

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services**

**VINCENT C. GRAY
MAYOR**



**LISA M. MALLORY
DIRECTOR**

**COMPENSATION REVIEW BOARD
CRB No. 12-115**

**KAREN T. FREEMAN-CUNNINGHAM,
Claimant–Petitioner,**

v.

**DISTRICT OF COLUMBIA DEPARTMENT OF TRANSPORTATION,
Employer–Respondent.**

Appeal from a Compensation Order of
The Honorable Fred D. Carney, Jr.
AHD No. PBL11-051, DCP No. 30090950807-0001

Harold L. Levi, Esquire for the Petitioner
Pamela Smith, Esquire for the Respondent

Before MELISSA LIN JONES, HENRY W. MCCOY, and JEFFREY P. RUSSELL,¹ *Administrative Appeals Judges.*

MELISSA LIN JONES, *Administrative Appeals Judge*, for the Compensation Review Board.

DECISION AND ORDER

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board (“CRB”) pursuant to D.C. Code §1-623.28, 7 DCMR §118, and the Department of Employment Services (“DOES”) Director’s Administrative Policy Issuance No. 05-01 (February 5, 2005).

FACTS OF RECORD AND PROCEDURAL POSTURE

On November 27, 2001, Ms. Karen T. Freeman-Cunningham injured her left shoulder, lower back, left side, and left knee when she fell on the job.² Neither this accident nor these injuries were before the administrative law judge (“ALJ”) in the underlying case.

¹ Judge Russell has been appointed a temporary CRB member pursuant to the Department of Employment Services’ Director’s Administrative Policy Issuance No. 12-01 (June 20, 2012).

² *Freeman-Cunningham v. D.C. Department of Transportation*, AHD No. PBL08-033, DCP No. LT5PD00243 (May 5, 2009).

On September 9, 2009, Ms. Freeman-Cunningham slipped on a battery and injured her right knee. The Office of Risk Management Public Sector Workers' Compensation Program ("WCP") accepted her claim, but on July 12, 2011, WCP issued a Notice of Intent to Terminate Public Sector Workers' Compensation Payments.

The parties proceeded to a formal hearing to adjudicate Ms. Freeman-Cunningham's entitlement to workers' compensation disability benefits. On June 28, 2012, the ALJ issued a Compensation Order denying Ms. Freeman-Cunningham's claim for relief.

On appeal, Ms. Freeman-Cunningham asserts that her twenty-seven years of service as a crossing guard compromised her knees and that the ALJ's failure to consider cumulative trauma to her knees constitutes reversible error. Similarly, Ms. Freeman-Cunningham asserts the ALJ failed to consider her progressive conditions allegedly caused by her 2001 injury. In addition, Ms. Freeman-Cunningham argues the ALJ's recitation of the claim for relief for "wage loss and medical benefits... for injuries to her low back sustained on January 31, 2011, from the date of injury until Claimant is able to return to work"³ is more than semantic error because Ms. Freeman-Cunningham did not seek an "award of benefits," did not claim injuries to her low back, and did not sustain a work injury on January 31, 2011. Finally, Ms. Freeman-Cunningham asserts the modification provisions in §1-623.24(d)(1) of the District of Columbia Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Code §1-623.1 *et seq.* ("Act") were not applied properly. For all these reasons, Ms. Freeman-Cunningham requests we reverse the Compensation Order.

The D.C. Department of Transportation ("Employer") argues there is substantial evidence to support the ruling that Ms. Freeman-Cunningham's work-related, right knee injury has resolved. Employer requests the Compensation Order be affirmed.

ISSUES ON APPEAL

1. Did the ALJ properly consider the issues for resolution?
2. Did the ALJ apply the proper standard of proof?

ANALYSIS⁴

Preliminarily, we agree with Ms. Freeman-Cunningham that the claim for relief contains clerical errors, but despite the mention of a low back injury sustained on January 31, 2011, the ALJ clearly

³ Claimant-Petitioner's Memorandum in Support of Petition for Review, p. 6.

⁴ 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 1-623.28(a) of the 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).

was aware that Ms. Freeman-Cunningham had sustained a right knee injury on September 9, 2009. Thus, the clerical errors in the claim for relief constitute harmless error.

As for the argument that the Compensation Order must be reversed because Ms. Freeman-Cunningham did not seek an “award of benefits” as noted in the claim for relief, the ALJ correctly stated the burden of proof in a public sector case wherein the claim has been accepted:

Once a claim for disability compensation has been accepted and benefits paid, to prevail at a formal hearing, the employer has the burden to prove a change in condition to support the modification or termination of benefits. *Jones v. D.C. Superior Court*, CRB No. 10-003, AHD No. PBL09-026, DCP No. 7610460001199-0002 (March 11, 2011) citing *Lightfoot v. D.C. Department of Consumer and Regulatory Affairs*, ECAB No. 94-25 (July 30, 1996).^[5]

Then, after considering the medical records of Dr. Wiemi Douoguih, the ALJ went on to weigh all the evidence, and in the end, the ALJ applied this standard to the facts of the case in reaching a resolution of the issue of Ms. Freeman-Cunningham’s entitlement to additional workers’ compensation disability benefits. Any imprecision in the claim for relief, therefore, is harmless error.

As for Ms. Freeman-Cunningham’s argument that the ALJ failed to consider cumulative trauma from her many years of service is a cause of her disability, the parties specifically stipulated that Ms. Freeman-Cunningham had sustained a work-related injury to her right knee on September 9, 2009. Furthermore, there is no indication any claim for cumulative trauma was filed with WCP or was raised at the formal hearing:

The [*sic*] is no dispute between the parties that on September 9, 2009, Claimant stepped on a battery at work and filed a claim for injury to her right knee. Her claim was accepted for the injury to her right knee. On July 12, 2011, the Public Sector Workers’ Compensation Program (Worker’s Comp.) issued a Notice of Intent to Terminate Public Sector Workers Compensation Payments. Therein, Worker’s [*sic*] Comp stated that Claimant’s benefit payments will end on August 9, 2011 because Claimant was no longer disabled and her September 9, 2009 injury had completely resolved. (EE 2).^[6]

⁵ *Freeman-Cunningham v. D.C. Department of Transportation*, AHD/OHA No. PBL11-051. DCP No. 30090950807-0001 (June 28, 2012), p. 4.

⁶ *Id.* See also, *Id.* at p.3:

As an initial matter the parties stipulate and I accordingly do find that Claimant sustained a work related injury to her right knee for which she received total wage loss and medical benefits from October 7, 2009 to August 9, 2011 and Claimant has not returned to work for Employer.

On September 9, 2009, Claimant injured her right knee when she slipped on an AA battery and her knee buckled but she did not fall. She kicked the battery out of her way and continued to work. Claimant complained that the next morning her right knee was stiff. She initially received treatment from her primary care giver Dr. Momah who referred her to Dr. Mark Rankin, orthopedic surgeon.

The CRB cannot address any issue regarding cumulative trauma because it was not raised below. Failure to exhaust administrative remedies in a public sector case is fatal because the issuance of a Final Determination is necessary to confer jurisdiction upon the Office of Hearings and Adjudications, Administrative Hearing Division (AHD)⁷ to consider such an issue.⁸

Finally, Ms. Freeman-Cunningham asserts the ALJ applied the wrong standard to her request for modification:

Under the Code, modification and termination are only permissible if Respondent has reason to believe a change of condition has occurred. D.C. Code §1-623.24(d)(1)(2001 ed.) Under the [Act],

“An award may not be modified because of a change to a claimant’s condition unless:

- (A) The disability for which compensation was paid has ceased or lessened;
- (B) The disabling condition is no longer causally related to the employment;
- (C) The claimant’s condition has changed from total disability to a partial disability;
- (D) The employee has returned to work on a full-time or part-time basis other than vocational rehabilitation under §1-623.04;
- (E) The Mayor or his or her designee determines based upon strong compelling evidence that the initial decision was in error.”

D.C. Code, §1-623.24(d)(4).

To the extent Respondent meets its initial burden of proof to show a change of condition, Petitioner has the burden to prove her entitlement to continued benefits by persuasive medical evidence sufficient to show that she continues to have a disability causally related to one or more work injuries.”^[9]

Ms. Freeman-Cunningham’s reliance on §1-623.24(d)(4) is misplaced. The type of modification Ms. Freeman-Cunningham refers to with the *Snipes* standard (“reason to believe a change of condition has occurred”) requires the issuance of a prior Compensation Order by Hearings and Adjudication. Hearings and Adjudication reviews a public sector claim denied or terminated by WCP *de novo* pursuant to the standard set forth in *Jones, supra*, and the ALJ applied that proper standard to Ms. Freeman-Cunningham’s claim.

⁷ As of February 2011, AHD’s name changed to Hearings and Adjudication

⁸ *Sisney v. D.C. Public Schools*, CRB No. 08-200, AHD No. PBL08-066, DCP No. DCP007970 (July 2, 2012).

⁹ Claimant-Petitioner’s Memorandum in Support of Petition for Review, p.7.

ORDER

The ALJ properly considered the issues for resolution and applied the proper standard. The June 28, 2012 Compensation Order is supported by substantial evidence, is in accordance with the law, and is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

MELISSA LIN JONES
Administrative Appeals Judge

September 19, 2012
DATE