

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA M. MALLORY
DIRECTOR

CRB No. 11-024 and 11-035

PENELOPE A. MINTER,

Claimant-Respondent and Cross-Petitioner,

v.

DISTRICT OF COLUMBIA OFFICE OF THE CHIEF MEDICAL EXAMINER,

Employer-Petitioner and Cross-Respondent.

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2011 DEC 15 AM 10 46

Appeal from a Compensation Order and an Amended Compensation Order of
Administrative Law Judge Belva D. Newsome
AHD No. PBL 073A, DCP No. 761035-0001-2006-0014

Pamela L. Smith, Esquire, for the Petitioner and Cross-Respondent

Penelope A. Minter, *pro se* Respondent and Cross-Petitioner

Before JEFFREY P. RUSSELL,¹ LAWRENCE D. TARR and HENRY MCCOY, *Administrative Appeals Judges*.

JEFFREY P. RUSSELL, for the Compensation Review Board.

DECISION AND ORDER

BACKGROUND

Ms. Minter was employed by Employer as a "Secretariat", a position that is otherwise un-described in the two Orders (a Compensation Order and an Amended Compensation Order) before us for review. On September 25, 2006, she slipped and fell on a wet floor, injuring herself. She filed a claim for disability compensation benefits with Disability Compensation Program (DCP) which has subsequently been re-titled as the Public Sector Worker's Compensation Program (PSWCP), which was accepted in a Notice of Determination (NOD) in which the injury was described as being to her "back and ankle". Ms. Minter was allowed 21 days Continuation of Pay and was directed to obtain

¹ Judge Russell is appointed by the Director of DOES as an Interim Board Member pursuant to DOES Administrative Policy Issuance No. 11-02 (June 13, 2011).

medical care from the Employer-approved list of physicians through the managed care provider selected by Employer, OCCUNET-PPO.

She was treated initially by Dr. James Callan and later on referral by Dr. Callan by Dr. Raphael Steuart, both OCCUNET-PPO physicians. Both doctors examined and treated her for her injuries, which in their reports were described as including injury to her right knee.

Employer had Ms. Minter evaluated by Dr. Louis Levitt on April 13, 2007 for the purpose of an "Additional Medical Evaluation" (AME). Dr. Levitt included an examination of the right knee in his AME report. In that report, Dr. Levitt expressed the opinion that Ms. Minter's work-related injuries had resolved sufficiently that she required no further medical care and could return to her regular work. Based upon that report, Employer issued a second NOD on April 27, 2007, terminating further medical care.

Review of the Agency administrative file maintained by the hearings section of the Office of Hearings and Adjudication within the Department of Employment Services (DOES), then known as the Administrative Hearings Division (AHD), reveals that Ms. Minter authored a letter of protest concerning this decision. The letter is dated June 1, 2007, and is addressed to the then head of the Office of Risk Management (ORM), Kelly Valentine, and three subordinates, including a Mr. Hempstead, then the Claims Examiner handling Ms. Minter's claim for the DCP (now PSWCP). That letter was attached to the request for a hearing made by filling out a Uniform Request for Review of Eligibility Determination, referred to as a "UNA-1". The UNA-1 is signed by Ms. Minter and dated June 15, 2007, which is also the date that is date-stamped by AHD. Thus, Ms. Minter requested a hearing to review the April 27, 2007 NOD by filing a UNA-1 with AHD on June 15, 2007.

In the letter, Ms. Minter indicates that she had a "desire to appeal the circumstances and findings of the IME [...] which was scheduled by your office and took place on April 13, 2007." She went on to state in that letter that "I received a letter from Mr. Hempstead on May 2nd regarding the denial of Disability Compensation benefits and my right to appeal."

Referring to the calendar, 30 days from April 27, 2007 is May 27, 2007, a Sunday, and the following day, May 28, 2007, was a holiday, Memorial Day. Thus, the time for filing a request for formal hearing contesting or seeking review of a NOD issued April 27, 2007 expired on May 29, 2007. Also, referring to the calendar, 30 days from May 2, 2007 is June 1, 2007. Whether one counts from the date the NOD was issued, or the date that Ms. Minter advised this Agency and ORM that she received it, the request for hearing was late by either 17 days or 14 days.

Review of the AHD Agency file reveals further that a scheduling order scheduling a formal hearing for September 4, 2007 was issued by AHD. On that date, the ALJ assigned to the matter, Judge Carney, issued an Order in which it is recited that Ms. Minter had requested that the AFH be withdrawn to permit her time to obtain an attorney, and in that Order the ALJ dismissed the AFH without prejudice and stated that Ms. Minter could re-file the AFH within 60 days.²

² Review of the AHD file reveals that the Order of September 4, 2007 is erroneous in several respects. It states that Ms. Minter's written request for withdrawal of the AFH was made August 31, 2007. However, there is no written request

A scheduling order was re-issued November 13, 2007 setting the matter in for a formal hearing on January 28, 2008, before a different ALJ, Judge Newsome. On January 4, 2008, the ALJ issued an Order in which, *inter alia*, the ALJ determined that Employer had failed to appear at a prehearing conference on January 3, 2008, and ordered that the matter proceed on an *ex parte* basis with only Ms. Minter being permitted to offer evidence. By Order issued January 9, 2008, the ALJ granted Ms. Minter's request for a continuance of the January 28, 2008 date, and re-set the matter for February 12, 2008.

On January 17, 2008, Employer filed a Motion to Dismiss the AFH, arguing that AHD lacked jurisdiction to review the NOD, based upon the lateness of the filing of the AFH.

In an Order issued January 23, 2008, the ALJ denied the Motion, relying upon *Galligan v. DOES*, 918 A.2d 386 (D.C. 2007) and *Thompson v. DOES*, 848 A.2d 593 (D.C. 2004). The ALJ determined in that Order that Ms. Minter had received the NOD on May 2, 2007 based upon the letter of June 1, 2007 referenced above. The ALJ based the denial upon her conclusion that Ms. Minter "reasonably could believe to her detriment that she could not file her appeal without the basis of the Notice of Determination, the medical report [of the AME by Dr. Levitt]."

By separate Order on January 23, 2008, the ALJ continued the formal hearing to February 19, 2008.

The hearing occurred on that date, following which a Compensation Order awarding temporary total disability benefits, permanent partial disability benefits for scheduled disability to the legs, payment for medical benefits, restoration of leave, and accrued interest was issued April 14, 2008.

That Compensation Order was appealed to the CRB by Employer. In a Decision and Remand Order issued June 18, 2009, the CRB vacated the April 14, 2008 Compensation Order because, due to technical problems involving the recording of the February 19, 2008 formal hearing, no hearing transcript was then or ever would become available. A new formal hearing was ordered.

On June 26, 2010, ORM unilaterally vacated the April 27, 2007 NOD *nunc pro tunc*, and restored Ms. Minter's entitlement to medical benefits retroactive to April 27, 2007.

On July 28, 2010, the re-hearing occurred. Employer objected to the matter proceeding on jurisdictional grounds, arguing that "there currently isn't a Notice of Determination that has recently been issued within the last 30 days". HT 14. The ALJ deferred ruling on the motion until writing the Compensation Order. HT 16. That Compensation Order (CO) was issued 23, 2011.

In the CO, the ALJ awarded Ms. Minter temporary total disability from "February until November 4, 2007; permanent partial disability compensation for 312 weeks from November 5, 2007 due to an 18% permanent impairment to her lower extremities; restoration of leave; and, continuing causally related medical treatment with reimbursement for out-of-pocket and insurance paid medical bills from April 27, 2007."

dated that date. There is a written request from Ms. Minter dated August 21, 2007 requesting not a withdrawal, but a continuance for that purpose.

Ms. Minter and Employer both timely appealed the CO.

Ms. Minter also filed a Motion for Clarification on March 10, 2011 with the ALJ, to which no response was filed by Employer. In response to the motion the ALJ issued an Amended Compensation Order (ACO) on March 22, 2011, amending the CO. In the ACO, the ALJ does not state what portions of the CO remained intact and what portions were changed. Rather, the ALJ wrote that:

[T]he February 23, 2011 Compensation Order is amended as follows:

Claimant is entitled to temporary total disability compensation benefits from February to November 4, 2007; permanent partial disability compensation from November 5, 2007 to the present and continuing, due to an 18% permanent impairment to her lower extremities, restoration of leave; and, continuing causally related medical treatment with reimbursement for out-of-pocket and insurance paid medical bills from April 27, 2007.

ACO, page 3. Both parties timely appealed the ACO.³

³ There have been numerous motions for extensions of time to file various memoranda and oppositions, along with other filings, pleadings and requests for relief of one kind or another. Due to the multiplicity of such filings in this case (at least nineteen such pleadings), they will not be disposed of individually.

All pending motions to extend time are granted.

On April 4, 2011, Employer filed a Motion to Stay both the CO and the ACO. Ms. Minter has opposed. The Motion to Stay is denied as moot given the outcome of this appeal.

Ms. Minter includes in her April 4, 2011 Opposition to Petitioner's Motion to Extend Time to file a memorandum of points and authorities a request that Employer's AFR be dismissed as untimely. It appears that no separate document entitled "Application for Review" from Employer is contained within the Agency file. However, Employer's Motion to Extend Time to File the memorandum of points and authorities was filed March 25, 2011. That motion will be deemed to adequately apprise interested parties of Employer's appeal of the CO and ACO, and is deemed to constitute an AFR. Having been filed within 30 days of both the CO and ACO, it was timely and the Motion to Dismiss is denied.

Ms. Minter's May 20, 2011 "Memorandum of Points and Authorities in Support of Partial Application for Review [...] and Claimant's Motion for Leave to Amend the Record with the DCP Record, If Required" requests that if additional material contained in the PSWCP files is needed to further consider her request for permanent partial disability benefits, that she be permitted to amend the record with that additional unspecified information. Because the determination of this panel is that the permanent partial disability claim can not be considered by this Agency until such time as a claim for such is presented to and decided upon by the PSWCP, the request is denied.

STANDARD OF REVIEW

The scope of review by the CRB, as established by the Act and as contained in the governing regulations, is generally limited to making a Determination as to whether the factual findings of the 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.*, (the Act), at § 1-623.28 (a), and *Marriott International v. D.C. DOES*, 834 A.2d 882 (D.C. 2003). Consistent with this standard of review, the CRB and this review panel are constrained to affirm 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 this panel might have reached a contrary conclusion. *Id.*, at 885.

DISCUSSION AND ANALYSIS

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 PSWCP Determinations by an ALJ in DOES. As a general principle, the only matters that DOES has authority to review are matters upon which PSWCP 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 this instance, the proceedings before DOES were commenced based upon the contents of the NOD issued April 27, 2007. Only issues related to that NOD could be considered in DOES administrative review proceedings. That NOD was "vacated" by PSWCP *nunc pro tunc* on June 26, 2010, and PSWCP restored Ms. Minter's entitlement to medical benefits retroactive to April 27, 2007. Had PSWCP not rescinded the NOD, and had the matter proceeded to a formal hearing, and assuming that Ms. Minter's AFH was timely⁴, the absolute most that the ALJ could have properly done for Ms. Minter would have been to have vacated the NOD. Anything beyond that would have been beyond the authority of DOES to pass upon.

By rescinding the NOD, PSWCP essentially threw in the towel on this AFH by unilaterally restoring to Ms. Minter everything that the NOD had denied or terminated. There was no longer any controversy pending for which a hearing could be convened. To the extent that this victory for Ms. Minter does not completely address all of the matters that she seeks to have addressed, such as claims for disability compensation, whether permanent, temporary, total or partial, those claims must be specifically presented to PSWCP for consideration and Determination, and a timely request for review or appeal made to this Agency if she is dissatisfied with the resolution of the claim.

The denial of the Motion to Dismiss made at the time of the formal hearing, for lack of jurisdiction, was erroneous as a matter of law.

⁴ We do not reach that issue or any others beyond whether AHD had any cognizable issues before it at the time of the formal hearing, including whether the January 23, 2008 Order denying Employer's Motion to Dismiss was in accordance with the law, as the other matters are all moot in light of the determination that withdrawal of the NOD eliminated any basis for DOES jurisdiction.

CONCLUSION

The unilateral vacating of the Notice of Determination of April 27, 2007 by PSWCP rendered the Application for Formal Hearing moot and resolved all issues that could have been brought to the Department of Employment Services for review under the Act.

ORDER

The Compensation Order of February 23, 2011 and the Amended Compensation Order of March 22, 2011 are reversed and vacated.

FOR THE COMPENSATION REVIEW BOARD:



JEFFREY P. RUSSELL
Administrative Appeals Judge

December 15, 2011

DATE