

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services
Labor Standards Bureau

Office of Hearings and Adjudication
COMPENSATION REVIEW BOARD



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CRB (Dir. Dkt.) No. 04-15

FERNANDO STANFORD,

Claimant–Petitioner,

v.

CAPITOL CARE BUILDING AND LIBERTY MUTUAL INSURANCE COMPANY,

Employer/Carrier–Respondent.

Appeal from a Compensation Order of
Administrative Law Judge Karen R. Calmiese
OHA/AHD No. 99-072A, OWC No. 295203

Eric M. May, Esquire, for the Petitioner

Chanda W. Stepney, Esquire, for the Respondent

Before JEFFREY P. RUSSELL, LINDA F. JORY and FLOYD LEWIS, *Administrative Appeals Judges*.

JEFFREY P. RUSSELL, *Administrative Appeals Judge*, for the Compensation Review Panel:

DECISION AND ORDER

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board pursuant to D.C. Official Code §§ 32-1521.01 and 32-1522 (2004), 7 DCMR § 230, and the Department of Employment Services Director’s Directive, Administrative Policy Issuance 05-01 (February 5, 2005).¹

¹ Pursuant to Administrative Policy Issuance No. 05-01, dated February 5, 2005, the Director of the Department of Employment Services realigned the Office of Hearings and Adjudication to include, *inter alia*, establishment of the Compensation Review Board (CRB) in implementation of the District of Columbia Fiscal Year 2005 Budget Support Act of 2004, Title J, the District of Columbia Workers’ Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, *codified at* D.C. Official Code § 32-1521.01. In accordance with the Director’s Directive, the CRB replaces the Office of the Director in providing administrative appellate review and disposition of workers’ and disability compensation claims arising under the District of Columbia Workers’ Compensation Act of 1979, as amended, D.C. Code Ann. §§ 32-1501 to 32-1545 (2005), and the District of Columbia Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Code Ann. §§ 1-623.1 to 1-643.7 (2005), including responsibility for administrative appeals filed prior to October 1, 2004, the effective date of the District of Columbia Workers’ Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004.

BACKGROUND

This appeal follows the issuance of a Supplemental Order from the Administrative Hearings Division (AHD) of the Office of Hearings and Adjudication (OHA) in the District of Columbia Department of Employment Services (DOES). In that Supplemental Order, which was filed on December 29, 2003, the Administrative Law Judge (ALJ) granted Petitioner's claim for a supplemental allowance commencing March 18, 2000, pursuant to D.C. Code § 32-1506, but denied Petitioner's claim for imposition of a 20% penalty for late payment of compensation due pursuant to a Compensation Order, as provided for in D.C. Code § 32-1515(f). Petitioner appealed the denial of the penalty.

As grounds for this appeal, Petitioner alleges as error that the denial of the 20% penalty was not in accordance with the law, in that the ALJ based her decision upon the fact that there was no supplemental allowance award made in the initial Compensation Order in which Petitioner was adjudged to be permanently and totally disabled issued March 18, 2003, a basis that Petitioner asserts is erroneous. Respondent opposed the appeal, asserting that the denial of the 20% penalty is in accordance with the law.

ANALYSIS

As an initial matter, the scope of review by the Compensation Review Board (CRB) and this Review Panel, as established by the Act and as contained in the governing regulations, is 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. Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §32-1501 to 32-1545 (2005), at §32-1521.01(d)(2)(A). "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 Int'l. v. Dist. of Columbia Dep't. of Employment Serv's.*, 834 A.2d 882 (D.C. 2003). Consistent with this standard of review, the CRB and this Review Panel are constrained to uphold 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 the reviewing authority might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

Turning to the case under review herein, we note that the sole issue on appeal is the denial of the requested penalty, which Petitioner's counsel erroneously refers to as one for "bad faith". *See*, Memorandum of Points and Authorities in Support of Claimant's Application for Review, page 2. No other issues are presented concerning the facts of non-payment of the supplemental allowance, or Petitioner's entitlement thereto as set forth in the Supplemental Order.

Petitioner alleges that the ALJ's decision to deny the requested 20% penalty is erroneous as a matter of law. In so contending, Petitioner cites the plain language of the penalty statute, which reads as follows:

If any compensation, payable under the terms of an award, is not paid within 10 days after it becomes due, there shall be added to such unpaid compensation an amount equal to 20% thereof, which shall be paid at the same time as, but in addition to, such compensation ...

D.C. Code § 32-1515 (f). Petitioner argues that his entitlement to permanent total disability exists by virtue of the finding in the Compensation Order of March 18, 2003, and the entitlement to a supplemental allowance to which he is entitled by virtue of the mere passage of time pursuant to D.C. Code § 32-1506, which entitlement is one which exists “without application” under subsection (a) thereof. Petitioner goes on to cite the AHD decision in *Proctor v. John*, OHA No. 98-225B, OWC No. 295408 (March 13, 2003) in support of his position.

Respondent argues that the ALJ properly denied the penalty claim, stating as follows:

However, it was not until the March 18, 2003 Compensation Order that a determination was made regarding the date of permanency and Employer was ordered to pay permanent total disability benefits. Furthermore, the March 18, 2003 Compensation Order neither discussed nor ordered the payment of supplemental allowances. [citation to *Proctor, supra*, omitted]. Inasmuch as there had been no prior award of supplemental allowances, [the ALJ] correctly determined that Employer’s untimeliness cannot be considered a failure to pay pursuant to an award

Employer/Carrier’s Response to Claimant’s Application for Review, page 3 – 4. Review of the Supplemental Order confirms that it was the fact that the Compensation Award of March 13, 2003 “neither discussed nor ordered payment of the Supplemental Allowance benefits” that caused the ALJ to deny the request for the penalty. Supplemental Order, unnumbered page 3.

The reasoning of Respondent and the ALJ does not comport with the plain meaning of the words of the penalty provision and the words of the supplemental allowance provision; read together, the statute entitles a permanently and totally disabled worker to a supplemental allowance “without application” for the allowance where there has been a determination of permanent total disability. The payment of compensation benefits are, in this case, “under the terms of” the award contained in the Compensation Order of March 18, 2003. Nothing more than the passage of a year’s time from the date of attaining permanent total disability status was required to entitle Petitioner to the supplemental allowance. Respondent misreads the Act if it supposes that the fact that the date upon which entitlement to a supplemental allowance entitlement had already passed by the time of the *determination* of permanent total disability status, relieved it of the obligation to pay the allowance commencing the day after the date upon which Petitioner attained permanent total disability status. It is the date of that status (*i.e.*, the date of permanency), not the date of the Compensation Order that establishes that status, that is relevant to the amount of compensation benefits to which a claimant is entitled.

The denial of the 20% penalty was not in accordance with the law. Petitioner was deemed in the Compensation Order of March 18, 2003 to have been permanently and totally disabled as of March 15, 1999. Under the terms of that Compensation Order, therefore, Petitioner was entitled to a supplemental allowance as of March 16, 2000. Nothing in the Compensation Order of March 18,

2003 relieved Respondent of its obligation to pay the supplemental allowance as part of the *accrued benefits* to which Petitioner was entitled by virtue of the Compensation Order of March 18, 2003. Failure to timely pay the benefits following the issuance of the Compensation Order results in a liability for the penalty.

CONCLUSION

The Supplemental Order's denial of the 20% penalty under D.C. Code § 32-1515 (f) is not in accordance with the law, and must be reversed.

ORDER

The Supplemental Order of December 29, 2003 is hereby AFFIRMED to the extent that it awarded the requested supplemental allowance, and is REVERSED to the extent that it denied the requested 20% penalty pursuant to D.C. Code § 32-1515(f), which penalty is hereby awarded as a modification of the Supplemental Order.²

FOR THE COMPENSATION REVIEW BOARD:

JEFFREY P. RUSSELL
Administrative Appeals Judge

April 7, 2006
DATE

² The Supplemental Order contained inconsistent date references relating to the when the entitlement to the supplemental allowance commenced, which inconsistencies were not mentioned by either party in this appeal. Nonetheless, for the sake of accuracy, we also modify the date of entitlement to the supplemental allowance contained in the "Conclusions of Law" portion thereof, from March 18, 2000, and from March 15, 2000, being the date thereof referred to in the concluding sentence of the paragraph immediately preceding the "Conclusions of Law", to March 16, 2000, being the day following the one year anniversary of Petitioner's having attained permanency as established in the Compensation Order of March 18, 2003. *See, Long v. Plaza Realty Investors*, Dir. Dkt. No. 97-45, OHA No. 92-462B, OWC No. 104068 (October 14, 1998).