CRB 12-104

DEBORAH T. JACKSON,
Claimant-Respondent,

v.

DISTRICT OF COLUMBIA HOUSING AUTHORITY,
Self-Insured Employer- Petitioner.

Appeal from a Compensation Order by
Administrative Law Judge Fred D. Carney, Jr.
AHD PBL No. 11-022A, OWC No. 30110173190-0001

Harold L. Levi, Esquire, for the Claimant
Shermineh C. Jones, Esquire for the Self-Insured Employer

Before LAWRENCE D. TARR, MELISSA LIN JONES, and HEATHER C. LESLIE,[1] *Administrative Appeals Judges.*

LAWRENCE D. TARR, *Administrative Law Judge* for the Compensation Review Board.

DECISION AND ORDER

OVERVIEW

This case is before the Compensation Review Board (CRB) on the request for review filed by the self-insured employer, the District of Columbia Housing Authority (employer) of the June 8, 2012, Compensation Order (CO) issued by an Administrative Law Judge (ALJ) in the Office of Hearings and Adjudication Section, Department of Employment Services (DOES). In the CO, the ALJ determined the claimant timely filed an Application for Hearing and granted her request for restoration of temporary total disability benefits, related medical benefits, and accrued interest.

PROCEDURAL HISTORY AND BACKGROUND FACTS OF RECORD

The claimant, Deborah T. Jackson, worked for the employer as a Special Police Officer. Her primary responsibility was to protect the tenants and visitors of public housing. On January 31,

[1] Judge Leslie has been appointed by the Director of DOES as a CRB member pursuant to DOES Policy Issuance No. 12-02 (June 20, 2012).

2011, the claimant and another officer, Charles Fields, were chasing a burglary suspect who had jumped from a fourth floor window in a housing facility operated by the employer. During the chase, the claimant slipped on some ice and fell.

That day, the claimant and her supervisor, Sergeant Robert Lee, filed an "Employer & Employee First Report of Injury or Occupational Disease" (Form 1) with the employer.[2] This form stated the claimant injured her left wrist and neck in the accident.

The claimant testified that a few weeks later the claimant asked Sergeant Lee to amend her claim to also identify that she injured her back. Sergeant Lee testified that he tried to amend the claim but was told by one of the employer's human resource employees that the claim could not be amended.

The claimant also testified that the human resource staff person told her she could not amend her claim, as did a claims adjuster for the employer. The claimant testified these conversations took place before the employer issued the Notice of Determination Regarding Original Claim For Compensation (Notice of Determination). HT at 45.

On March 1, 2011, the employer sent the claimant the Notice of Determination. The Notice of Determination notified the claimant that her claim was accepted for a left wrist injury, and that if she disagreed she must appeal to the Office of Hearings and Adjudication (OHA).

The claimant did not agree with the Notice of Determination and submitted an application for a formal hearing (AFH) to OHA. OHA date stamped the claimant's AFH as received on April 20, 2011. The US Postal Service return receipt "green" card for certified mail that was returned to the claimant and submitted at the second formal hearing showed the card was received on March 29, 2011.

The claimant's AFH was assigned docket number AHD PBL No. 11-022. The parties received notice that a formal hearing was scheduled for August 3, 2011, before the Honorable Fred D. Carney, Jr. Believing that the AFH was not filed until April 20, 2011, the employer filed a motion to dismiss the AFH with Judge Carney on June 22, 2011. On July 21, 2011, ALJ Carney issued a show cause order to the claimant directing her to respond to the employer's motion within ten days. The claimant did not respond.

ALJ Carney convened the first formal hearing on August 3, 2011. The claimant appeared at the hearing *pro se*. Judge Carney advised the claimant of her right to be represented, and that she will be held to the "same standard" as if she were represented by an attorney. The claimant told Judge Carney that she understood this and that she chose to represent herself. (HT at 5-6).

The claimant did not introduce any evidence at the August 3, 2011, formal hearing that showed she timely filed her AFH. ALJ Carney told the claimant the he was going to dismiss her case without prejudice but that she could re-file it. On September 7, 2011, the ALJ Carney issued an Order dismissing the AFH without prejudice. The claimant did not appeal this Order.

[2] The employer's workers' compensation claims plan is administered by the Public Sector Workers' Compensation Program. For this decision, we shall use "employer" to refer to both the employer and that program.

On August 16, 2011, the claimant, now represented by present counsel, requested a new formal hearing. This request was assigned a new docket number, AHD PBL 11-022A, and OHA scheduled the second formal hearing for December 5, 2011.

On October 17, 2011, claimant's counsel filed an "Opposition to Motion to Dismiss or, in the Alternative, Request for Reconsideration of Dismissal Order." The employer filed an opposition to the claimant's motion. The ALJ did not take any action with respect to the claimant's motion.

At the beginning of the second formal hearing on December 5, 2011, the employer acknowledged that it previously accepted the claim for wrist injury and that it now also was accepting the claim for a neck injury. The employer continued to contest the claim for injury to claimant's back.

Both parties presented testimony and introduced documentary evidence at the second formal hearing. After the hearing record closed on January 3, 2012, the claimant, through counsel, sought to re-open the record to introduce three documents: an affidavit from Sergeant Lee (who was unable to attend the first hearing because of medical reasons), a supervisor's report, and a December 19, 2011, medical report from Dr. Yousaf. The ALJ, in the CO, admitted the Lee affidavit and the medical report.

The ALJ issued the CO on June 8, 2012. The CO has the AHD docket number "PBL 11-022", the docket number that was assigned to the claimant's first AFH that had been dismissed by Order dated September 7, 2011.

In the CO, the ALJ held that the claimant's first AFH was timely because the USPS green card that was introduced into evidence at the second formal hearing showed that it was received on March 29, 2011, within 30 days of the Notice of Determination. The ALJ further held that the claimant proved she injured her back when she fell on January 31, 2011.

The ALJ awarded the claimant "temporary total [sic]; restoration related medical benefits; and accrued interest in that Employer failed to support the suspension of benefits by a preponderance of evidence." CO at 12.

The employer timely filed a request for review with the CRB.

THE STANDARD OF REVIEW

The scope of review by the CRB is limited to making a determination as to whether the factual findings of the appealed order are based on substantial evidence in the record and whether the legal conclusions drawn from those facts are in accordance with applicable law. "Substantial evidence" is relevant evidence a reasonable person might accept to support a conclusion. *Marriott International v. DOES*, 834 A.2d 882, 885 (D.C. 2003) and §1-623.28(a), District of Columbia Government Comprehensive Merit Personnel Act of 1978, as amended, §1-623.1 et seq., (the "Act").

Consistent with this standard of review, the CRB is constrained to uphold an 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, supra.*

DISCUSSION AND ANALYSIS

On review the employer raises several arguments. The employer first asserts that AHD did not have jurisdiction to hear any matter relating to the claimant's lower back claim because it "neither denied that the lower back injury was a part of the accepted claim nor denied a request for authorization to treat the lower back. In other words, the Claimant had not exhausted her administrative remedies under the Act and regulations." Employer's memorandum at 5-6.

The ALJ, in the CO, addressed this argument as follows:

> Employer further argued that there was no final order from the Mayor in this matter from which to appeal. Employer is estopped form alleging there was no final order because it argued earlier that Claimant had 30 days from the date of the March 1, 2011 Acceptance Order which also informed Claimant that she could appeal to an ALJ. Therefore, Employer's motion to dismiss is denied and Claimant may proceed to a formal hearing.

CO at 11.

While we do not agree with the ALJ's analysis that the employer is estopped from asserting this argument, we find that under the specific facts of this case, the employer's failure to specifically deny the claimant's back claim is not a bar to OHA's jurisdiction over that claim.

The employer is correct that as a general rule, OHA does not have jurisdiction to determine a claim for injury to a specific body part unless the employer has issued a determination denying liability for that body part. In several recent decisions, the CRB overruled *Tellish v. D.C. Public Schools*, CRB No. 07-001, AHD No. PBL 05-028A, DCP No. DCPS 007013 (February 16, 2007) and held that the plain language of D.C. Code §1-623.24 (b) (1) requires that the employer make a determination with respect to a claim before an injured worker may obtain a formal hearing. *Sisney v. DCPS*, CRB No. 08-200, AHD No. PBL08-066, DCP No. DCP007970 (July 2, 2012), *Brooks v. DCDMH*, CRB No. 10-062, AHD No. PBL 96-065B, DCP No. 7610100001199-0016 (August 16, 2012, *Newby v. DCPS*, CRB No 10-162, AHD No. PBL 01-064D, DCP No. LT-PARK001712 (September 11, 2012).

In the present case, the claimant asserted three claims: left wrist, neck and back. The Notice of Determination only accepted the claimant's left wrist claim. The Notice was silent as to the neck and back claims. However, the employer did not challenge AHD's jurisdiction over the neck claim. Indeed, at the hearing it advised the ALJ that it was accepting that claim.

The employer, in effect, conceded jurisdiction over the claim for neck injury even though it did not specifically deny that claim. Since the employer did not challenge jurisdiction with respect to one of the claims on which the Notice of Determination was silent, we find it may not act inconsistently and challenge jurisdiction over the other claim on which the Notice of Determination was silent, the back claim.

In its memorandum, the employer argued that the USPS receipt was of limited probative value to whether the claimant's request first formal hearing was timely because "The return receipt does not identify the mailer or the contents of the package delivered. On its face, the return receipt proved nothing." Employer's memorandum at 11. In light of the ALJ's finding that the claimant was a credible witness, we find the ALJ could reasonably infer that the March 29, 2011, letter contained the claimant's AFH.

The employer's also asserts the ALJ did not have authority to convene a second formal hearing after he took evidence at the first formal hearing, indicated at that hearing that the claimant's AFH was not timely, and dismissed the claim. The employer argues that a second hearing was improper because that hearing was not applied for within 30 days after the Notice of Determination. We find that because of statements made by the ALJ at the first formal hearing, it was proper to hold a second formal hearing.

At the conclusion of the first formal hearing, after commenting that he would have had jurisdiction to proceed had the employer's Notice of Determination denied the claimant's back claim, the ALJ told the claimant:

> But it doesn't say that. I don't have any option but to dismiss your case. But what I am going to do I'm [going to] give you some advice. But I'm not going to do that on the record.
>
> I changed my mind. I am going to do that on the record. What I'm [going to do] I'm [going to] dismiss your case without prejudice. That means you [can] re-file it. And you're still going to have a very big problem about the fact that this case that you got a denial on March 1st.
>
> And it got here on April 20th. I don't know how you are going to get around that. But you do have the right to re-submit your application from here and start over.
>
> Now, what I'd suggest you do is find one of these Workers' Comp lawyers, there are some that exist, because the same ones come before me all the time, and have them represent you.
>
> I think that they would be able to put—to advocate at the administrative level, that is, with the Disability Comp program, your claims examiners. And so they understand how to handle claims. They do that kind of work
>
> And they could either put [you] in a position where they would issue you a new denial order, denying your low back and neck and other alleged injuries. And you can appeal from that. Or they can get them to accept it. So I think that's what you should try to do.

> With that, April 20, 2011 application is dismissed. This dismissal is without prejudice. Claimant can re-file the application at another—at a later date without prejudice to the fact that she's already had a dismissal. The hearing is adjourned.

August 3, 2012 HT at 24-25.

As the underlined parts of the ALJ's statement show, the ALJ advised the claimant that even though he was dismissing her hearing application, she could file it again, which she did. It would be unjust to penalize the claimant because the claimant acted in accordance with the instructions given to her by the ALJ.

Lastly, the employer takes issue with the ALJ's conclusion that the claimant proved she aggravated her pre-existing back injury when she fell at work on January 31, 2011.

The ALJ first found that the claimant had a previous work-related injury on September 1, 2009. Although the employer accepted this claim as a neck injury, the ALJ noted that a 2009 medical report and a physical therapy report stated the claimant was experiencing pain down her back.

Having found that the claimant had a pre-existing back injury, the ALJ relied on the credible testimony of the claimant that she injured her back, as well as medical reports from Drs. Yousaf, Baig, and Sandhu, all of whom treated the claimant for back problems after the January 31, 2011, accident. The ALJ further quoted from Dr. Yousaf's December 19, 2011 report that said, in part,

> Following is the explanation of Ms. Jackson's back pain following a fall on January 31, 2011. The patient first reported back pain on March 31, 2011. Clinical examination indicated limitation of motion spasm. The patient did not demonstrate any neurological deficits. The patient had sustained no additional injuries since her fall on January 31, 2011. Probable explanation of her clinical lumbar presentation is:
>
> 1. Extension of the cervical spasm along the spinal musculature distally towards the thoracolumbar area
> 2. Initial insult to the lumbar facet cartilage, which slowly evolved to full blown inflammation of the facets.

CO at 9.

Dr. Yousaf's report linking the "initial insult" that evolved into the present problem, that occurred "following" the January 31, 2011, together with the claimant's credible testimony that she hurt her back during the fall, is substantial, non-speculative evidence that supports the ALJ's finding.

CONCLUSION AND ORDER

The June 6, 2011, Compensation Order is supported by substantial evidence in the record, is in accordance with the law, and is AFFIRMED.[3]

FOR THE COMPENSATION REVIEW BOARD:

/s/ *Lawrence D. Tarr*
_____
LAWRENCE D. TARR
Administrative Appeals Judge

October 11, 2012
DATE

[3] Although not specified by the ALJ's CO, the award for medical benefits would be limited to OCCUNET doctors' bills. *Mitchell v. DOES*, 47 A.3d 974 (D.C. 2012).