

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**  
**Department of Employment Services**

**VINCENT C. GRAY**  
**MAYOR**



**LISA M. MALLORY**  
**DIRECTOR**

**COMPENSATION REVIEW BOARD**

**CRB No. 11-146**

**GAYNELL NIXON,**  
**Claimant–Petitioner,**

**v.**

**DISTRICT OF COLUMBIA DEPARTMENT OF HOUSING,**  
**Employer-Respondent.**

Appeal from a Compensation Order by  
The Honorable Fred D. Carney, Jr.  
AHD No. PBL10-068, DCP No. 7610010000119999-0015

Ms. Gaynell Nixon, self-represented Petitioner  
Frank McDougald, Esquire, for the Respondent

Before MELISSA LIN JONES, HEATHER C. LESLIE,<sup>1</sup> and HENRY W. MCCOY, *Administrative Appeals Judges*.

**DECISION AND ORDER**

**JURISDICTION**

Jurisdiction is conferred upon the Compensation Review Board 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).

**FACTS OF RECORD AND PROCEDURAL HISTORY**

On January 23, 1996, Ms. Gaynell Nixon injured her right ankle and foot in a compensable accident. Dr. Howard Horowitz and Dr. Daniel Ignacio treated Ms. Nixon for her work-related injuries.

On April 15, 2010, Ms. Nixon fell getting out of her car at her home. When she fell, Ms. Nixon knocked out a tooth. As a result, Ms. Nixon filed a claim for disability compensation benefits pursuant to the District of Columbia Government Comprehensive Merit Personnel Act of 1978, as

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<sup>1</sup> Judge Leslie has been appointed by the Director of the Department of Employment Services as a temporary Compensation Review Board (“CRB”) member pursuant to Administrative Policy Issuance No. 11-04 (October 5, 2011).

amended, D.C. Code §1-623.1 *et seq.* (“Act”). The Office of Risk Management Disability Compensation Program (“DCP”)<sup>2</sup> denied Ms. Nixon’s claim.

Ms. Nixon sought reconsideration of DCP’s denial. DCP maintained its position so Ms. Nixon filed an Application for Formal Hearing, and in a Compensation Order dated November 15, 2011, an administrative law judge (“ALJ”) denied Ms. Nixon’s claim for dental treatment. The ALJ ruled Ms. Nixon had failed to meet her burden of proof.

On appeal, Ms. Nixon contends the ALJ ignored the provisions of the Act that require her employer, the District of Columbia Housing Authority (“DCHA”), provide her with medical services. Ms. Nixon also contends the ALJ failed to afford her the benefit of a presumption of compensability. Ms. Nixon argues that the coming and going rule is not applicable because she has not worked in approximately fifteen years and that her current dental injury is compensable because of a “chain of causation.”<sup>3</sup> Finally, Ms. Nixon disagrees with the ALJ’s credibility assessment.

DCHA asserts the November 15, 2011 Compensation Order is supported by substantial evidence and should be affirmed. Furthermore, DCHA points out that there is no presumption of compensability in public sector workers’ compensation cases.

#### ISSUES ON APPEAL

1. Do §§1-623.03(a)(1) and 1-623.03(a)(2) require DCHA provide Ms. Nixon with medical services for her dental injury?
2. Did the ALJ err in not affording Ms. Nixon a presumption of compensability?
3. Is the ALJ’s credibility determination supported by substantial evidence and in accordance with the law?
4. Is the November 15, 2011 Compensation Order’s conclusion that Ms. Nixon’s dental injury is not compensable supported by substantial evidence in the record and in accordance with the law?

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<sup>2</sup> Effective October 1, 2010, the Disability Compensation Program’s name was changed to the Public Sector Workers’ Compensation Program.

<sup>3</sup> Claimant’s Memorandum of Points and Authorities in Support of Application for Review, unnumbered p. 2.

*ANALYSIS*<sup>4</sup>

Pursuant to §§1-623.03(a)(1) and 1-623.03(a)(2) of the Act, an injured, government worker is entitled to medical services, appliances, and supplies if that worker sustains an on-the-job injury:

- (a) The District government shall furnish to an employee who is injured while in the performance of duty the services, appliances, and supplies prescribed or recommended by a qualified physician, who is approved by the Mayor or his or her designee pursuant to subsection (d) of this section, which the Mayor considers likely to cure, give relief, reduce the degree or period of disability, or aid in lessening the amount of the monthly compensation. These services, appliances, and supplies shall be furnished:

(1) Whether or not disability has arisen;

(2) Notwithstanding that the employee has accepted or is entitled to receive benefits under subchapter III of Chapter 83 of Title 5 of the United States Code, or another retirement system for employees of the District or federal government.

Unless and until a government worker sustains a compensable injury, there is no obligation that medical services, appliances, or supplies be provided pursuant to the Act. Thus, until Ms. Nixon's claim has been accepted or proven, §§1-623.03(a)(1) and 1-623.03(a)(2) of the Act do not apply.

Regarding a presumption of compensability, pursuant to §32-1521(1) of the private sector workers' compensation act, a claimant is entitled to a presumption of compensability;<sup>5</sup> however, Ms. Nixon is not a private sector employee, and there is no presumption of compensability in the public sector act. Thus, it would have been reversible error for the ALJ to have afforded Ms. Nixon any presumption of compensability.

Next, because Ms. Nixon's injury was not witnessed, the credibility determination is crucial to the assessment of compensability in this case. Credibility determinations, like all other findings of fact, must be supported by substantial evidence in the record when reviewed as a whole.<sup>6</sup> Here, the ALJ ruled Ms. Nixon's testimony lacked credibility regarding how the injury occurred because her testimony is not consistent with the documents submitted into evidence. Although Ms. Nixon testified that she told Dr. Horowitz she fell because of weakness in her right foot, Dr. Horowitz's

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<sup>4</sup> 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. Section 32-1521.01(d)(2)(A) of the Act. 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).

<sup>5</sup> Section 32-1521(1) of the District of Columbia Workers' Compensation Act of 1979, D.C. Code, as amended, §32-1501 *et seq.* states, "In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of evidence to the contrary: (1) That the claim comes within the provisions of this chapter."

<sup>6</sup> See *Davis v. Western Union Telegraph*, Dir. Dkt. 88-84, H&AS No. 87-751, OWC No. 098216 (March 4, 1992).

April 22, 2010 report states Ms. Nixon told Dr. Horowitz she had tripped over a curb which caused her to fall into a car door. The inconsistency between Ms. Nixon's testimony and Dr. Horowitz's medical records constitutes substantial evidence to support the ALJ's finding that Ms. Nixon's testimony lacked credibility regarding how she was injured.

Finally, the ALJ undertook a comprehensive analysis of the case before determining Ms. Nixon had not sustained a compensable injury. Ms. Nixon's dental injury could not have arisen out of a performance of work duties because Ms. Nixon has not performed any duties for DCHA for more than ten years. Ms. Nixon denies she was returning from a doctor's appointment on April 15, 2010,<sup>7</sup> and as explained in the Compensation Order, there is no evidence in the record that Ms. Nixon's activities on that day qualify as an exception to the going and coming rule, as a traveling employee exception, or as quasi-employment. Finally, neither Dr. Horowitz nor Dr. Ignacio has offered any opinion indicating Ms. Nixon's fall was caused in any way by her compensable work injury. Thus, there is substantial evidence supporting the ALJ's denial of Ms. Nixon's request for benefits.

#### CONCLUSION AND ORDER

Neither §1-623.03(a)(1) of the Act, §1-623.03(a)(2) of the Act nor the presumption of compensability apply to Ms. Nixon's claim. The ALJ's credibility determination is supported by substantial evidence and is in accordance with the law. The November 15, 2011 Compensation Order is supported by substantial evidence in the record, is in accordance with the law, and is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

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MELISSA LIN JONES  
Administrative Appeals Judge

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June 19, 2012  
DATE

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<sup>7</sup> Claimants [*sic*] Response to Employer's Opposition, unnumbered p. 1.