GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

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DEPT. OF EMPLOYMENT SERVICES
COMPENSATION REVIEW BOARD
2014 NOV 25 AM 11 39

COMPENSATION REVIEW BOARD

CRB No. 14-084

JOHNNIE PAYLOR,
Claimant–Petitioner/Cross-Respondent,

v.

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,
Self-Insured Employer-Respondent/Cross-Petitioner

Appeal of an June 6, 2014[1] Compensation Order by
Administrative Law Judge Fred D. Carney, Jr.
AHD No. PBL 12-049, DCP No. 301110362389-0001

Johnnie Louis Johnson III for the Claimant-Petitioner/Cross-Respondent
Corey P. August for the Employer-Respondent/Cross-Petitioner

Before: HEATHER C. LESLIE, MELISSA LIN JONES, and JEFFREY P. RUSSELL, *Administrative Appeals Judges.*

HEATHER C. LESLIE, for the Compensation Review Board.

DECISION AND REMAND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

Claimant sustained a work-related injury on February 7, 2011. The then Office of Risk Management, now Public Sector Workers' Compensation Program, accepted the claim and awarded wage loss and medical benefits.

On or about January 14, 2012, Claimant returned to work and subsequently ceased working for Employer on March 2, 2012. On May 1, 2012 a Notice of Determination (NOD) was sent to Claimant, advising him that benefits were terminated effective January 13, 2012. Claimant requested a reconsideration of this decision. On June 29, 2012, the termination of benefits was affirmed.

[1] We are aware the Certificate of Service page lists a date of June 5, 2014, the day before the Compensation Order was signed, as the date the parties were served. We will treat this as a typographical error.

Claimant requested a Formal Hearing, seeking restoration of benefits from June 29, 2012 to the present and continuing, payment of medical bills and payment of attorney's fee. The sole issue presented for adjudication was the nature and extent of Claimant's disability. On June 6, 2014, a CO was issued denying Claimant's request for disability benefits but granting Claimant's claim for medical benefits.

Both parties timely appealed the decision. Employer argues that while the denial of wage loss benefits was supported by the substantial evidence in the record and was in accordance with the law, the ALJ erred in granting medical benefits as that was not addressed in the NOD. Thus, AHD did not have jurisdiction to award any medical benefits.

Claimant argues that the ALJ's denial of wage loss benefits was inconsistent with the medical and testimonial evidence in the record. Notably, Claimant argues that Claimant's resignation was forced upon him by the Employer. Employer opposed Claimant's Application for Review, arguing the denial of wage loss benefits is supported by the substantial evidence in the record and in accordance with the law.

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. Code § 1-623.1 *et seq.* ("Act").

Turning to Employer's appeal and arguments first, Employer argues the ALJ lacked jurisdiction to address the Claimant's request to award medical benefits. We agree.

A review of the evidence reveals the NOD, issued on May 1, 2012 stated, under the "New Decision" section:

> For the reasons stated above, your benefits have ended effective January 13, 2012.

Employer's exhibit 13.

Immediately preceding that section, the NOD outlined that Dr. Levitt released Claimant to work with restrictions, which Claimant subsequently did, and that Claimant then retired on March 2, 2012. Based on Claimant having returned to work, Employer terminated Claimant's temporary total disability (TTD) benefits.

Claimant requested reconsideration, which was denied. The June 29, 2014 Decision on Reconsideration stated:

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[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. DOES*, 834 A.2d 882 (D.C. 2003).

> Per review, you returned to work on January 14, 2012, ending your eligibility for TTD benefits.
>
> Please consult with your adjuster regarding eligibility for medical benefits.
>
> Therefore the original decision to terminate benefits is UPHELD.

Employer's exhibit 14.

As we have held previously, the plain language of § 1-623.24(b)(1) of the Act requires "the issuance of a decision" by the Employer before an injured worker may request a formal hearing:

> The authority of this Agency to review disputes arising out of the Public Sector Workers' Compensation Act is wholly governed by the terms of that Act. D.C. Code §1-623.24(b)(1) provides for an appeal or review of a final decision of [DCP] Determinations by an ALJ in [the Department of Employment Services ("DOES")]. As a general principle, the only matters that DOES has authority to review are matters upon which [DCP] has rendered a decision, and it is that decision that is reviewed by DOES. In the absence of an operative decision, there is nothing for DOES to review and rule upon.
>
> In other words, the Act is clear that the actual issuance of a Final Determination, as opposed to a constructive denial, is a prerequisite to AHD's adjudication of the request for benefits:
>
> While the courts have broad grants of authority to adjudicate matters, the adjudicatory authority of an administrative agency is limited by an enabling act. Under the Act governing this matter, a claim for benefits for a work-related injury must first be made to the Public Sector Division of the Office of Workers' Compensation, that is, the OBA. See D.C. Official Code §1-623.24(a); 7 DCMR §§104, 105, 106, 199. The OBA, now the TPA, is responsible for conducting necessary investigations into an injured worker's claim and then making an initial determination either to award or deny disability compensation benefits for that claim. It is only if the injured worker is dissatisfied with the determination the worker can request a hearing before the ALJ. *See* D.C. Official Code §1-623.24(b)(1). Thus, an ALJ is without ancillary authority to adjudicate claims for compensation that have not been first presented to the OBA, or the TPA, for investigation and resolution.")

Sisney v. D.C. Public Schools, CRB No. 08-200, AHD No. PBL 08-066 (July 2, 2012) (emphasis in original), citing *Minter v. D.C. Office of the Chief Medical Examiner*, CRB Nos. 11-024 and 11-035, AHD No. PBL073A, DCP No. 761035-0001-2006-0014 (December 15, 2011).

We agree with the Employer that an NOD has not been issued regarding any medical benefits and that the NOD issued only advised Claimant that his TTD benefits were to be terminated. Without an NOD issued regarding Claimant's entitlement to medical benefits, including the payment of medical

bills, AHD was without jurisdiction to award any medical bills.[3] This portion of the CO is VACATED.

Turning to Claimant's appeal, at the onset we must remind Claimant we are limited in awarding benefits outlined in the statute. Claimant at the Formal Hearing did ask that the ALJ award him payment of health insurance benefits. Claimant also seems to argue that the ALJ should order the Employer to reinstate Claimant as an employee. Claimant's argument at 14. The statute only allows the award of disability and medical benefits related to an injury which occurred on the job. Any questions or issues regarding health insurance benefits or Claimant's request for reinstatement as an employee is not within the jurisdiction of AHD or the CRB as the Act does not address or confer authority to adjudicate these issues.

Claimant, in argument also argues that the ALJ erred in not according the treating physician preference to Dr. Launder. As recently discussed by the District of Columbia Court of Appeals in *District of Columbia Public Schools v. DOES*, 95 A.3d 1294 (D.C. 2014), there is not a treating physician preference in the public sector workers compensation law. Physicians are to be accorded equal weight in public sector workers compensation cases. Claimant's argument is rejected.

Addressing Claimant's argument that the ALJ erred in not awarding attorney's fees, Claimant points to no statutory authority in support of his argument. As we stated in *Bonaparte v. DC Office of Tax and Revenue* CRB No. 13-152, AHD No. PBL 12-047 (February 12, 2014),

> The regulations governing the [Public Sector Workers' Compensation Act], however, do provide that "Claims for representation of a claimant shall be submitted in writing to the ALJ, if a hearing has been requested, within 30 days of the issuance of a decision under subsection 130.12." 7 DCMR § 132.1.
>
> 7 DCMR 130, including § 130.12, governs the hearing process before DOES ALJs. Section 130.12 provides that, following a formal hearing, "the ALJ shall then issue an order to reverse, modify, affirm or remand a determination rendered by the claims examiner". Thus, under the regulations, a claim for an attorney's fee must be filed within 30 days of the *issuance* of a Compensation Order. There is no provision either permitting or requiring the extension of that time period. There is no regulatory or statutory provision permitting or requiring that the fee petition be filed upon the expiration of the time for filing an appeal, nor is there any provision in the PSWCA or the regulations permitting or requiring that the time for filing a request for an attorney's fee be made only after the Compensation Order becomes final.
>
> However, where a fee is sought to be assessed against the employer following the "successful prosecution of a claim" that has been denied initially by the Public Sector Workers' Compensation Program (PSWCP), but granted ultimately by an ALJ following a formal hearing, D.C. Code § 1-623.27 provides:

[3] We also must note that Claimant did not submit any outstanding bills into evidence nor claim any medical treatment that Claimant desired to have performed. Indeed, in argument, Claimant's counsel does reference Sibley Memorial Hospital bills but does admit the order is "unclear if other medical procedures were included in this decision." Claimant's argument at 15.

> If a person utilizes the services of an attorney-at-law in the successful prosecution of his or her claim under § 1-623.24 (b) [the formal hearing process before an ALJ], or before any court for review of any action, award, order, or decision, there shall be awarded, in addition to the award of compensation, in a compensation order, a reasonable attorneys fee, not to exceed 20% of the actual benefit secured, which shall be paid directly by the Mayor or his designee to the attorney for the claimant in a lump sum within 30 days after the date of *the compensation order*. (Italics added).

> This language is somewhat ambiguous, inasmuch as it refers to not one but two "compensation orders", the first being "the award of compensation" following the formal hearing, and the second being "a compensation order" for the attorney's fee award itself. While there is no time period set forth in which a fee petition is required to be filed, it is mandated that the fee itself be paid within 30 days of "the compensation order". Despite the fact that the D.C. Code § 1-623.27 (c) makes acceptance of a fee that is not first approved as part of "an order" a criminal misdemeanor, the procedural details as to how such an order is obtained are largely left unstated. Obviously, to not run afoul of the law, a request for such an award of an attorney's fee is a necessity. Since the mandate of payment of the attorneys fee award requires that it be made "within 30 days of the compensation order", the most sensible meaning of the "the compensation order" is the separate "compensation order" awarding the fee.

Claimant has not properly requested for an attorney's fee within 30 days of issuance of the CO. Claimant's argument is rejected.

Next, reviewing the CO, we note that the ALJ correctly stated at the onset,

> It has been consistent held that after a claim has been accepted and disability benefits paid, the burden of proof rests with the employer to present substantial and recent medical evidence to justify a modification or termination of those benefits. *See* TOOMER v. D.C. DOES, CRB No. 05-202, OHA No. PBL No. 98-048A, DCP No. LT5-DOC001603 (May 2, 2005); JONES V. DOC. *Dir. Dkt.* No. 07-99, OHA No. PBL. No. 97-14, ODC No. 312082 (December 19, 2000); ROBINSON V. D.C. GENERAL HOSPITAL, ECAB No. 95-8, ODCVC No. 303585 (July 8, 1997).

CO at 4.

The ALJ then described the second step in the burden shifting scheme as,

> The burden then shifted to Claimant to show by preponderance of the evidence that he continues to suffer with an impairment of condition resulting from his employment that is causing him wage loss, and that he did not voluntarily separate from suitable employment.

CO at 5-6.

The above analysis is in error. In both the first and second step, the ALJ misapplied the standard of proof. As we stated in *Mahoney v. D.C. Public Schools*, CRB No. 14-067, AHD No. PBL 14-004 (November 12, 2014), the Employer first must produce reliable, probative and current evidence of a change prior to the date benefits were modified or terminated. If the Employer satisfies this burden, then the burden shifts to the Claimant who then must produce substantial evidence that his condition has not changed at this second step in the analysis. Claimant is not required to establish this by a preponderance of the evidence.

Mahoney, an en banc decision, summarized the burden shifting scheme as follows:

> In conclusion, we find that once the government-employer has accepted and paid a claim for disability benefits, the employer has the burden of proving by a preponderance of the evidence that conditions have changed such that the claimant no longer is entitled to the benefits.
>
> The employer first has the burden of producing current and probative evidence that claimant's condition has sufficiently changed to warrant a modification or termination of benefits. If the employer fails to present this evidence then the claim fails and the injured worker's benefits continue unmodified or terminated.
>
> If the employer meets its initial burden, then the clamant has the burden of producing reliable and relevant evidence that conditions have not changed to warrant a modification or termination of benefits. If this burden is met, then the evidence is weighed to determine whether employer met its burden of proving by a preponderance of the evidence that claimant's benefits should be modified or terminated.

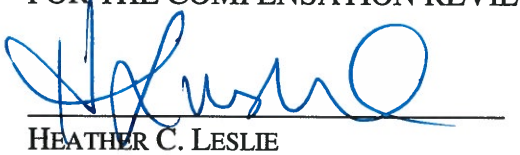
Mahoney at 8-9.

On remand, the ALJ is to reanalyze whether Claimant met his burden, that of substantial evidence which is reliable and relevant, that his condition has not changed. Until such time as the ALJ applies the correct burden of proof, all other arguments are moot.

CONCLUSION AND ORDER

The June 6, 2014 Compensation Order is not supported by the substantial evidence in the record and in not accordance with the law. It is VACATED and REMANDED for further consideration in accordance with the discussion above.

FOR THE COMPENSATION REVIEW BOARD:



HEATHER C. LESLIE
Administrative Appeals Judge

November 25, 2014
DATE