

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR



F. THOMAS LUPARELLO
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 14-088

SAMUEL MURRAY,
Claimant–Petitioner

v.

DISTRICT OF COLUMBIA DEPARTMENT OF YOUTH REHABILITATION SERVICES
Self-Insured Employer—Respondent

Appeal of an June 13, 2014 Compensation Order issued by
Administrative Law Judge Fred D. Carney, Jr.
AHD No. PBL 13-037, DCP No. 30100886102-0001

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2014 NOV 26 PM 12 26

Johnnie Louis Johnson III, for the Petitioner
Kevin Turner for the Respondent

Before: HEATHER C. LESLIE, MELISSA LIN JONES, and JEFFREY P. RUSSELL, *Administrative Appeals Judges.*

HEATHER C. LESLIE, for the Compensation Review Board.

DECISION AND REMAND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

Claimant sustained a work-related injury on July 30, 2010 to his left shoulder. The then Office of Risk Management Disability Compensation Program, now Public Sector Workers' Compensation Program, accepted the left shoulder claim and awarded wage loss and medical benefits through November 2, 2010. Claimant subsequently returned to work.

Claimant treated with Dr. Sankara Rao Kothakota and was diagnosed with a torn rotator cuff with impingement syndrome of his left shoulder. Claimant continued to treat with Dr. Kothakota. Because of persistent pain, Claimant was evaluated by Dr. Christopher Magee on February 27, 2013. Dr. Magee recommended surgical intervention and opined Claimant could only work in a sedentary capacity.

Employer sent Claimant to an independent medical evaluation (IME) with Dr. Louis Levitt on two occasions. On March 29, 2011, Dr. Levitt took a history of the injury and medical treatment. Dr. Levitt also performed a physical examination and reviewed objective testing. Dr. Levitt opined

Claimant was not a surgical candidate and could return to work without restrictions. At the last examination on February 26, 2013, Dr. Levitt noted Claimant would not allow him to perform a complete examination. Dr. Levitt terminated the examination and offered no opinion whether surgery was appropriate.

On February 7, 2013 a Notice of Determination (NOD) was sent to Claimant, advising him that because indemnity benefits had not been paid for a period of over two (2) years, no further indemnity payments would be paid. This NOD was sent in response to Claimant's correspondence dated January 7, 2013.

Claimant requested a Formal Hearing, seeking temporary total disability benefits from December 17, 2012 to the present and continuing, surgical repair to the left rotator cuff, injections and medications. The issues to be adjudicated were whether Claimant's claim was barred pursuant to 7 DCMR § 120.5(a), the nature and extent of Claimant's disability, and whether Claimant's current need for medical treatment was medically casually related to the July 30, 2010 work injury. On June 13, 2014, a CO was issued denying Claimant's request for temporary total disability benefits and surgery. The CO further stated that Claimant's request for disability benefits was not barred by 7 DCMR § 120.5(a)¹ and granted Claimant's request for medication.

Claimant timely appealed the decision. Claimant argues the CO is "totally inconsistent with the medical and testimonial evidence presented at the hearing." Claimant's argument at 1. Employer opposes the appeal, stating the CO is supported by the substantial evidence in the record.

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 conclusions drawn from those facts are in accordance with the applicable law.² Section 1-623.28(a) of the District of Columbia Government Merit Personnel Act of 1978, as amended, D.C. Code § 1-623.1 *et seq.* ("Act").

Prior to addressing Claimant's arguments on appeal, we must determine whether AHD had jurisdiction based upon the NOD issued.

In summarizing the February 7, 2013 NOD, the ALJ correctly noted:

WCP did not issue an NOD specifically denied payment for the surgery on the grounds that the procedure is not medically necessary as a result of that accident.

CO at 3.

¹ Employer did not appeal the finding that Claimant's request for temporary total disability benefits was not barred by 7 DCMR § 120.5(a).

² "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. DOESs*, 834 A.2d 882 (D.C. 2003).

A review of the evidence shows that the February 7, 2013 NOD denied Claimant's request solely based upon 7 DCMR § 120.5.³ No other reason was stated as to why Claimant's claim was denied.⁴ Thus, the only proper issue before the ALJ was whether Employer's denial of Claimant's TTD based upon § 7-120.5 was proper.

As we have held previously, the plain language of §1-623.24(b)(1) of the Act requires "the issuance of a decision" by the Employer before an injured worker may request a formal hearing:

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 [DCP] Determinations by an ALJ in [the Department of Employment Services ("DOES")]. As a general principle, the only matters that DOES has authority to review are matters upon which [DCP] 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 other words, the Act is clear that the actual issuance of a Final Determination, as opposed to a constructive denial, is a prerequisite to AHD's adjudication of the request for benefits:

While the courts have broad grants of authority to adjudicate matters, the adjudicatory authority of an administrative agency is limited by an enabling act. Under the Act governing this matter, a claim for benefits for a work-related injury must first be made to the Public Sector Division of the Office of Workers' Compensation, that is, the OBA. See D.C. Official Code §1-623.24(a); 7 DCMR §§104, 105, 106, 199. The OBA, now the TPA, is responsible for conducting necessary investigations into an injured worker's claim and then making an initial determination either to award or deny disability compensation benefits for that claim. It is only if the injured worker is dissatisfied with the determination the worker can request a hearing before the ALJ. *See* D.C. Official Code §1-623.24(b)(1). Thus, an ALJ is without ancillary authority to adjudicate claims for compensation that have not been first presented to the OBA, or the TPA, for investigation and resolution."

³ 7 DCMR § 120.5 states in relevant part,

The Program shall not begin payment of indemnity compensation to the employee again if three hundred sixty-six (366) days or more has passed since:

- (a) The employee received a payment of compensation; or,
- (b) A final order was issued by a judicial entity regarding the employee's indemnity payments.

⁴ As Employer states in argument, Employer did not consider the merits of Claimant's case based upon its belief that Claimant's request for disability benefits was barred by § 7-120.5.

Sisney v. D.C. Public Schools, CRB No. 08-200, AHD No. PBL 08-066 (July 2, 2012) (emphasis in original), citing *Minter v. D.C. Office of the Chief Medical Examiner*, CRB Nos. 11-024 and 11-035, AHD No. PBL073A, DCP No. 761035-0001-2006-0014 (December 15, 2011).

The ALJ considered this issue first and determined:

Under a plain reading of the applicable regulation, DCMR § 7-120.5 (a), the Claimant received a "payment of compensation" during July 2013, before the August 5, 2013 pre-hearing conference, at the time that WCP determined that he was entitled to unpaid benefits and issued an additional payment of benefits. Although the payment in July 2013 occurred after the application was received by WCP on January 11, 2013, after the issuance of the NOD denial order on February 7, 2013, and after the application for review was filed on March 1, 2013, the requirement for allowing a recurrence claim under the regulation has been satisfied. Employers' failure to pay benefits required by its earlier acceptance of the claim, while the Claimant and his counsel continued to ask for payment, resulted in a payment of compensation within 366 days.

CO at 9.

The Employer did not appeal this finding. As Employer concedes in argument, ORM voluntarily paid an additional \$5,766.00 in temporary total disability benefits on July 17, 2013 based on the July 30, 2010 claim. Employer's argument at 3. We find the above analysis to be supported by the substantial evidence in the record and in accordance with the law.

However, we find the ALJ committed reversible error by addressing issues that were not properly before the ALJ. The only issue addressed in the NOD was whether Claimant's receipt of temporary total disability benefits was barred by 7 DCMR § 120.5. As stated above, AHD is constrained to address only the issues raised and decided in the NOD.

Because Employer issued the NOD based on one issue—whether additional benefits were barred by 7 DCMR § 120.5. The Employer cannot rely upon any other defense at the Formal Hearing. Upon remand, the ALJ shall enter an award in favor of the Claimant reinstating his temporary total disability benefits.

Finally, Claimant argues that the ALJ erred in not awarding attorney's fees but fails to point to any authority in support of his argument. As we stated in *Bonaparte v. DC Office of Tax and Revenue* CRB No. 13-152, AHD No. PBL 12-047 (February 12, 2014),

The regulations governing the [Public Sector Workers' Compensation Act], however, do provide that "Claims for representation of a claimant shall be submitted in writing to the ALJ, if a hearing has been requested, within 30 days of the issuance of a decision under subsection 130.12." 7 DCMR § 132.1

7 DCMR § 130, including § 130.12, governs the hearing process before DOES ALJs. Section 130.12 provides that, following a formal hearing, "the ALJ shall then issue an

order to reverse, modify, affirm or remand a determination rendered by the claims examiner". Thus, under the regulations, a claim for an attorney's fee must be filed within 30 days of the *issuance* of a Compensation Order. There is no provision either permitting or requiring the extension of that time period. There is no regulatory or statutory provision permitting or requiring that the fee petition be filed upon the expiration of the time for filing an appeal, nor is there any provision in the PSWCA or the regulations permitting or requiring that the time for filing a request for an attorney's fee be made only after the Compensation Order becomes final.

However, where a fee is sought to be assessed against the employer following the "successful prosecution of a claim" that has been denied initially by the Public Sector Workers' Compensation Program (PSWCP), but granted ultimately by an ALJ following a formal hearing, D.C. Code § 1-623.27 provides:

If a person utilizes the services of an attorney-at-law in the successful prosecution of his or her claim under § 1-623.24 (b) [the formal hearing process before an ALJ], or before any court for review of any action, award, order, or decision, there shall be awarded, in addition to the award of compensation, in a compensation order, a reasonable attorneys fee, not to exceed 20% of the actual benefit secured, which shall be paid directly by the Mayor or his designee to the attorney for the claimant in a lump sum within 30 days after the date of *the compensation order*. (Italics added).

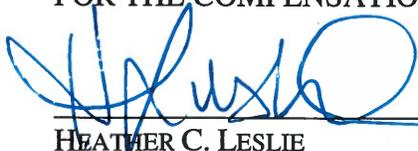
This language is somewhat ambiguous, inasmuch as it refers to not one but two "compensation orders", the first being "the award of compensation" following the formal hearing, and the second being "a compensation order" for the attorney's fee award itself. While there is no time period set forth in which a fee petition is required to be filed, it is mandated that the fee itself be paid within 30 days of "the compensation order". Despite the fact that the D.C. Code § 1-623.27 (c) makes acceptance of a fee that is not first approved as part of "an order" a criminal misdemeanor, the procedural details as to how such an order is obtained are largely left unstated. Obviously, to not run afoul of the law, a request for such an award of an attorney's fee is a necessity. Since the mandate of payment of the attorneys fee award requires that it be made "within 30 days of the compensation order", the most sensible meaning of the "the compensation order" is the separate "compensation order" awarding the fee.

Claimant has not properly requested for an attorney's fee within 30 days of issuance of the CO. Therefore the CRB finds Claimant's argument for an award of an attorney fee is without merit.

CONCLUSION AND ORDER

The June 13, 2014 Compensation Order VACATED and REMANDED. On remand, the ALJ shall enter an order awarding Claimant's claim for relief.

FOR THE COMPENSATION REVIEW BOARD:



HEATHER C. LESLIE
Administrative Appeals Judge

November 26, 2014
DATE