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 No. 09-053

SYLVESTER LEE,

Claimant–PETITIONER,

v.

DISTRICT OF COLUMBIA GENERAL HOSPITAL,

Employer–RESPONDENT.

2009 JUN 29 PM 12 03
COMPENSATION REVIEW BOARD

Appeal from a Compensation Order of
Administrative Law Judge David L. Boddie
AHD No. PBL 05-009A, DCP No. 7610140-0003-199002

Kirk D. Williams, Esq., for Petitioner

Pamela L. Smith, Esq., for Respondent

Before: E. COOPER BROWN, *Chief Administrative Appeals Judge,* JEFFREY P. RUSSELL and AMELIA G. GOVAN[1], *Administrative Appeals Judges*

AMELIA G. GOVAN, *Administrative Appeals Judge,* for the Review Panel:

DECISION AND ORDER OF REMAND

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board (CRB) pursuant to D.C. Official Code § 1-623.28, § 32-1521.01, 7 DCMR § 118, and DOES Director's Directive Administrative Policy Issuance No. 05-01 (Feb. 5, 2005), by which 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 Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Official Code § 1-623.1 *et seq.*, (the Act).

[1] Administrative Law Judge Govan is appointed by the Director of DOES as Interim Board Member pursuant to DOES Administrative Issuance No. 09-0-3 (January 29, 2009), in accordance with 7 DCMR §252.2 and Administrative Policy Issuance No. 05-01 (February 5, 2005).

OVERVIEW

On May 19, 1995, Mr. Lee suffered an accidental injury to his right upper extremity while working for the District of Columbia General Hospital. He timely filed a claim for disability compensation benefits; his claim was accepted by the Disability Compensation Program (DCP) and benefits were paid. On April 29, 2008, the DCP reduced the amount of Mr. Lee's temporary total wage replacement benefits; he filed a timely Application for Formal Hearing, seeking reversal of the DCP action, with the Administrative Hearings Division (AHD), Office of Hearings and Adjudication, District of Columbia Department of Employment Services (DOES). Prior to the evidentiary hearing date, the matter was resolved and Mr. Lee's Application for Formal Hearing was withdrawn. An Order dismissing the Application and remanding the matter to the Office of Risk Management was issued by the ALJ on August 15, 2008.

Mr. Lee's attorney filed a Petition for an award of an attorney's fee in the amount of $4,200.00 (for 17.50 hours of work) for services rendered on behalf of Mr. Lee. On September 17, 2008 the ALJ issued an Order to Show Cause; the parties filed pleadings consistent with their respective positions.[2] This appeal follows the issuance of an AHD Order, issued February 18, 2009. In that Order, the Administrative Law Judge (ALJ) denied the fee request. Said Order stated, in part, that the requested fee amount was not supported by a sum certain from which to derive the twenty percent figure (which cannot exceed twenty percent of the actual disability benefits awarded).

Counsel for Claimant-Petitioner (Petitioner) filed an Application for Review on March 16, 2009 seeking review of the AHD determination. On March 31, 2009, the Self-Insured Employer-Respondent (Respondent) filed an Opposition to the Application for Review. Petitioner, on May 15, 2009, also filed a Motion for Summary Reversal and Remand. Therein, counsel urged passage of a Decision and Order summarily reversing and remanding the February 18, 2009 AHD Order. In support of this Motion, counsel relies on *Cedric Martin v. D.C. Department of Corrections*, CRB No. 08-212, AHD No. PBL 08-004, DCP No. 761032-0003-2004-0010 (April 14, 2009). As grounds for this position, Petitioner argues that the *Martin* decision mandates ongoing payments in situations where the total fee award exceeds the actual benefits secured by the claimant at the time of the fee Petition. In opposition, Respondent argues that Petitioner did not meet its burden of producing proof of the "actual benefits secured".

Because the Order is not consistent with this Board's decision in *Martin*, it is not in accordance with the law. Accordingly, the decision below is vacated and this matter remanded for entry of an order awarding attorneys fees consistent with the CRB's decision in *Cedric Martin, supra.*

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[2] Petitioner filed a "Supplemental Reply to Show Cause" which included a DCP printout (showing compensation payments of more than $31,614.40 in wage replacement benefits which were paid since April of 2008); medical benefits were not shown thereon.

DISCUSSION AND ANALYSIS

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. Official Code § 1-623.01, *et seq.*, at § 1-623.28(a), and *Marriott International v. D. C. Department of Employment Services*, 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, the record includes Petitioner's January 30, 2009 supplemental submission, in response to the ALJ's Show Cause Order, of evidentiary documentation of Mr. Lee's receipt of more than $31,000.00 in wage replacement benefits since April of 2008. Consistent with the CRB's recent decision in *Watson v. D.C. Dept. of Public Works*, CRB No. 09-019, AHD No. PBL-08-065A (February 9, 2009), the ALJ attributed Counsel's securing of benefits on Petitioner's behalf by way of stipulation as constituting the successful prosecution of Petitioner's claim within the meaning of D.C. Official Code § 1-623.27(b). However, the Order of the ALJ states:

> . . . this agency is mandated to grant an attorney's fee award based upon a fixed benefit amount, in order to ensure that a reasonable attorney's fee is awarded, which does not exceed 20% of the actual disability benefits obtained, ... Although this agency recognizes that Counsel has secured continuing and future benefits for claimant pursuant to a Stipulation agreed to by the parties, it is still noted that Counsel's requested fee amount of $4,200.00 is not supported by a sum certain from which to derive the 20% required in order to award a reasonable attorney's fee.

The determination below is in error. Counsel submitted evidentiary support for the sum certain reflecting benefits secured for Petitioner herein. This Board's decision in *Martin, supra*, is applicable to the instant appeal. Therein, it was noted that the attorney fee provisions of D.C. Official Code § 1-623.24(g) of the Public Sector Act are virtually identical to the attorney fee provisions of the D.C. Workers' Compensation Act, at D.C. Official Code § 32-1530(f), which has been interpreted by this agency "from time immemorial" to permit "recovery of 20% of post-judgment compensation received by a claimant as a lien against such future payments, up to the maximum allowable fee recovery to which the claimant's attorney is otherwise entitled." *Id.* at 3. The Board in *Martin* similarly interpreted Section 1-623.24(g). As the CRB therein stated, "We discern nothing within the public sector act that dictates following any other course than that endorsed under the private sector act. . . . [A]ttorney's fee awards are to be calculated as a percentage of the entire amount of the benefits award received by the claimant." *Id.* In order to effectuate this goal in situations where the total fee award exceeds the benefits secured by the claimant up to the issuance of the fee award, the ALJ is to enter an award for 20% of the actual benefits paid. Further, according to the Board's directive, the ALJ is to order that employer pay

counsel an amount equal to 20% of each future payment of compensation (in addition to the amount paid to the injured worker) until such time as counsel has received the entire fee approved or claimant is no longer receiving compensation, whichever comes first.

Accordingly, Counsel is entitled to the requested fee.

CONCLUSION

For the foregoing reasons, the Order herein appealed is reversed and remanded for disposition consistent with this Board's decision in *Cedric Martin v. D.C. Department of Corrections*, CRB No. 08-212, AHD No. PBL-08-004, DCP No. 761032-0003-2004-0010 (April 14, 2009).

ORDER

The Order of February 18, 2009 is REVERSED, and the case is REMANDED to AHD for further proceedings consistent with this Decision and Remand Order.

FOR THE COMPENSATION REVIEW BOARD:

AMELIA G. GOVAN
Administrative Appeals Judge

June 29, 2009
DATE