GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR

LISA M. MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 12-067

MOHAMED HASSON SAAD,
Claimant–Petitioner,

v.

DISTRICT OF COLUMBIA DEPARTMENT OF TAX AND REVENUE,
Self-Insured Employer—Respondent

Appeal from an Order by
Administrative Law Judge Fred D. Carney, Jr.
AHD No. PBL 01-073B, DCP No. 761010-006-0001

Mohamed Hasson Saad, *Pro Se* Claimant/Petitioner
Ross Buccholz, Esquire, for the Employer/Respondent[1]

Before: HENRY W. MCCOY, JEFFREY P. RUSSELL,[2] *Administrative Appeals Judges* and LAWRENCE D. TARR, *Chief Administrative Appeals Judges*.

HENRY W. MCCOY, *Administrative Appeals Judge*, for the Compensation Review Board.

DECISION AND REMAND ORDER

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board (CRB) pursuant to D.C. Official Code § 1-623.28, 7 DCMR § 118, and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005).

[1] The CRB received a notice of re-assignment stating that Assistant Attorney General (AAG) Ross Buccholz was not counsel for Employer. AAG Kevin Turner appeared as the attorney of record for Employer in proceedings before Hearings and Adjudication. However, there is no record that AAG Buccholz filed a response to Claimant's AFR.

[2] Judge Russell has been appointed by the Director of the DOES as an interim CRB member pursuant to DOES Administrative Policy Issuance No. 11-01 (June 23, 2011).

FACTS OF RECORD AND PROCEDURAL HISTORY

Claimant injured himself at work on November 20, 2000 when he slipped and fell at the entrance to his place of employment. Claimant reported the injury on June 20, 2001 and filed a claim for benefits which was denied on September 6, 2001. Claimant requested a hearing which resulted in a Final Compensation Order on February 7, 2002 denying the claim because Claimant failed to provide timely notice of his injury. An appeal to the Director was affirmed on July 19, 2002. Claimant appealed this decision to the D.C. Court of Appeals (DCCA).

On January 30, 2003, the DCCA granted a joint motion by the parties to remand the case to the agency to reconsider the denial of Claimant's benefits. Pursuant to that remand, the Director, on February 26, 2003, remanded the case to the Administrative Hearings Division for further findings on causal relationship and the nature and extent of disability, if any. The Director reserved the issue of timely notice.

On June 6, 2003, a Final Compensation Order was issued wherein it was concluded that Claimant's injuries to his lower back and hip were causally related to his employment and that he was disabled from performing his work duties from July 6, 2001 to August 14, 2001 and on August 20th, September 13th, and October 4, 2001 with attendant medical expenses. The order decided however that as Claimant's notice was untimely, his claim for relief was denied. Claimant appealed to the Director on June 19, 2003.

On September 8, 2003, the Director issued an Opinion and Order which determined that as the issue of timely notice had been specifically reserved to the Director, the Administrative Hearings Division lacked jurisdiction to hear and decide the issue. Accordingly, the Director found Claimant had given timely notice and granted Claimant's claim for relief. The Final Compensation Order of June 6, 2003 was reversed.

In 2008, Claimant requested authorization for medical treatment from Employer claiming that it was related to the November 20, 2000 work injury. On July 10, 2008, Employer issued a Notice of Determination denying Claimant's request. Claimant timely filed for a hearing and following that hearing a Compensation Order was issued on May 18, 2009 granting the requested authorization for medical treatment and disability benefits equivalent to 42 hours of sick leave.

Claimant timely filed an application for review with the CRB arguing that all of the leave he took between 2004-2008 should be reinstated. The CRB affirmed the May 18, 2009 Compensation Order on January 15, 2010; whereupon Claimant timely appealed to the DCCA.

In a March 2, 2011 decision, the Court affirmed the determination that Claimant was entitled to disability benefits for those periods when he was totally restricted from working by his treating physician. The Court determined that insofar as Employer conceded that Claimant used 49 hours of sick leave when he was unable to work during the period 2007-2008, plus 29 hours of annual leave, it did not rationally flow that Claimant was only awarded restoration of 42 hours of sick leave. Accordingly, the Court reversed and remanded the case for a recalculation of the number of leave hours to be restored or recalculation of the disability benefits to be paid.[3] On March 23, 2011, the

[3] *Saad v. DOES*, DCCA No. 10-AA-114, Memorandum Opinion and Judgment (March 2, 2011).

CRB remanded the case to Hearings and Adjudication for further consideration consistent with the Court's decision.

In a March 28, 2011, Compensation Order on Remand (COR), Administrative Law Judge (ALJ) Heather Leslie found that based on leave records for the period December 23, 2007 through May10, 2008, Claimant was entitled to disability benefits equivalent to 49 hours of sick leave and 26 hours of annual leave reimbursed or restored. The ALJ ordered that Claimant be paid temporary total disability benefits equivalent to 49 hours sick leave and 26 hours of annual leave or, in the alternative, restore 49 hours of sick leave and 26 hours of annual leave. In addition, Claimant was awarded medical treatment as recommended by her treating physician.[4] There is no record of Claimant appealing this award.

While participating in a pre-hearing conference on November 21, 2011, Claimant alleged that Employer had failed to pay the benefits as ordered in the March 28, 2011 COR. Claimant was instructed by ALJ Fred Carney that the proper course of action was to file a motion for default pursuant D.C. Code § 1-623.24(g). On the same date, Claimant filed "A Motion of Employer's Default of the Workers' Compensation Board Order on Remand dated 03/28/2011 [sic] and D.C. Court of Appeals Judgment dated 03/02/2011 [sic]."[5]

In his motion for default, Claimant sought a default of the March 28, 2011 COR for Employer's failure to pay timely in accordance with that order. Claimant asserted that while Employer was ordered to pay him 75 hours as temporary total disability benefits, Employer instead paid him 33 hours as TTD and restored 42 hours to his accumulated leave.

After reviewing and quoting from the DCCA order of March 2, 2011 and the COR, ALJ Carney determined that Claimant had failed to show that Employer had defaulted on the COR. The ALJ reasoned that the COR gave Employer the option to pay Claimant in wage benefits or leave reimbursement. Accordingly, Claimant's request for an order declaring default was denied.[6] Claimant timely appealed on April 27, 2012, with no record of Employer filing in opposition.

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

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[4] *Saad v. DOES*, AHD PBL No. 01-073B, DCP No. 761005-0009-2001-0001 (March 28, 2011).

[5] This information is contained in footnote 1 of the "*Order Denying a Supplemental Compensation Order on Default*" that is the subject of the instant appeal.

[6] *Order Denying a Supplemental Compensation Order on Default*, AHD No. PBL 01-073B, DCP No. 761010-006-0001 (March 29, 2012).

conclusions drawn from those facts are in accordance with the applicable law.[7] Section 1-623.28(a) of the District of Columbia Government Merit Personnel Act of 1978, as amended, D.C. Official Code § 1-623.1 *et seq*. ("Act"). Where, as in this case, we are presented with an appeal for which there is no evidentiary record to review, but strictly presented with an issue of law, the Board will affirm the order under review unless it is determined to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with applicable law.[8]

In denying his request for a default, Claimant asserts that Judge Carney committed error because Employer was ordered to pay him 75 hours of TTD but elected instead to pay him 33 hours of TTD and restored 42 hours of leave, which will cause him to pay taxes again when he uses the leave and the restored leave does not constitute disability benefits. Claimant also asserts as error the failure of Employer to provide medical treatment as ordered by the March 28, 2011 COR.

After the CRB affirmed the May 18, 2009 COR awarding Claimant disability benefits equivalent to 42 hours of leave or the restoration of 42 hours of leave taken due to his work injury, the DCCA left undisturbed that part of the CRB's decision affirming the ALJ's determination that Claimant was entitled to disability benefits only for those days he did not work during the period he placed in a non-work status by his treating physician. However, the Court remanded for a recalculation of the leave to be restored, or recalculation of the disability benefits to be paid, during the period of 2007-2008 when his treating physician said he was unable to work.

The Court noted that even Employer had conceded that a miscalculation had occurred insofar as it was actually 49 hours and not 42 hours of sick leave that Claimant had used, in addition to 26 hours of annual leave. The Court went on to say:

> Neither the ALJ nor the CRB suggested any reason why the restoration of leave should be limited to sick leave and not include annual leave (which the record suggests petitioner used when his sick leave was running low), and the Employer likewise has suggested no reason why petitioner should not have his annual leave restored for the period when he was unable to work. Moreover, as described above, petitioner's initial award of temporary total disability benefits was based in part on his use of "personal leave" (not just "sick" leave). In short, the ALJ's conclusion that petitioner should be awarded only 42 hours of leave does not flow rationally from the finding that he is entitled to disability benefits for the period when, according to his treating physician, he was unable to work and in fact did not work. We conclude that a remand is required for recalculation of the leave hours to be restored (or recalculation of the disability benefits to be paid).[9]

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[7] "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. District of Columbia Department of Employment Services*, 834 A.2d 882 (D.C. 2003).

[8] *See* 6 Stein, Mitchell & Mezines, *Administrative Law*, § 51.93 (2001).

[9] *Saad v. DOES*, DCCA No. 10-AA-114, p. 5.

On remand, Judge Leslie conducted a review of Claimant's leave records in evidence and found that during the period of December 23, 2007 through May 10, 2008, Claimant was entitled to disability benefits equivalent to 49 hours of sick leave and 26 hours of annual leave[10] (or restoration of said leave) taken as a result of the work injury.[11] Employer was ordered to pay Claimant TTD benefits equivalent to 49 hours of sick leave and 26 hours of annual leave or, in the alternative, restore the respective number of leave hours, as well as medical treatment recommended by the treating physician, Dr. Muawwad.

In response to Claimant's motion for default, Employer provided Judge Carney with documentation that it paid Claimant TTD benefits equivalent to 33 hours of leave and restored 42 of accumulated leave. Employer asserted that it had the option to compensate Claimant in this manner and thus was in compliance with the March 28, 2011 COR.

Accordingly, Judge Carney reasoned:

> Considering the arguments of both parties, it is determined that Claimant has failed to show that Employer has defaulted on the March 28, 2011 Compensation Order on Remand. Turning aside first to clarify the jurisdiction of this forum, it is well settled that the Administrative Law Judge cannot enforce the orders of a higher authority. Therefore no default can be entered on behalf of the DC Court of Appeals and the Compensation Review Board. The undersigned understands that Claimant is attempting to enforce the order of Judge Leslie. That Order plainly gives Employer the option to pay Claimant in wage benefits or leave reimbursement. It did not address the issue of double taxation as raised by Claimant and Claimant presented no legal authority to support his contention that he is entitled to have his benefits restored in the form of wage loss benefits.[12]

Judge Carney is correct in making his determination that Claimant has failed to show that Employer has defaulted on the March 28, 2011 COR, albeit for the wrong reasons. D.C. Code § 1-623.24(g)[13] imposes a sanction where the government fails to timely begin payment of an ordered award. Claimant makes no such assertion in this case. Rather, Claimant seeks an order declaring default because Employer paid him, ostensibly in a timely manner, in a form inconsistent with the COR that will also subject him to additional taxes.

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[10] The ALJ initially misstated the allocation of leave hours as "26 hours of sick leave and 49 hours of annual leave" but correctly stated it as "49 hours of sick leave and 26 hours of annual leave" in the conclusion of law and the order.

[11] *Saad v. DOES*, AHD PBL No. 01-073B, p. 5.

[12] *Id*.

[13] D.C. Official Code § 1-623.24(g) provides in relevant part: "If the Mayor or his or her designee fails to make payments of the award for compensation as required by subsection (a-3)(1), (a-4)(2), or (b)(3) of this section, the award shall be increased by an amount equal to one month of the compensation for each 30-day period that payment is not made. . . . "

We also note that while Judge Carney correctly states that the March 28, 2011 COR gives the Employer the option of paying Claimant in wage benefits **or** leave reimbursement, he is incorrect in his statement that "Claimant presented no legal authority to support his contention that he is entitled to have his benefits restored in the form of wage loss benefits" because this is the essence of the COR order and the opinion from the DCCA. However, neither opinion orders payment exclusively in the form of wage loss benefits as asserted by Claimant or a combination of the two as elected by Employer.

It was determined in the COR that Claimant was entitled to a total of 75 hours, either in the form of TTD benefits **or** the restoration of the same number of hours to his accumulated leave and there is no dispute as to this number. As can be seen also from the quoted passage above from the DCCA, this matter was returned for recalculation of the leave hours to be restored **or** recalculation of the disability benefits to be paid. Both orders contemplated payment of the 75 hours as either restoration of the leave **or** TTD benefits, with no implied or express option of a combination of the two.

As there is no assertion by Claimant that payment pursuant to the March 28, 2011 COR was untimely, there is no basis under D.C. Code § 1-623.24(g) to impose a penalty and enter an order declaring default. In addition, insofar as Claimant has been made whole for the 75 hours of "personal leave" he used, albeit in the form of 33 hours of TTD benefits and the restoration of 42 hours of accumulated leave, we are aware of no provision in the statute that has been contravened.[14] Accordingly, while Claimant's motion for an order declaring default for the form of payment made was denied for the wrong reason, it is deemed to be harmless error. The declaring of a default is a timeliness issue and as timeliness was not raised, Claimant's AFR, as filed, would fail and would be dismissed.

Claimant next argues that Judge Carney erred in not granting his motion for a default with regard to his claim that Employer has failed to provide medical treatment by Dr. Muawwad as ordered by the March 28, 2011 COR. Claimant argues that Dr. Muawwad has retired and that his treatment has now been undertaken by another member of the same practice, Dr. Rida Azer; with some of Dr. Azer's bills being paid and others not. After review, we find merit in this argument and remand for further consideration.

In addressing this issue, Judge Carney made the following finding:

> I find Employer has provided Claimant with payment of related medical expenses related to his accepted work injury to the exclusion of non-work related treatment or treatment by unauthorized physicians.

Based on this finding, Judge Carney reasoned:

[14] As to Claimant's argument that the restoration of 42 hours of accumulated leave would result in him having to pay taxes again when the leave is taken, we are not persuaded. Claimant's original claim was for the restoration of the personal leave he was forced to take when he was unable to work due to his work injury. The DCCA specifically remanded this case for a recalculation of the leave hours to be restored and only parenthetically allowed for the alternative recalculation of disability benefits to be paid. We can therefore reasonably infer that Claimant's argument of "double taxation" would not have passed scrutiny with them also.

> As to the medical bills, Employer posits that it has paid the authorized medical treatment as ordered. In support of its' [sic] contention Employer filed the March 12, 2010 [sic] which indicates that Employer through Sedgwick authorized a list of medical procedures that included EMG/NCV BLE. MRI L-SPINE, and others. (Attachment 1) Employer posits that Claimant wants to be reimbursed for an MRI ordered by a doctor selected by Claimant who was not an authorized care provider as required by the Act. The March 28, 2011 order grants Claimant the payment of medical treatment by Dr. Muawwad.[15]

We find the ALJ's discussion problematic as it references a March 10, 2010 document that is apparently appended to the order as Attachment 1 but is not available for our review and there is also reference to treatment by unnamed unauthorized physicians. While Claimant appended various documents to his AFR, we are not at liberty to entertain exhibits *de novo*, as all documentary exhibits must be properly identified for the record and admitted into evidence by the ALJ and accompany the certified record when requested from Hearings and Adjudications.

While the March 28, 2011 COR granted Claimant medical treatment recommended by Dr. Muawwad, the treating physician, there is no apparent recognition by Judge Carney that the doctor has retired and Claimant's ongoing treatment assumed by another member of the medical practice, Dr. Azer. Judge Carney's discussion appears to only recognize treatment by Dr. Muawwad and deny treatment by "unauthorized physicians." Without further details we are unable to determine whether this is correct. On remand, the ALJ is to identify the documents admitted into evidence that form the basis for his ruling and also identify the "unauthorized physicians" who have treated Claimant so we can properly assess whether denying the motion for a default on this issue is supported by substantial evidence in the record.

CONCLUSION AND ORDER

The denial of Claimant's motion declaring a default based on the form of payment made pursuant to the March 28, 2011 COR but not as to the timeliness of the payment in accordance with D.C. Code § 1-623.24(g) is affirmed. The denial of Claimant's motion based on the nonpayment of medical bills is not supported by substantial evidence in the record and thus not in accordance with the law. Accordingly, the March 29, 2012 Order Denying A Supplemental Compensation Order On Default is VACATED IN PART AND REMANDED for further consideration in keeping with this Decision and Remand Order.

FOR THE COMPENSATION REVIEW BOARD:

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HENRY W. MCCOY
Administrative Appeals Judge

January 16, 2013
DATE

[15] *Saad v. DOES*, AHD PBL No. 01-073B, p. 6.