

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 16-045

**ERMA R. FITZGERALD,
Claimant-Respondent,**

v.

**DISTRICT OF COLUMBIA PUBLIC SCHOOLS,
Employer-Petitioner.**

Appeal from a March 3, 2016 Compensation Order
by Administrative Law Judge Gwenlynn D'Souza
AHD No. PBL 10-044C, DCP No. 30081229428-0001

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2016 OCT 6 PM 1 56

(Decided October 6, 2016)

Frank Mc Dougald for Employer
David J. Kapson for Claimant

Before GENNET PURCELL, JEFFREY P. RUSSELL, and HEATHER C. LESLIE, *Administrative Appeals Judges*.

GENNET PURCELL for the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

Erma Fitzgerald ("Claimant") worked for District of Columbia Public Schools ("Employer") as an educational assistant. Claimant's job duties required her to work in a classroom, meet a special needs student at the bus outside the building each morning, travel from classroom-to-classroom for eight class periods a day, attend recess, and accompany the student to the bus at the end of each day. These activities required approximately one hour of walking and stair climbing each workday.

On November 18, 2008, while at work, Claimant fell down a flight of stairs injuring both knees and her back. In December 2008, Claimant began treating with Dr. Sameer B. Shammas for injuries sustained during her work-related fall, and was medically restricted from working until January 26, 2009 on which date she was cleared to return to work.

In October 2009 Claimant's left knee became symptomatic. On November 5, 2009, at Employer's request, Claimant consulted with Dr. David Johnson, for a medical examination. Dr. Johnson found that Claimant sustained an aggravation of pre-existing arthritis in her left knee due to her November 2008 work-related fall. Dr. Shammas found that Claimant sustained an aggravation to both knees, and on June 16, 2009, recommended Claimant undergo a bilateral total knee replacement due to persistent pain caused by standing or walking.

On January 9, 2009, Claimant filed a claim for bilateral knee contusions and a lumbar back sprain; her claim was accepted, and benefits were paid.

In June 2010 and November 2010 respectively, Claimant had her left and right knees replaced.

On February 12, 2009, a Magnetic Resonance Imaging ("MRI") revealed disc herniation, foraminal narrowing and a disc bulge with compression of Claimant's lumbar spine. In July of 2009, Dr. David A. Levis performed a foraminal disc excision and decompression on the right of Claimant's back and released Claimant from treatment. On January 27, 2010, Dr. Shammas noted mild residual discomfort in Claimant's back.

On or about March 22, 2011, Dr. Shammas again released Claimant to work. When later deposed on June 2, 2011, Dr. Shammas clarified that his release of Claimant was with the understanding that Claimant would be working as a teacher and would not be required to climb multiple flights of stairs as she is unable to do so on a continuous basis.

On March 23, 2011, the Office of Risk Management issued a Notice of Determination Terminating Workers' Compensation Benefits ("Notice of Determination") based on the March 22, 2011 release to work issued to Claimant, and effective as of that same date.

On April 7, 2011, Claimant filed an Application for Formal Hearing ("AFH") before the Administrative Hearings Division ("AHD") of the Department of Employment Services ("DOES") regarding the March 23, 2011 Notice of Determination. The application was dismissed without prejudice at Claimant's request on July 12, 2011.

On February 2, 2012, Claimant filed a second AFH before AHD for the payment of outstanding medical bills. On May 10, 2012, the parties jointly moved to continue the hearing "without date" to allow the parties to resolve the issues amicably. On July 27, 2012, AHD dismissed Claimant's second AFH without prejudice, based on the lack of prosecution.

On October 8, 2015, Claimant filed a third AFH with AHD, this time requesting temporary total disability benefits from March 23, 2011 to the present and continuing. On January 13, 2016, Employer filed a motion to dismiss ("Motion") asserting that the third AFH was time-barred as more than one year had elapsed since the date of the Notice of Determination. Claimant opposed the Motion on the grounds that Employer waived the defense of untimeliness by virtue of its May 10, 2012 joint continuance.

Employer's Motion was denied by an order issued on January 29, 2016. In denying the motion, the ALJ concluded that Employer did not indicate any prejudice would occur by proceeding in a case in which discovery has already been conducted.

Claimant's third AFH proceeded to a formal hearing on February 4, 2016. Employer's Motion to Dismiss was renewed and denied by the ALJ at that formal hearing.

The issues to be decided by the ALJ at the formal hearing, as listed in the CO, were:

Whether or not Employer properly terminated benefits based on a release to return to work?

Whether or not Claimant is entitled to temporary total disability benefits?

CO at 3.¹

On March 3, 2016, the ALJ issued a Compensation Order ("CO") finding that Claimant was entitled to temporary total disability benefits for the period of March 24, 2011, to the present and continuing, less credit for retirement benefits paid. *Erma R. Fitzgerald v. District of Columbia Public Schools*, AHD No. PBL 10-044C, DCP 30081229428-0001 (March 3, 2016).

Employer timely appealed the CO to the Compensation Review Board ("CRB") by filing Employer's Application for Review and Memorandum in Support of Application for Review ("Employer's Brief"). Employer also appealed the ALJ's ruling on the Motion asserting that Claimant's third AFH, filed on October 8, 2015 was untimely, and that the ALJ abused her discretion, and erred as a matter of law in denying the Motion. Employer argued that it demonstrated by a preponderance of the evidence that Claimant was able to return to work on March 22, 2011, and therefore was not totally disabled. Claimant's Brief, page 8 - 11.

Claimant opposed Employer's appeal by filing an Opposition to Application for Review ("Claimant's Brief"). In her opposition, Claimant asserted the CO is supported by substantial evidence and should be affirmed.

ISSUES ON APPEAL

Whether the ALJ erred as a matter of law in denying Employer's Motion to Dismiss.

Whether the March 3, 2016 CO is based upon substantial evidence.

STANDARD OF REVIEW

The scope of review by the CRB as established by the District of Columbia Workers' Compensation Act ("Act") and as contained in the governing regulations is limited to making a determination as to whether the factual findings of a Compensation Order on appeal are based upon substantial evidence in the record, and whether the legal conclusions drawn from those facts flow rationally from those facts and are otherwise in accordance with applicable law. D.C. Code § 32-1521.01(d)(2)(A). "Substantial evidence" as defined by the District of Columbia Court of Appeals ("DCCA"), is such evidence as a reasonable person might accept to support a

¹ The ALJ also made findings of fact and conclusions of law regarding the issue of whether Claimant voluntarily limited her income although this issue was not listed under the Issues section of the CO and has not been raised on appeal.

particular conclusion. *Marriott Int'l. v. DOES*, 834 A.2d 882 (D.C. 2003) (“*Marriott*”). Consistent with this scope of review, the CRB is also bound 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 members of the CRB review panel considering the appeal might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885. This is the standard by which we assess the ALJ’s disposition of the merits of this claim.

In its review of an appeal from an order which is not based on an evidentiary record, the CRB must affirm unless the order being reviewed is determined to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. *See* 6 Stein, Mitchell & Mezones, ADMINISTRATIVE LAW § 51.03 (2001). This is the standard by which we review Employer’s challenge to the ALJ’s denial of the Motion.

ANALYSIS

To reiterate, on October 8, 2015, Claimant filed a third AFH with the AHD requesting temporary total disability benefits from March 23, 2011 to the present and continuing. On January 13, 2016, Employer filed the Motion. Claimant opposed the Motion on the grounds that Employer waived the defense of timeliness by its joinder in the May 10, 2012 motion to continue the proceedings before the AHD. On January 29, 2016, the ALJ issued an Order denying the Motion. Our review of the Order dismissing the Motion reveals that the ALJ considered whether the July 27, 2012 dismissal of the Claimant’s AFH could be construed as a voluntary dismissal and whether Employer would be prejudiced as a result of her denial.

The ALJ wrote:

The record reveals that Claimant did not voluntarily withdraw her application for formal hearing on July 27, 2012. Claimant sought a continuance with the consent of Employer, but instead the case was dismissed without prejudice. Unlike in the *Ware* case, Employer has not indicated that any prejudice would occur by proceeding in a case in which discovery has already been conducted.

Order at 2.

Employer asserts the ALJ’s distinguishing of the facts in *Constance Ware v. Department of Corrections*, AHD No. PBL 96-083C, DCP No. LT DOC000598, was misguided.

Employer argues:

The ALJ’s rationale for denying the Motion reflects a misreading of *Ware*. The decision in *Ware* was not based upon a determination that employer would have been prejudiced if the matter had proceeded to a hearing, but instead the decision was based on the claimant’s failure to act diligently to resolve the August 2004 decision to terminate her benefits. In *Ware*, more than two (2) years elapsed between the time when claimant’s AFH was dismissed and when she filed another AFH. In the instant matter, more than three (3) years elapsed following the dismissal of Claimant’s July 2012 AFH and when she filed the October 8, 2015

AFH. The ALJ's rationale for denying the Motion is illogical because it would allow a claimant to file an AFH ten (10) or more years after the dismissal of a prior AFH if discovery has been completed.

Employer's Brief at 10.

We disagree. The statute of limitation for filing an AFH pursuant to D.C. Code § 1-623.24(b) ordinarily runs from date that the Disability Compensation Program issues a determination.

D.C. Code § 1-623.24 states, in pertinent part:

(b)(1) Before review under § 1-623.28(a), a claimant for compensation not satisfied with a decision of the Mayor or his or her designee under subsection (a) of this section is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on the claim before a Department of Employment Services Disability Compensation Administrative Law Judge[.]

D.C. Code § 1-623.24

In summarizing her decision to deny Employer's Motion in the CO, the ALJ stated:

On January 29, 2016, Employer's Motion to Dismiss was denied based on the relevant case law and the pertinent facts, particularly that Employer jointly filed a motion to continue, Claimant did not request dismissal in May 2012, and Employer was not prejudiced since discovery on the issue of Claimant's then current medical condition was completed since 2011.

CO at 2.

Employer asserts that the joint motion filed on May 10, 2012 to indefinitely continue the proceedings on Claimant's February 2, 2012 second AFH is irrelevant to the issue of timeliness Employer argues:

It should be stressed that Employer's consent to continue the May 2012 formal hearing is irrelevant to the issue of timeliness because once the AFH was dismissed in July 2012, it was the responsibility of Claimant to timely file another AFH to challenge the March 2011 decision to terminate her benefits. Employer could not file an AFH on Claimant's behalf. Moreover, Employer had no role in Claimant's failure to act reasonably and diligently in filing another AFH following the July 2012 dismissal.

Employer's Brief at 10.

While both the claimant and the employer have distinct roles within the procedural resolution of a workers' compensation claim, the fundamental purpose of a statute of limitation as a defense, or as in this case, a statutory time bar to seek review of an administrative action, is to encourage the timely resolution of claims. The defense may be waived by an agreement of the parties to the controversy; so may the limitation defense be estopped, or prevented from use where, as in this case, Employer's action (or inaction as it were) amounted to an affirmative inducement to the

Claimant to delay bringing her October 8, 2015 AFH. Employer's consent to continue the May 2012 formal hearing, and in particular, its consent *absent* a stipulation as to the statute of limitation or a date certain for rescheduling the formal hearing, was tantamount to Employer's waiver of its right to raise the D.C. Code § 1-623.24 statute of limitation defense to the October 8, 2015 AFH.

It must be noted that there is an absence of case law with factual situations similar to the one presented *sub judice* that this Panel can rely upon. The case law is inconsistent as to what happens when a Claimant seeking formal review of a Notice of Determination, is granted a continuance request consented to by the employer in the matter absent any specificity relating to the 30 day eligibility for review period/statute of limitation contained in D.C. Code Section 1-623.24.

As such, we determine that in the event a party requests a continuance action for a formal hearing seeking review of a Notice of Determination received by a Claimant pursuant to D.C. Code §1-623.24 and the opposing party consents to the ALJ's granting of that continuance action, in the absence of specific written language indicating a date or time period certain, in which the parties agree to a:

- (a) tolling of the time period mandated by §1-623.24 of the Act; or,
- (b) date-specific rescheduling of the formal hearing conducted pursuant to §1-623.24 of the Act and the relevant to the Notice of Determination at issue;

the §1-623.24 statute of limitation will be considered effectively waived for the purposes of the Claimant's entitlement to a formal review of the §1-623.24 Notice of Determination at issue.

Based on the foregoing, notwithstanding that more than three years elapsed between the July 27, 2012 dismissal, without prejudice, and the October 8, 2015 AFH, we determine that the ALJ did not err as a matter of law, and that her decision to deny the Motion was not an abuse of discretion.

Turning now to the issue of Claimant's entitlement to temporary total disability benefits from March 24, 2011 to the present and continuing, Employer argues that the CO's findings are not based on substantial evidence and should be reversed. Specifically, Employer asserted that it was Claimant's persistent back pain, and not the condition of her knees, that resulted in the medical restrictions barring her from walking up and down stairs on the job. Alternatively, Employer argues that Claimant has recovered from all injuries related to the November 18, 2008 incident and her current symptoms are related to complications from her bilateral knee replacements and unrelated to the work injury.

Employer argues:

Claimant's inability to negotiate stairs and the restriction placed on her was in regard to her back and not her knees. Claimant's Exhibit 5, pages 33-40 clearly shows that through 2009, Dr. Shammas was treating Claimant for her persistent back pain and that after she returned to work in February 2009, the restriction placed on her from walking up and down stairs was due to her persistent back

pain because he stated “[t]he complaint of the back to me from the beginning of the injury till I send her to the neurosurgeon [sic].” CE 16 at 77. Hence, the evidence of record does not support the finding by the ALJ.

Employer’s Brief at 11.

In reaching her decision the ALJ utilized the three-prong burden-shifting analysis set forth in *Mahoney v. District of Columbia Public Schools*, CRB No. 14-067, (November 12, 2014) (*en banc*). In doing so, the ALJ found no reason to reject the opinion and deposition testimony of Dr. Shammas that Claimant’s was unable to walk up and down stairs on a frequent basis, an integral part of her daily duties with Employer. The ALJ also relied upon the opinion of Employer’s medical examiner, Dr. Ferguson, who opined that Claimant’s bilateral knee condition was a result of her knee surgery. CO at 6 -7. Employer’s argument that Claimant’s inability to climb stairs on the job was related to her back pain and not her knee condition is not otherwise supported by the record. We reject Employer’s argument and affirm the ALJ’s conclusion that Claimant is entitled to temporary total disability benefits as specified in the CO.

CONCLUSION AND ORDER

The conclusion that Claimant’s October 5, 2015 Application for Formal Hearing was timely filed was not an abuse of discretion, or an error as a matter of law, and is AFFIRMED. The award of temporary total disability benefits, subject to an Employer credit for the retirement benefits paid to Claimant, is AFFIRMED. The conclusion that Claimant did not voluntarily limit her income was not appealed and is therefore left undisturbed.

So ordered.