

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

Office of Hearings and Adjudication
COMPENSATION REVIEW BOARD



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CRB (Dir.Dkt.) No. 04-28

FLORENCE GALLIGAN,

Claimant – Petitioner,

v.

JOHN F. KENNEDY CENTER FOR PERFORMING ARTS

AND ROYAL AND SUN ALLIANCE INSURANCE COMPANY,

Self-Insured Employer – Respondent.

Appeal from a Compensation Order of
Administrative Law Judge Karen R. Calmiese
OHA No. 03-045A, OWC No. 571106

Florence M. Galligan, *Pro Se*

Joel E. Ogden, Esq., for the Respondent

Before LINDA F. JORY, FLOYD LEWIS AND JEFFREY P. RUSSELL, *Administrative Appeals Judges*.

LINDA F. JORY, *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 Compensation Order from the Administrative Hearings Division (AHD) of the Office of Hearings and Adjudication (OHA) in the District of Columbia Department of Employment Services (DOES). In that Compensation Order, which was filed on January 29, 2004, the Administrative Law Judge (ALJ) awarded Petitioner temporary total disability benefits from June 13, 2002 to July 19, 2002, and from August 19, 2002 to the present and continuing and causally related medical expenses. The ALJ denied an award for retaliatory discharge pursuant to D.C. Code §32-1542 and penalties pursuant to §32-1528. The Claimant-Petitioner (Petitioner) now seeks review of that Compensation Order.

Specifically Petitioner asserts the following:

1. The ALJ erroneously failed to find that the nature of her injury was permanent.
2. The ALJ's finding that Respondent is entitled to a credit for the period of July 19, 2002 through August 19, 2002 is erroneous.
3. The ALJ erred in not finding Respondent's termination of Petitioner's employment was retaliatory for her continued prosecution of her claim to benefits.
4. The ALJ erred in not finding Respondent acted in bad faith in suspending Petitioner's benefits and should be penalized accordingly.
5. The ALJ failed to consider whether Petitioner was entitled to other costs as a result of the failures of Respondent to pay her benefits in a timely way and to continue them without suspension.
6. The ALJ improperly conducted the Formal Hearing and as a result, Petitioner was prejudiced by procedural failures.

Employer has responded asserting:

1. The ALJ's ultimate conclusions were based upon substantial evidence, despite being exposed to an open period of indemnity benefits, Respondent has not filed its own application for review.
2. Petitioner's ability to present additional evidence expired at the close of the formal hearing and Petitioner's post hearing affidavit dated August 17, 2003 should not be reviewed by this tribunal.
3. There was no evidence in the record which would have supported an award of benefits based upon a scheduled injury. Neither side submitted impairment ratings nor was the issue raised for consideration. Petitioner is not prejudiced, as she retains the right to pursue this remedy at a later date.
4. The primary remedy for a violation of §32-1542 of the Act is that "any employee so discriminated against shall be restored to his [or her] employment", however Petitioner alleges an inability to return to work in her pre-injury capacity.

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.

5. Petitioner's allegation that she is entitled to payment of attorney fees is frivolous as she represented herself at the Formal Hearing.
6. The issue of permanent total disability was not raised for the ALJ's consideration and Petitioner has not waived her right to pursue that claim in any future proceedings.
7. Petitioner incorrectly submits that if she is determined to be permanently and totally disabled, Respondent will be unable to request her to attend independent medical evaluations. Regardless of a finding for permanent total disability, Respondent is entitled to request modifications of prior orders.
8. Petitioner did not file her Application for Review on a timely basis. Petitioner's AFR should be dismissed.
9. Alternatively the Compensation Order should be affirmed as there were no errors of law and all factual conclusions were supported by substantial evidence.

ANALYSIS

As an initial matter, the standard of review by the Compensation Review Board (CRB) and this Review Panel, as established by the Act and as contained in the governing regulations, is limited to making a determination as to 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. Official Code § 32-1521.01 (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. District of Columbia Department of Employment Services*, 834 A.2d 882 (D.C. App. 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.

The question before the Panel at this juncture is whether the Petitioner's letter to the Director of the Department of Employment Services (the Director) sent and received via facsimile on March 5, 2004 constitutes a timely filed Application for Review.

7 D.C.M.R § 230.2 states:

Within thirty days (30) days from the date shown on the Certificate of Service of the Compensation Order, any party may seek the Director's review by filing with the Director two (2) copies of an Application for Review, any memorandum of points and authorities in support of the application which the party desires to have considered, and a certification that copies of the application and memorandum have been served, by mail or personal delivery, upon the opposing party. The party shall also file a copy of the Application for Review with the Office of Hearings and Adjudication.

The Compensation Order in this case was issued on January 29, 2004. The certificate of service attached to the Compensation Order shows that it was sent, via certified mail, to Petitioner at the

same address claimant has listed as her return address. Pursuant to the regulations promulgated to administer the Act, Petitioner should have filed an Application for Review with the Director within 30 days of January 29, 2004 or by February 28, 2004. Petitioner did not file any correspondence with the Director's office until March 5, 2004² which consists of a letter asking for additional time in order to file an application to appeal certain aspects of the ALJ's compensation order. Petitioner indicated that the request was made because she was in New York City when service of the Compensation Order was attempted. Petitioner also indicated her apartment had a gas leak which prevented her from retrieving her mail and retrieving the Compensation Order from the post office. Petitioner concludes her letter by asking to be considered for permanent total disability. Thereafter, Petitioner filed a Memorandum on Appeal with the Director's office on April 5, 2004.

Upon consideration of the timeliness of Petitioner's initial filing, the Panel is mindful that the Director, in a prior public sector decision, stated:

[T]he current language of 7 DCMR §118.2 does not state that the 30 day filing requirement may be waived upon showing "good cause". The Municipal Regulation was amended on September 15, 2000, 47 D.C. Reg. 7486 and there is no longer a provision allowing the Director discretion to waive the late filing of an appeal. Therefore, since Claimant's Application for Review was filed more than 30 days after the Final Compensation Order was issued, it is untimely.

See Yvette Jackson v. D.C. Department of Corrections, Dir. Dkt. No. 25-03, PBL No. 96-92A (July 13, 2004). While the Panel acknowledges that the Director cites the regulation promulgated to administer the public sector act, comparison of the language of the pertinent regulation in the Private Sector's Act reveals the language in the Panel's view is identical³. *See* 7 D.C.M.R § 230.2.

Inasmuch as Petitioner's correspondence requesting addition time to file an appeal is 5 days late, the Panel concludes she has not filed a timely Application for Review under the Act. In that Petitioner's Application for Review is untimely, the Panel is without authority to address the merits of Petitioner's appeal or Respondent's reply or review the record before the ALJ. *See Gooden v. The Washington Post*, CRB (Dir. Dkt.) No. 04-44, OHA No. 97-25A; OWC No. 279073 (March 14, 2005). Nevertheless, review of the administrative portion of the record, specifically the Compensation Order reveals the ALJ has not adjudicated any claim for permanent partial impairment nor permanent total disability. Accordingly, Petitioner is not precluded from bringing additional requests for permanent total or permanent partial benefits from either the Office of Workers' Compensation or AHD with whatever medical documentation Petitioner deems material and reliable. *See Jerome Oubre v. District of Columbia Department of Employment Services*, 630 A.2d 699 (D.C. App. 1993).

² The panel takes judicial notice that 2004 was leap year, therefore Petitioner's letter if accepted as an Application for Review was filed 6 days late.

³ 7 D.C.M.R. indicates that the appeal should be filed "within 30 days from the date of the award" as opposed to the date shown on the Certificate of Service with the Panel acknowledges is usually, as it is in the instant case, the same date.

CONCLUSION

Petitioner's Application for Review was not timely filed pursuant to the Act. The Board, is therefore without authority to address the Petitioner's appeal or review the record created by the ALJ. *See Gooden, supra.*

ORDER

The March 5, 2004 Application for Review is hereby DISMISSED, as untimely filed.

FOR THE COMPENSATION REVIEW BOARD:

LINDA F. JORY
Administrative Appeals Judge

October 20, 2005
DATE