requests the CRB deny Employer's request for an extension of time to file its opposition.

Pursuant to 7 DCMR §258.8, "Any response in opposition [to an Application for Review] must be filed with the Clerk of the Board within fifteen (15) calendar days from the date of filing of the Application for Review." Employer concedes Ms. Camp filed an Application for Review on June 27, 2013 and does not contend it did not receive a copy of the Application for Review timely; Employer argues that because the CRB's Notice of Application for Review was served on Phillip A. Lattimore, III in the Office of the Attorney General in Suite 800S at 441 4th Street, NW, its opposition which was filed more than 1 month after the regulatory deadline should be accepted for filing and should be considered when resolving this appeal.

The CRB acknowledges the Notice of Application for Review was not sent to the Office of the Attorney General; however, 7 DCMR §258.8 states that the filing of an opposition is triggered by the filing of an Application for Review; therefore, the error in mailing this notice does not extend any statutory or regulatory deadlines. Furthermore, Employer does not dispute it received the timely filed Application for Review. Consequently, pursuant to the regulatory deadline, Respondent's Request for an Extension of Time to Submit Its Memorandum of Points and Authorities in Opposition to the Application for Review was not filed timely and is DENIED; Employer's Memorandum of Points an [*sic*] Authorities in Opposition to Petitioner's Application for Review also was not filed timely and has not been considered in this appeal.[7]

[5] Respondent's Request for an Extension of Time to Submit Its Memorandum of Points and Authorities in Opposition to the Application for Review, p. 1.

[6] *Id.*

[7] Given the CRB's resolution of this issue, Petitioner's Motion to Strike, or in the Alternative, Reply to, Employer's Late-Filed Opposition to Application for Review is moot.

## ANALYSIS[8]

As to Ms. Camp's arguments on the merits, she concedes she did not seek permanent total or permanent partial disability compensation benefits,[9] and she concedes "the evidence is that [her] work-related injury conditions are now permanent."[10] Her sole claim for relief was "temporary total disability benefits from the date of termination to the present and continuing," and the sole issue for resolution was "Has there been a change in Claimant [*sic*] medical condition to support termination of temporary total disability benefits?"[11]

In a public sector case, if a claim for disability compensation has been accepted and benefits have been paid, Employer initially must adduce persuasive evidence sufficient to substantiate a modification or termination of an award of benefits.[12] Employer paid Ms. Camp temporary total disability compensation benefits; therefore, the burden was on Employer to present evidence to support a modification or termination of benefits payable as a result of disability caused by the injury.[13] The ALJ ruled Employer had satisfied its burden:

> To meet its initial burden, Employer presented the January 5, 2012, independent medical report and opinion of Dr. David C. Johnson, an orthopedic surgeon, [footnote omitted] to support its decision to suspend Claimant's temporary total disability benefits. Dr. Johnson found on his examination Claimant's gait was normal, bi-lateral leg raising tests and maneuvers were negative, extension of back and side bending was normal and range of motion of hips normal and pain free. He found both lower extremities to be stable with no effusion or local tenderness about the knees, no sensory deficit or motor weakness in the upper extremities, with range of motion normal and pain free. His examination of the back revealed no spasm with range of motion 67 degrees to the right and 60 degrees to the left and pain with flexion but not with rotation.

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[8] The scope of review by the CRB is limited to making a determination as to whether the factual findings of the appealed 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. Section 32-1521.01(d)(2)(A) of the District of Columbia Workers' Compensation Act, as amended, D.C. Code §32-1501 to 32-1545, (Act). Consistent with this standard of review, the CRB is constrained to uphold a Compensation Order that is supported by substantial evidence, even if there also is contained within the record under review substantial evidence to support a contrary conclusion and even if the CRB might have reached a contrary conclusion. *Marriott International v. DOES*, 834 A.2d 882, 885 (D.C. 2003).

[9] Memorandum in Support of Petition for Review of Compensation Order, p. 3.

[10] *Id.* at p. 13.

[11] *Camp*, *supra*, at p. 2.

[12] *Lightfoot v. D.C. Department of Consumer and Regulatory Affairs,* ECAB No. 94-25 (July 30, 1996); *Scott v. Mushroom Transportation*, Dir. Dkt. No. 88-77 (June 5, 1990). Although the Employees' Compensation Appeals Board was abolished in 1998, its rulings remain persuasive in deciding disability cases.

[13] *Jones v. D.C. Department of Corrections,* Dir. Dkt. No. 07-99, OHA No. PBL97-14, ODC No. 312082 (December 19, 2000).

Dr. Johnson noted prior electrodiagnostic studies performed by Claimant's treating physician indicated no evidence of radiculopathy. Dr. Johnson believed Claimant's complaints have been largely subjective in nature with loss of motion, tenderness and positive-straight leg tests. He opined Claimant, who is 72 years old, has reached MMI and currently suffers from a normal progression of multilevel degenerative disc disease of the cervical and lumbar spine, status post-surgery on the neck and found no abnormality that could be attributed to the November 4, 1980 work injury.

Dr. Johnson wrote:

> She has reached maximum medical improvement from the injury of November 4, 1980. I believed that the patient's current symptoms are. . . due to a normal progression of multilevel degenerative disc disease of the cervical and lumbar spine. She, in my opinion has never been disabled from her normal work. . . as a pathology department technician at DC General Hospital. It should be noted, however, that the patient has not worked since November 14, 1980, a period of thirty-one years, and it is unlikely that she will ever return to work, especially at her advanced age of seventy-two years. I do not think that vocational rehabilitation efforts are likely to provide any benefit nor would they be successful in getting her to return to work. Since she has not worked in the past thirty-one years []admittedly from an injury that in my opinion. . . did not warrant any restrictions from her normal work activities over the years.

Dr. Johnson's report is sufficient to meet Employer's burden of showing a change in condition such that the disabling condition is no longer causally related to Claimant's employment pursuant to §1-623.24(d)(1)(B). As the Employer has produced evidence that supports a reasonable basis for terminating claimant's benefits, claimant now bears the burden to show that she is entitled to ongoing payments of temporary total disability benefits due to the injury she sustained on November 14, 1980.[14]

The CRB finds the ALJ's determination that Employer met its burden is supported by substantial evidence and is in accordance with the law; therefore, there is no justification for setting aside the ALJ's ruling that the burden of proof shifted to Ms. Camp to prove her entitlement to reinstatement of temporary total disability compensation benefits.

With the burden shifted, the ALJ considered Ms. Camp's evidence and favored Dr. Batipps' opinion:

> In support of her position that temporary total disability benefits should not be terminated, Clamant relies upon her testimony and medical reports

[14] *Camp*, *supra*, at pp. 5-6.

prepared by her treating physician, Dr. Michael Batipps, a neurologist. [Footnote omitted.] Claimant testified she has persistent cervical, lumbar and lower extremity pain with prolonged sitting, walking, lifting, reaching and bending. She also testified she takes Daypro 600 mg. and performs home exercise to manage her pain and discomfort. She further testified her manual dexterity is poor, she drops things, is unable to lift, reach overhead and unable to sit over a microscope or otherwise return to pre-injury employment. HT pp. 48, 51-54; 60-69.

Treating records show that on April 2, 2012, Dr. Batipps, examined Claimant and found lumbosacral tenderness and decreased range of motion of the lumbosacral spine. He assessed Claimant has chronic back pain and lumbar radiculopathy as a result of her work injury and there is no prognosis for continued recovery. Dr. Batipps opined Claimant's medical impairment is permanent. He wrote:

> It is clear the patient has had document [*sic*] cervical and lumbosacral disc herniations following the [work] injury and she has had consistent cervical and lumbosacral radicular pain since that time. . . This is a chronic permanent problem" [*sic*] . . . this patient should not ever return to work and vocational efforts are not at all indicated. CE 7.

Herein, the medical evidence of record is uncontroverted that Claimant has reached maximum medical improvement from her work injuries, from both an orthopedic standpoint and neurological standpoint and that at Claimant's advanced age of seventy-two years, it is unlikely she will ever return to work and vocational rehabilitation efforts are not likely to provide any benefit.[15]

A claimant is entitled to temporary total disability compensation benefits when unable to work in her pre-injury position for a limited period of time as a result of a work-related injury.[16] A claimant is entitled to permanent total disability compensation benefits when the normal healing process has reached a plateau and the claimant is unable to perform usual employment.[17] There are important distinctions between these two types of benefits, and different evidence is required to prove entitlement to either. The evidence in this case supports the ALJ's conclusion that Ms. Camp is not entitled to temporary total disability compensation benefits:

> The reliable medical evidence of record establishes Claimant's impairment is no longer temporary but permanent. [Footnote omitted.] There is overwhelming

[15] *Camp*, *supra*, at pp. 6-7.

[16] *Savoy v. Evered Bardon*, Dir. Dkt. No. 96-59, H&AS No. 93-377, OWC No. unknown (April 24, 1997). See note 21 regarding applicability of private sector workers' compensation cases to public sector workers' compensation cases.

[17] *Logan v. DOES*, 805 A.2d 237 (D.C. 2002). See note 21 regarding applicability of private sector workers' compensation cases to public sector workers' compensation cases.

> evidence in the record for the undersigned to conclude Claimant has a residual permanent disability from the work injury and degenerative disease. Although not expressly stated in the claim, the undersigned is persuaded that such findings require a conclusion that Claimant's condition is permanent rather than temporary. The D.C. Court of Appeals has been held that disbility [*sic*] is not defined medically; rather as used in the Act, "disability" is an economic and legal concept which should not be confounded with a medical condition. Thus, Claimant has failed to show through reliable and substantial medical evidence that her disability has not changed or remains temporary in nature. Furthermore, Claimant has not shown evidence of a continuing temporary wage loss as a result of her work injury.[18]

Furthermore, it is not contested that Ms. Camp did not request an award of permanent total disability compensation benefits,[19] and Employer was not on notice that it should prepare to defends against such a claim; therefore, as the ALJ correctly stated:

> There has been no claim herein for permanent disability. The due process protection recognized by the D.C. Court of Appeals in *Transportation Leasing v. District of Columbia Department of Employment Services*, 690 A.2d 487 (D.C. 1997) stands as a bar to grant relief that has not been requested, as well the ALJ reaching and deciding underlying issues that give rise to relief where, as in the instant case, the lack of notice and opportunity to present evidence and argument addressing such issues results in prejudice to the opposing party. Accordingly, the ALJ cannot award benefits for relief not claimed by a party and substitute it for another form of relief. [Footnote omitted.][20]

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[18] *Camp*, *supra*, at p. 7.

[19] Ms. Camp concedes an ALJ cannot award benefits for relief that have not been claimed by a party and cannot substitute one benefit for another. *Id.* at p. 14.

[20] *Id.* at p. 7. See *Teklu v. Jurys Doyle Hotel*, CRB No. 08-016, AHD No. 05-241, OWC No. 601765 (January 23, 2008):

> Pursuant to the Scheduling Order issued in proceedings before AHD, the parties are required to jointly execute and file in advance of the formal hearing a joint pre-hearing statement and stipulation identifying, *inter alia,* the issues to be presented and the claim for relief that is sought. Absent formal amendment to that documentation, [footnote omitted] Employer had every reason in the instant case to expect that the ALJ would rule on the claim for relief as presented, and adjudicate only those issues identified by the parties in their stipulation and joint pre-hearing statement.

Although *Teklu* is a workers' compensation case litigated pursuant to the District of Columbia Workers' Compensation Act of 1979, D.C. Code, as amended, §32-1501 *et seq.* ("WCA"), the WCA and its caselaw are instructive on general principles of workers' compensation law, and this jurisprudence has validity and applicability under both the public and private sector statutes and schemes, especially when the statutory provisions as so similar. *Kralick v. D.C. Department of Human Services,* CRB No. 07-043. OHA/AHD No. PBLXX-885, DCP No. 10092 (March 27, 2007).

There is no basis for disturbing the ALJ's ruling.

## CONCLUSION AND ORDER

The ALJ applied the correct burden of persuasion and correct burden of proof and did not err by denying Ms. Camp an award of permanent total disability compensation benefits when Ms. Camp did not request permanent total disability compensation benefits and when Employer was not on notice of such a claim for relief. The June 21, 2013 Compensation Order is supported by substantial evidence, is in accordance with the law, and is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

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MELISSA LIN JONES
Administrative Appeals Judge

September 26, 2013
DATE