

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA M. MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 12-098

ROSA L. GASTON JENKINS,
Claimant–Petitioner,

v.

DISTRICT OF COLUMBIA DEPARTMENT OF MOTOR VEHICLES,
Self-Insured Employer -Respondent

Appeal from a Compensation Order by
The Honorable Amelia G. Govan
AHD No. PBL 11-049, DCP No. 761019000120060005

Rosa L. Gaston Jenkins, *Pro Se*, for the Claimant/Petitioner
Ross Buchholz, Esquire, for the Employer/Respondent

Before: HENRY W. MCCOY, MELISSA LIN JONES, AND LAWRENCE D. TARR, *Administrative Appeals Judges*.

HENRY W. MCCOY, *Administrative Appeals Judge*, for the Compensation Review Board.

DECISION AND REMAND ORDER

JURISDICTION

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

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OVERVIEW AND FACTS OF RECORD

This appeal follows the issuance of a Compensation Order (CO) by the Hearings and Adjudication (H&A) section, Office of Hearings and Adjudication, Department of Employment Services. In that CO, which was issued on May 25, 2012, the Administrative Law Judge (ALJ) granted Claimant's request for ongoing medical benefits but denied the request for a lump-sum payment as set forth in Claimant's evidence.

As of July 31, 2006, Claimant was exposed to environmental work conditions that caused her to develop a respiratory illness that was accepted as a compensable work injury by Employer who commenced payment of temporary total disability benefits and the payment of causally related medical expenses. These payments continued until August 26, 2011 when Employer issued a Notice of Determination denying additional indemnity and medical benefits based upon an independent medical evaluation that Claimant's condition had reached maximum medical improvement, that no additional medical treatment was necessary and that she was capable of returning to full duty without any restrictions.

Claimant filed for a formal hearing seeking restoration of her medical benefits. On May 25, 2012, a CO was issued granting restoration of continuing medical benefits but denying the request for a lump sum payment.¹ Claimant has appealed this decision, with Employer filing in opposition.

In her appeal, Claimant appears to argue for reversal of the CO so as to provide medical care that does not require prior authorization from a claims examiner and because the CO failed to award the lump sum payment requested. In response, Employer initially challenges Claimant's appeal as being untimely filed and in the alternative, the CO should be affirmed as it awarded Claimant all the relief she was entitled to receive under the statute.

ANALYSIS

The scope of review by the CRB is limited to making a determination as to whether the factual findings of the Order are based upon substantial evidence in the record and whether the legal conclusions drawn from those facts are in accordance with the applicable law.² Section 1-623.28(a) of the District of Columbia Government Merit Personnel Act of 1978, as amended, D.C. Official Code § 1-623.1 *et seq.* ("Act"). 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.

¹ *Jenkins v. D.C. Department of Motor Vehicles*, AHD No. PBL 11-049, DCP No. 76109000120060005 (May 25, 2012).

² "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 International v. District of Columbia Department of Employment Services*, 834 A.2d 882 (D.C. 2003).

Turning to the case under review herein, we necessarily first address Employer's challenge to the CRB's jurisdiction based upon the assertion that Claimant's memorandum requesting review of the CO was not timely filed within the statutorily mandated thirty (30) calendar day period from the date of issuance. As a matter of law, if an application for review is not timely filed, the CRB does not have the authority to consider an application for review.

D.C. Official Code § 1-623.28(a) states in pertinent part:

The Director of the Department of Employment Services may review an award for or against payment of compensation on application by either the claimant or the Office of the Attorney General. An application for review pursuant to this subsection must be filed within 30 days after the date of the issuance of the decision of the Mayor or his or her designee pursuant to § 1-623.24(b)(1). . . .

In addition, 7 DCMR § 118.2 states:

Any party adversely affected or aggrieved by a compensation order or final decision issued by the Administrative Hearings Division with respect to a claim for disability benefits pursuant to Title XXIII of the District of Columbia Government Comprehensive Merit Personnel Act of 1978 (D.C. Official Code § 1-623.1 *et seq.* (2001)) may appeal said compensation order or final decision to the Board by filing an Application for Review with the Board within thirty (30) calendar days from the date shown on the certificate of service of the compensation order or final decision in accordance with and pursuant to the provisions of 7 DCMR § 258.

The CO herein appealed was issued by H&A on May 25, 2012 and served upon the parties the same day. Page 9 of the CO contained Claimant's "Appeal Rights" stating where an application for review was to be sent and when. Any Application for Review had to be filed within 30 calendar days of the date of the Certificate of Service. Pursuant to the foregoing provisions, an Application for Review should have been filed with the CRB on or before June 25, 2012, to be timely.

The copy of Claimant's appeal sent by the CRB to Employer to elicit a response bore a date-stamp from the CRB of June 27, 2012, ostensibly signifying the date it was filed. In arguing that Claimant's Application for Review is untimely, Employer cites the June 27, 2012 date.

The official record on appeal contains a copy of Claimant's memorandum requesting review that is date-stamped as received by the CRB on June 27, 2012. This copy has a hand-written Certificate of Service attesting that the application for review was served on Employer's counsel and the Associate Director of the Department Of Employment Services (DOES), Mohammad Sheikh, on

June 21, 2012 and this is the date on the postage paid stamp on the envelope sent by certified mail to Mr. Sheikh. It was this copy that was sent to Employer by the CRB for a response.³

To assist in resolving the issue of whether the instant appeal was timely filed, the United States Postal Service's Track & Confirm website was accessed. Using the unique number assigned to items sent by certified mail displayed on the envelope containing Claimant's appeal, shows that it was accepted by the Postal Service on June 21, 2012 and delivered to the addressee, in this case the Associate Director of DOES, on June 22, 2012. The record also contains documentation that allows it to be inferred that after being delivered to Mr. Sheikh and for reasons unknown not date-stamped, the package was forwarded to the Office of Hearings and Adjudication where it was date-stamped as received on June 22, 2012 and subsequently forwarded to the CRB on June 27, 2012.⁴

Based upon the above scenario, it appears that Claimant improperly filed her Application for Review on June 22, 2012 when it was received by the associate director of the DOES and later date-stamped with that date by the H&A section of OHA. The CRB has previously held that an Application for Review misfiled at an office within the DOES constituted a timely filing if done so within 30 days of the issuance of the CO.⁵

The Certificate of Service attached to the CO being appealed shows that it issued on May 25, 2012. The 30 calendar day period ended on June 25, 2012. Although it was misfiled with the wrong office within DOES, Claimant's Application for Review is deemed to have been filed on June 22, 2012 and therefore is found to have been filed in a timely manner. Employer's motion to dismiss as untimely filed is therefore denied. Accordingly, we now turn to the merits of Claimant's appeal.

On appeal, Claimant challenges the CO because (1) it puts her medical treatment at a disadvantage by making her "wait for authorization from my claim examiner" and (2) her request for a lump sum settlement was denied. In concluding her appeal with the statement "I would like a continuance of the above Health Plan and continuance of a lump-sum payment", Claimant appears to be referencing the doctors she has been treated by at Kaiser Permanente and that she should be granted unlimited access to them and that the denial of a lump sum settlement in accordance with the "Settlement Sheet" that was admitted into evidence as CE 1 should be reversed.⁶

³ The record also contains a separate copy of the appeal memorandum with a date stamp from H&A of June 22, 2012. However, this copy does not contain a Certificate of Service.

⁴ The United States Postal Service Track & Confirm record for Certified Mail #7009 0080 0000 5995 7856 shows that it was delivered to the addressee on June 22, 2012 at 8:34 am. The date-stamp from the OHA shows that it was received at approximately 10:59 am.

⁵ See *Covington v. Metro Pets Pals, L.L.C.*, CRB No. 03-97, OHA No. 02-488A, OWC No. 583242 (March 18, 2005); *Paniagua v. Hilton Hotel Corp.*, CRB No. 11-006, AHD No. 10-313, OWC No. 657301 (June 7, 2011).

⁶ The Settlement Sheet lists a variety of costs for medical equipment, medical treatment, therapy, and transportation with further loss wages expressed individually and totaled yearly (\$130,051.81) and the next 12 years (\$1,553,456.07).

It is well-settled in this jurisdiction that once the DCP⁷ (the agency-employer) accepts an injured worker's claim as compensable, the DCP bears the initial burden to demonstrate a change in the injured worker's medical condition such that disability benefits need to be modified or are no longer warranted and must be terminated.⁸ The evidence used to modify or terminate benefits must be current and fresh in addition to being probative and persuasive of a change in medical status.⁹

The DCP's burden is one of production and requires an evaluation of the DCP's evidence standing alone without resort to evaluating or weighing the injured worker's evidence in conjunction thereto for if the DCP fails to sustain its burden, the injured worker prevails outright.¹⁰ However, if the DCP meets its burden, then the burden shifts to the injured worker to show through reliable, relevant, and substantial medical evidence that her physical condition has not changed and that benefits should continue. If the injured worker meets her burden, the medical evidence is weighed to determine the nature and extent of disability, if any.

In conducting her analysis, the ALJ while first making note of Employer's initial burden makes no determination that the burden has been met so as to shift the burden of production to Claimant.¹¹ Rather, the ALJ proceeds to state that there is no "presumption of the nature and extent of a claimant's disability", that Claimant had the burden of proving her claim "for additional benefits" by "presenting reliable, relevant, and substantial medical evidence."¹² The ALJ then states definitively that "Claimant has the burden of proving that she is entitled to the relief requested."¹³ However, this assignment of the evidentiary burden is only correct and applicable once a determination has been made that Employer has met its initial burden that Claimant's medical condition has changed so as to warrant the termination of benefits. In the instant case, that has not occurred.

The ALJ proceeded with an assessment of Claimant's evidence, both testimony and exhibits, and determined that the need for ongoing medical treatment had been established. The ALJ conducts a thorough and favorable examination of the medical reports of Claimant's treating physician with only a casual reference to Dr. Meyerson's (Employer's independent medical examiner) report as being unpersuasive. The ALJ applied the treating physician preference allowing her to conclude that

⁷ The DCP (Disability Compensation Program) changed its name to the Public Sector Workers' Compensation Program effective October 1, 2010.

⁸ See *Chase v. D.C. Department of Human Services*, ECAB No. 92-9 (July 29, 1982).

⁹ See *Robinson v. D. C. General Hospital*, ECAB No. 90-15 (September 16, 1992).

¹⁰ See generally *Byrd v. D.C. Department of Human Services*, OHA No. PBL 03-015A, DCP No. LT4-DHS000775 (June 16, 2004) (As the DCP failed to sustain its initial burden, there was "no need to discuss claimant's testimony and evidence.")

¹¹ See *Toomer v. D.C. Dept. of Corrections*, CRB No. 05-202, OHA No. PBL No. 98-048A, DCP No. LT5-DOC001603 (May 2, 2005); *Jones v. D.C. Dept. of Corrections*, Dir. Dkt. No. 07-99 OHA No. PBL No. 97-14, ODC No. 312082 (December 19, 2000).\

¹² CO at 5.

¹³ *Id.*

Claimant had met her burden of establishing entitlement to the requested medical benefits and concluded as a matter of law that

Claimant has provided specific and comprehensive evidence to establish that her current upper respiratory/sinus condition has not resolved or improved. Claimant's evidence that the respiratory/sinus condition related to her July 31, 2006 workplace exposure was not improved is not persuasively contracted by evidence proffered by the Employer. Furthermore, Claimant has presented substantial medical evidence to supports (sic) her entitlement to ongoing medical benefits for recurrent respiratory/sinus problems.¹⁴

As the ALJ's analysis is faulty in its apparent incorrect assignment of the burden of proof and the application of the treating physician preference in a public sector case, we are constrained to reverse and remand.

As we have outlined above, Employer had the initial burden of production in this matter and only upon meeting this burden would that burden shift to Claimant. There is nothing in the CO to indicate that the ALJ conducted an initial assessment of Employer's evidence to determine whether there was a change in Claimant's condition. Rather, it appears that the entire evidentiary burden has been placed on Claimant. This is a misapplication of the law. On remand, the ALJ shall make an assessment of Employer's evidence standing alone without resort to evaluating or weighing Claimant's evidence and if Employer fails to meet its burden, the Claimant prevails outright without any need for the burden to shift.

With regard to the treating physician preference, we remind the ALJ that as to public sector workers' compensation cases, this preference was repealed from the Act.¹⁵ The application of the treating physician by the ALJ constituted a misapplication of the law and as such we are constrained to return a Compensation Order committing such an error.¹⁶

In an effort to preclude this as an issue in any subsequent appeal, we address Claimant's argument that the denial of her claim for a lump sum settlement should be reversed. In the event on remand that the claim for medical benefits is restored, we reject this argument as having no basis in the statute. Claimant advances no cogent argument to support such an award and nor does she cite to any authority based in case law or the statute. As we likewise discern there to be none, we find no basis for the provision of a prospective lump sum medical payment.

¹⁴ CO at 6.

¹⁵ The 2010 amendment to the Act, D.C. Law 18-223, deleted the former third sentence of §1-623.23(a-2)(4), which read: "In all medical opinions used under this section, the diagnosis or medical opinion of the employee's treating physician shall be accorded great weight over other opinions, absent compelling reasons to the contrary."

¹⁶ See *D.C. Dept. of Mental Health v. DOES*, 15 A.3d 692 (D.C. 2011).

CONCLUSION AND ORDER

Claimant's memorandum requesting a review of the May 25, 2012 CO was timely filed within 30 days of its issuance. The determination that Claimant is entitled to the restoration of her medical benefits was made based on a misapplication of the burden of production and the treating physician preference and thus not in accordance with the law. Accordingly, the CO of May 25, 2012 is REVERSED AND REMANDED for further consideration in keeping with this Decision and Remand Order.

FOR THE COMPENSATION REVIEW BOARD:


HENRY W. MCCOY
Administrative Appeals Judge

August 8, 2012
DATE