GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR

LISA M. MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 12-054

HENRY LOPEZ,

Claimant - Respondent,

v.

DISTRICT OF COLUMBIA FIRE & EMERGENCY MEDICAL SERVICES DEPARTMENT,

Employer - Petitioner.

Appeal from a Compensation Order of
Administrative Law Belva Newsome
AHD No. PBL 04-015F, DCP No. LT5-EMS004227

Lloyd J. Eisenberg, for the Claimant
Pamela L. Smith, Esquire, for the Employer

Before HEATHER C. LESLIE,[1] JEFFREY P. RUSSELL,[2] *Administrative Appeals Judges* and LAWRENCE D. TARR, *Chief Administrative Appeals Judge*.

HEATHER C. LESLIE, *Administrative Appeals Judge*, for the Compensation Review Board.

DECISION AND ORDER

OVERVIEW

This case is before the Compensation Review Board (CRB) on the request for review filed by the Employer - Petitioner (Employer) of the March 5, 2012, Compensation Order on Remand (COR) issued by an Administrative Law Judge (ALJ) in the Hearings and Adjudication Section (OHA) of the District of Columbia Department of Employment Services (DOES). In that CO, the ALJ first determined that OHA had jurisdiction to adjudicate the case and granted in part the Claimant's request for a recalculation of temporary total disability benefits. We VACATE.

[1]Judge Heather C. Leslie is appointed by the Director of DOES as an interim Board member pursuant to DOES Administrative Policy Issuance No. 12-02 (June 20, 2012).

[2]Judge Russell is appointed by the Director of the DOES as an interim CRB member pursuant to DOES Administrative Policy Issuance No. 12-01 (June 20, 2012).

BACKGROUND AND FACTS OF RECORD

On January 1, 2003, the Claimant suffered an injury while at work. The Employer accepted the claim and paid temporary total disability from the date of the injury through and including the date of the Formal Hearing on February 2, 2010. At various times disputes arose over the exact amount to be paid. The Claimant made numerous attempts to have his concerns addressed regarding an alleged underpayment by the Office of Risk Management (ORM). There is record of several applications for Formal Hearings being filed and dismissed.

On October 21, 2009, the Claimant filed an application for another Formal Hearing which was scheduled for February 2, 2010. The testimony at the Formal Hearing indicates that the issues to be adjudicated at that hearing included whether or not the Claimant was being paid correctly and whether or not a right shoulder injury was causally related to the January 1, 2003 injury. The Employer argued that OHA lacked jurisdiction to hear the case because a notice of determination (NOD) had not been issued and concurrently submitted a Motion to Dismiss arguing the same.[3]

The ALJ cited numerous unsuccessful attempts over several years by the Claimant to obtain an answer regarding the amount paid from the ORM. Hearing Transcript at 21. As such, the ALJ assumed jurisdiction. Hearing Transcript at 12 & 23. The ALJ then continued the hearing to a later date to allow for the parties to resolve the outstanding issues as well as to allow the Employer time to issue a NOD.

For reasons not identified in the record, the Claimant on March 25, 2010 filed a statement of his case in lieu of a hearing. The Employer did not respond to the Claimant's statement. On April 23, 2010, a CO was issued granting the Claimant's request for recalculation of his temporary total disability payments.[4]

The Employer timely appealed to the CRB. The CRB, in a decision and order dated December 23, 2011, noted that the ALJ failed to rule upon the Employer's motion to dismiss. Thus, the CRB vacated and remanded the case to the ALJ with instructions to rule upon the Employer's motion to dismiss.[5]

A COR was issued on March 5, 2012.[6] The ALJ, while acknowledging the Employer had not issued a notice of determination, still asserted OHA had jurisdiction as the Employer had sent the Claimant certified mail indicating the Claimant was not entitled to a cost of living increase and setting forth the reasons for this conclusion. The ALJ determined the letter satisfied the statutory

[3]The Claimant filed an opposition to the Motion to Dismiss as well as a Request for Attorney's Fees. The Employer opposed the request for fees. The ALJ dismissed the request for an attorney's fee as untimely.

[4] *Lopez v. District of Columbia Department of Fire & Emergency Services*, AHD No. PLB 04-015F, AHD No. LT5-EMS004227 (April 23, 2010).

[5] *Lopez v. District of Columbia Department of Fire & Emergency Services*, CRB No. 10-122, AHD No. PLB 04-015F, AHD No. LT5-EMS004227 (December 23, 2011).

[6] *Lopez v. District of Columbia Department of Fire & Emergency Services*, AHD No. PLB 04-015F, AHD No. LT5-EMS004227 (March 5, 2012).

requirements outlined in D.C. Code § 1-623.24(b)(1) and 7 DCMR § 101.1 and denied the Employer's motion to dismiss. The ALJ again awarded cost of living increases but denied the Claimant's request for attorney's fees.

The Employer timely appealed on April 5, 2012. On appeal, the Employer argues OHA lacked jurisdiction as a notice of determination had not been issued. The Employer also argues that even if OHA did have jurisdiction, the CO was not based upon the substantial evidence in the record and was not in accordance with the law. The Claimant in opposition argues that the Employer did issue a decision in accordance with the statute, thereby conferring jurisdiction to OHA. Moreover, the Claimant argues the CO correctly interpreted and applied D.C. Official Code Ann. §1-623.12(b).

THE STANDARD OF REVIEW

The scope of review by the CRB, 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 on Remand are based upon substantial evidence in the record, and whether the legal conclusions drawn from those facts are in accordance with applicable law. S*ee* D.C. Comprehensive Merit Personnel Act of 1978, as amended, D.C. Official Code § 1-623.01, *et seq.*, at § 1-623.28(a), and *Marriott International v. D. C. Department of Employment Services*, 834 A.2d 882 (D.C. 2003).

Consistent with this standard of review, the CRB is 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.

DISCUSSION AND ANALYSIS

Preliminarily, we note that the Claimant filed a Motion to Dismiss the Employer's application for review as being untimely as it was filed more than 30 days after the date of the COR, March 4, 2012. The Employer opposes this motion, stating that the certificate of service was dated March 5, 2012 and that pursuant to 7 DCMR § 258.2, the Employer's application was timely.[7] We agree with the Employer. We note that March 4, 2012 is a Sunday. As the Office of Hearings and Adjudications was closed on Sunday, March 4, 2012, we treat the reference to this date as an administrative error. The certificate of service accompanying the order certifies the documents were sent to the parties on Monday, March 5, 2012. We will adopt March 5, 2012 as the date of the Compensation Order on Remand. The Employer's appeal was timely.

Turning to the merits of the appeal, we first address the question of whether OHA had jurisdiction to hear the case. The Employer argues that as a Notice of Determination had not been issued, OHA did not have jurisdiction to hear the claim. The Claimant argues that the correspondence sent to the Claimant satisfied the statutory requirement of a final decision. We agree with the Claimant.

[7] 7 DCMR § 258.2 provides that "[a]n Application for Review must be filed within thirty (30) calendar days from the date shown on the certificate of service of the compensation order or final decision from which appeal is taken"

The ALJ was correct in her determination that AHD had jurisdiction to consider the claim for an increase in the compensation rate due. It is undisputed that Mr. Lopez had requested an increase in his compensation rate, and that a response to that request sent via a certified letter from DCP to Mr. Lopez. The letter reads in pertinent parts:

> We have completed a thorough review of your file **per your request to ascertain if you are entitled to an adjustment of your compensation benefits.** […].
>
> Although **you are not entitled to an adjustment of the maximum compensation rate for 2003**, you are entitled to a COLA […].
>
> You are currently receiving $1,576.92 bi-weekly before deductions, based on our review of your benefits **you are not entitled to an adjustment of your compensation rate** and it appears there is an overpayment possibly owed to DCP [the Disability Compensation Program]. (emphasis added).

(Petitioner's characterization of this letter as something other than a denial of the request for an increase in the compensation rate is erroneous. While Petitioner is correct that it is a "clarification" of the current status of the case, that fact does not render it something other than a decision to deny Mr. Lopez's request that that his status be changed, any more than a decision to deny a requested medical procedure based upon a determination that the procedure is not medically necessary "clarifies" the current medical status of a claimant, as viewed by DCP.[8] See also *White v. DC Parks and Recreation*, CRB No. 12-166, AHD No. PBL 99-039E (December 28, 2012).

However, the ALJ was ultimately in error in ordering the adjustment of the compensation rate, for the reasons set forth in Petitioner's Arguments II and III, set forth as follows::

> [T]he COR is based upon an erroneous interpretation of the law in determining the maximum allowable compensation rate. The April 23, 2010 Compensation Order (CO) which the ALJ incorporated by reference in the COR provided that it would adopt Claimant's Exhibit #1. This exhibit may not be applied to this matter because it is based upon an incorrect pay scale. Notably, Claimant has identified the maximum rate of basic compensation for 2003 to be $66,655.61. This is an incorrect interpretation of D.C. Official Code § 1-623.12 (b).
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> In pertinent part, the applicable statute states,
>
> > [] the monthly rate for disability, [] may not be more than 73% of the monthly pay of the maximum rate of basic pay for **DS**-12, Step 10. (emphasis added.)

[8]We point out that we do not make any determination whether or not this letter would satisfy the requirements of regulations as amended, in July 2012. In the amended regulations, the requirements pertaining to a Notice of Determination is outlined with greater specificity. See DCMR § 7-105.

> *See* D.C. Official Code § 1-623.12 (b). The term "DS" is a term of art. It is found in the District of Columbia Personnel Manual, Chapter 11A, Classification, Section 1101 and states "[t]he District Services Schedule ("DS") is the basic pay schedule for positions which are divided into 18 grades of difficulty and responsibility of work." […][quoting from D.C. DHR Regulations, Chapter 11A, "Definitions", § 1101]. The plain language of […] § 1-623.12(b) refers to a specific salary schedule within the District of Columbia Government. […] According to the applicable DS Salary Schedule, the basic pay for DS 12, Step 10, at the time of Claimant's injury was $58,770. To adopt the amount of $66,655.61 would exceed the amount authorized by D.C. Official Code § 1-623.12(b).
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> Neither of the pay scales presented by Claimant is applicable to this statute. […] Claimant's first pay scale applies to union employees that do not exceed a Grade 10. The second salary schedule is for management supervisory service referred to as pay plan schedule MSS. Neither salary schedule would apply in determining the maximum amount for the basic compensation rate. […] [T]his maximum rate does not change from claimant to claimant but is a set figure that applies to everyone receiving public sector benefits. Claimant's calculations, which the ALJ adopted, exceed the maximum amount allowed by statute pursuant to the "DS" Salary Schedule and are thus contrary to the law in the District of Columbia.
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> […]
>
> The award of a cost of living adjustment (COLA) was not consistent with applicable laws and regulations. The ALJ adopted the proffered calculation of the Claimant without explanation other than stating that COLAs are allowed by statute. […] Employer does not dispute that COLAs are awarded pursuant to the Government's regulations. However, the District of Columbia has not awarded a cost of living increase since October 14, 2007. The ALJ's award of cost of living increases subsequent to October 14, 2007, is contrary to applicable regulations. Therefore, the COR must be reversed because it is not supported by law.

(emphasis in original). We agree with Petitioner in this analysis, and accordingly we vacate the adjustment to Mr. Lopez's compensation rate as set forth in the COR.

CONCLUSION

The ALJ was correct in determining OHA had jurisdiction to hear the case. The ALJ exceeded the scope of her authority in awarding COLAs beyond 2007. The COR is VACATED.

ORDER

The March 5, 2012 Compensation Order is VACATED.

FOR THE COMPENSATION REVIEW BOARD:

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HEATHER C. LESLIE
Administrative Appeals Judge

January 15, 2013
DATE