

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**  
**Department of Employment Services**

**VINCENT C. GRAY**  
**MAYOR**



**LISA M. MALLORY**  
**DIRECTOR**

**COMPENSATION REVIEW BOARD**

**CRB No. 12-118**

**TRACEY TALBERT,**  
**Claimant–Respondent,**

v.

**DISTRICT OF COLUMBIA CHILD AND FAMILY SERVICES AGENCY,**  
**Employer–Petitioner.**

Appeal from a Compensation Order of  
The Honorable Fred D. Carney  
AHD No. PBL 09-034A, DCP No. 76100600022005-0011

Andrea G. Comentale, Esquire for the Petitioner  
David J. Kapson, Esquire for the Respondent

Before HEATHER C. LESLIE,<sup>1</sup> HENRY MCCOY, and JEFFREY P. RUSSELL,<sup>2</sup> *Administrative Appeals Judges.*

HEATHER C. LESLIE, *Administrative Appeals Judge*, for the Compensation Review Board.

**DECISION AND ORDER**

**OVERVIEW**

This case is before the Compensation Review Board (CRB) on the request for review filed by the Employer - Petitioner (Employer) of the July 12, 2012, Compensation Order (CO) issued by an Administrative Law Judge (ALJ) in the Office of Hearings and Adjudication of the District of Columbia Department of Employment Services (DOES). In that CO, the ALJ granted the Claimant's request for medical treatment.

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<sup>1</sup> Judge Heather C. Leslie is appointed by the Director of DOES as an interim Board Member pursuant to DOES Administrative Policy Issuance No. 12-02 (June 20, 2012).

<sup>2</sup> Judge Russell is appointed by the Director of the DOES as an interim CRB Member pursuant to DOES Administrative Policy Issuance No. 12-01 (June 20, 2012).

## PROCEDURAL HISTORY AND FACTS OF RECORD

The Claimant sustained a work related injury to her back in an elevator accident on May 25, 2006. The Claimant immediately sought treatment and eventually underwent surgery for her work injury. The Claimant was out for a period of time because of this injury and received temporary total disability benefits. Eventually, the Claimant came under the care and treatment of Dr. Abdul Soudan for her back injury who recommended a spinal cord stimulator to treat her continued pain.

The Employer denied the Claimant's request for approval for the spinal cord stimulator in a letter dated September 20, 2010 on the letterhead of its third party administrator, Sedgwick CMS. In that document, a summary of a peer review was provided. The letter stated that the treatment was being denied as "the health care service requested does not meet established treatment standards of medical necessity." Employer's Exhibit 1.

A Formal Hearing was held on August 15, 2011. A CO was issued on July 12, 2012. In that CO, the ALJ granted the Claimant's request for medical treatment. The ALJ held that although a notice of determination had not been issued, the request for medical treatment was "deemed accepted" as the Employer failed to follow the procedures set forth in D.C. Code § 1-623.03.

The Employer timely appealed on July 26, 2012. The Employer argues the CO is not supported by the substantial evidence in the record as the ALJ did not properly consider the utilization review report. The Claimant argues the CO is supported by the substantial evidence in the record and should be affirmed.

## STANDARD OF REVIEW

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.<sup>3</sup> 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"). Consistent with this standard of review, the CRB must uphold a Compensation Order that is supported by substantial evidence, even if there is substantial evidence in the record to support a contrary conclusion, and even where the CRB might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

## DISCUSSION AND ANALYSIS

The first issue the CRB must address is whether or not the CRB has jurisdiction to entertain the current appeal. A similar case involving authorization for medical treatment was recently decided by the CRB in *Harrison v. DOES*, CRB No. 11-105, AHD No. PBL 10-083, DCP No. 761032-0003-2006-0018 (June 26, 2012). In *Harrison*, the Claimant sought an award before the Office of Hearings and Adjudications authorizing epidural injections, which the Employer denied. The

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<sup>3</sup> "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).

Employer denied the requested treatment on Sedgwick letterhead stating that the requested treatment was not medically necessary, similar to the case at bar.

The CRB noted that D.C. Code § 1-623.23 (a-2)(4) states,

Disputes between a medical care provider, employee, or District of Columbia government on the issue of necessity, character, or sufficiency of the medical care or service furnished, or scheduled to be furnished . . . shall be resolved by the Mayor upon application for formal hearing by the District of Columbia government, employee, or medical provider. The decision of the Mayor may be reviewed **by the Superior Court of the District of Columbia**. The decision may be affirmed, modified, revised, or remanded in the discretion of the court. The decision shall be affirmed if supported by substantial competent evidence on the record. (Emphasis added).

The CRB went on to state,

This provision has rarely been the subject of cases brought to the Compensation Review Board (CRB). We can only find four: *Ashton v. D.C. Department of Motor Vehicles*, CRB No. 11-113 (April 30, 2012), *Lyles v. D.C. Department of Mental Health*, CRB No. 10-200 (August 23, 2011), *Lewis v. D.C. Public Schools*, CRB No. 10-110 (September 10, 2010), and *Tinsley v. D.C. Office of the State Superintendent of Education*, CRB No. 11-051 (January 5, 2011). The first three of these cases dealt with the fact that § 1-623.23 (a-2)(4) has been amended to remove language making mandatory the application of the "treating physician preference", and did not involve anything having to do with utilization review or the reasonableness and necessity of medical care.

*Tinsley* did deal with an appeal which related to a claim involving reasonableness and necessity and utilization review. However, in that case, the PSWCP took the position that the Sedgwick CMS letter advising the employee of the denial of medical care was not a "Notice of Determination [footnote omitted]," a position that the ALJ had accepted, and to which acceptance the CRB deferred. It was decided, therefore, that the ALJ's authorizing the surgery was not in accordance with the Act, because there had been no Notice of Final Determination, hence the ALJ was without jurisdiction to hear the claim.

Our research fails to reveal any Director's Decision or District of Columbia Court of Appeals decision in which the provision is cited.

Although *Tinsley* assumed that the CRB had jurisdiction over ALJ decisions regarding reasonableness and necessity and utilization review under the private sector Act, we are unaware of any prior authority in which the question of the CRB's jurisdiction over appeals from decisions of "the Mayor upon application for formal hearing" arising under § 1-623.23(a-2)(4) was addressed directly.

That phrase, "the Mayor upon application for formal hearing", in this context, can

only be referring to § 1-623.24(b)(1), where a person not satisfied with a decision made by the Public Sector Workers' Compensation Program (PSWCP) with regards to a claim for benefits under the Act may seek resolution of disputes at "a hearing on the claim before a Department of Employment Services Disability Compensation Administrative Law Judge." That is the only type of "formal hearing" referenced anywhere in the Act. And that is precisely the route this claim has taken: a utilization review decision to deny the requested medical care was brought to an Administrative Law Judge in DOES by way of an application for formal hearing filed by the employee, Ms. Harrison.

While § 1-623.24 (b)(1) contains within it reference to appeals pursuant to § 1-623.28 (a) (governing agency review of ALJ decisions in public sector workers' compensation claims), § 1-623.23 (a-2)(4) does not. The only reference to appeals of "reasonableness and necessity" decisions following utilization review disputes that are brought to a formal hearing vests review authority not in DOES, but in the Superior Court of the District of Columbia.

Under the plain, unambiguous and clear language of § 1-623.23 (a-2)(4), given that appellate review authority is vested elsewhere, the CRB lacks jurisdiction to consider an appeal of a decision following a formal hearing on issues pertaining to "necessity, character, or sufficiency of medical care furnished, or scheduled to be furnished, or fees charged by the medical care provider" in public sector workers' compensation cases.

Accordingly, we have no choice but to dismiss this appeal as being beyond our jurisdiction.

*Harrison, supra* at 3-4.

Similar to *Harrison*, we are constrained to dismiss the appeal as the issue is beyond our jurisdiction.

ORDER

The application for review is **DISMISSED**.

FOR THE COMPENSATION REVIEW BOARD:

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HEATHER C. LESLIE  
*Administrative Appeals Judge*

October 2, 2012  
DATE

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