

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA M. MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 12-148

SAUNDRA M. MCNAIR,
Claimant–Petitioner,

v.

DISTRICT OF COLUMBIA DEPARTMENT OF EMPLOYMENT SERVICES,
Employer–Respondent.

Appeal from an Order and a Compensation Order by
The Honorable Jeffrey P. Russell
AHD No. PBL12-018, DCP No. 30100723741-0001

Benjamin T. Boscolo, Esquire for Petitioner
Frank R. McDougald, Esquire for Respondent

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

MELISSA LIN JONES, *Administrative Appeals Judge*, for the Compensation Review Board.¹

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

On July 13, 2010, Ms. Sandra M. McNair injured her right knee while working for the District of Columbia Department of Employment Services (“Employer”) as an administrative law judge in the Office of Hearings and Adjudication (“OHA”). As a result of favoring her right knee, Ms. McNair injured her left knee as well.

A dispute arose over Ms. McNair’s entitlement to workers’ compensation disability benefits, and on December 8, 2011, the Public Sector Workers’ Compensation Program issued a Notice of Intent to Terminate Public Sector Workers’ Compensation Payments effective January 5, 2012. Ms. McNair requested reconsideration; her request was denied, and she filed an Application for Formal Hearing with OHA.

¹ 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 Director’s Administrative Policy Issuance No. 05-01 (February 5, 2005).

On July 11, 2012, Ms. McNair filed with OHA a Motion to Reassign Case to an Outside Administrative Law Judge. This motion was denied by written Order dated July 13, 2012.

A formal hearing was held on July 24, 2012. In a Compensation Order dated August 16, 2012, Ms. McNair's request for reinstatement of workers' compensation disability benefits from January 6, 2012 through April 29, 2012 was denied.²

On appeal, Ms. McNair does not challenge the merits of the Compensation Order denying her request for reinstatement of workers' compensation disability benefits. She asserts it was improper for "any current Administrative Law Judges, Administrative Appeals Judge or any current, permanent Department of Employment Services (DOES) employee to hear her case;"³ Ms. McNair contends she was deprived her due process rights because OHA lacked jurisdiction to hear her case and requests the Compensation Order be vacated and her claim for relief be granted.

On the other hand, Employer argues OHA did have jurisdiction over this matter. Employer requests the Compensation Order should be affirmed.

ISSUES ON APPEAL

1. Was Ms. McNair's Application for Review filed timely?
2. Did OHA have jurisdiction to hear Ms. McNair's case and to issue the August 16, 2012 Compensation Order?

ANALYSIS⁴

As a matter of law, if an Application for Review is not filed timely, the CRB does not have authority to consider the merits of the appeal; therefore, although not raised by the parties, the CRB must consider whether the Application for Review was filed timely.

Section 1-623.28(a) of the District of Columbia Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Code §1-623.1 *et seq.* ("Act"), in pertinent part, provides

[a]n 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).

² *McNair v. D.C. Department of Employment Services*, AHD No. PBL12-018, DCP No. 30100723741-0001 (August 16, 2012).

³ Memorandum in Support of the Application for Review, p. 1.

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. *See* D.C. Comprehensive Merit Personnel Act of 1978, as amended. D.C. Code §1-623.01 *et seq.*, at §1-623.28(a). 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).

Similarly, 7 DCMR §118.2 provides

[a]ny 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 section 258.^[5]

Assuming for purposes of this issue that the Order issued on July 13, 2012 qualifies as a final order,⁶ the thirty (30) calendar day period beginning from that date ended on August 12, 2012, a Sunday. When the thirtieth calendar day falls on a Saturday, Sunday, or legal holiday, the deadline is extended to the next business day;⁷ the next business day after August 12, 2012 was August 13, 2012. Ms. McNair's Application for Review was filed on September 17, 2012 and is not timely in regards to review of the July 13, 2012 Order *per se*; however, Ms. McNair appeals the jurisdictional issue in the August 16, 2012 Compensation Order by raising the recusal issue that formed the basis of her prior motion. Thus, the appeal is not from the July 13, 2012 Order but is from the August 16, 2012 Compensation Order, and the Application for Review is timely.

Regarding the August 16, 2012 Compensation Order, Ms. McNair's Application for Review raises no issue regarding the contents of that Compensation Order. Again, Ms. McNair attacks the Compensation Order on jurisdictional grounds. Specifically, Ms. McNair asserts OHA lacked jurisdiction to hear her case because no ALJ could hear her case. The essence of Ms. McNair's appeal is that no administrative law judge can withstand recusal; therefore, OHA lacks jurisdiction to hear her case, and no Compensation Order should have issued.

When any District of Columbia government employee is injured on the job, §1-623.24(b)(1) of the Act vests jurisdiction in OHA:

Before review under §1-623.28(a), a claimant for compensation not satisfied with a decision of the Mayor or his or her designee under subsection (a) of this section is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on the claim before a Department of Employment Services Disability Compensation Administrative Law Judge.

⁵ 7 DCMR §258.2 states “[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.”

⁶ Neither “compensation order” nor “final decision” is defined in the Act or the governing regulations; however, in limiting the CRB's appellate authority to review of compensation orders or final decisions, the regulations and the Act make a distinction between orders that represent a final pronouncement as to whether or not a worker is entitled to compensation and orders that neither award nor deny such compensation as a final matter. See 7 DCMR §251.2.

⁷ See *Jackson v. ECAB*, 537 A.2d 576, 578 (D.C. 1988).

Ms. McNair's position confounds jurisdiction with recusal; recusal does not divest a tribunal of jurisdiction. Recusal means an adjudicator should not preside over a case; a lack of jurisdiction means a tribunal cannot preside over a case.

Moreover, recusal requires more than "bald allegations of favoritism or bias with no proof thereof."⁸ In seeking recusal on the ground of bias, a party initially must allege facts that (1) are material and stated with particularity; (2) are such that, if true, they would convince a reasonable person that a bias exists; and (3) show that the bias is personal, as opposed to judicial, in nature. Personal bias in this context means that the alleged bias must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learns from participation in the case. In other words, the bias must have its source beyond the four corners of the hearing room.⁹

There is no doubt that recusal is mandated when a judge's impartiality reasonably can be questioned on an objective basis.¹⁰ On the other hand, a judge also has a strong obligation not to recuse when the situation does not so require.¹¹ As explained by the ALJ in the July 12, 2012 Order, Ms. McNair did not raise any issues regarding personal bias on the part of the presiding ALJ, and her remaining unsubstantiated and speculative allegations are not sufficient to rise to the level of recusal.

CONCLUSION AND ORDER

OHA had jurisdiction over Ms. McNair's workers' compensation case. We adopt the ALJ's reasoning and legal analysis in the July 13, 2012 Order, and we AFFIRM the August 16, 2012 Compensation Order.

FOR THE COMPENSATION REVIEW BOARD:

MELISSA LIN JONES
Administrative Appeals Judge

November 13, 2012
DATE

⁸ *Jones-Coe v. D.C. Dept. of Mental Health*, Dir. Dkt. No. 13-03; OHA No. PBL98-024A; DCP Nos. LT 4-DMH 000405 and 364789 (August 26, 2003).

⁹ *Dupont Circle Citizens Assn. v. D.C. Alcoholic Beverage Control Board*, 766 A. 2d 59 (D.C. 2001).

¹⁰ *Scott v. U.S.*, 559 A.2d 745 (D.C. 1989).

¹¹ *Anderson v. U.S.*, 754 A.2d 920 (D.C. 2000)