

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA M. MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD
CRB No. 12-166

RAYMOND WHITE,
Claimant-Respondent,

v.

DISTRICT OF COLUMBIA PARKS AND RECREATION,
Employer-Petitioner.

Appeal from a Compensation Order of
Administrative Law Judge Fred D. Carney, Jr.
AHD No. PBL99-039E, DCP No. 002295LT4PARK-000644

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2012 DEC 28 PM 1 15

William J. Howard, Esquire, for the Claimant-Respondent
Frank McDougald, Esquire, for the Employer-Petitioner

Before MELISSA LIN JONES, LAWRENCE D. TARR, and JEFFREY P. RUSSELL,¹ *Administrative Appeals Judges*.

MELISSA LIN JONES, *Administrative Appeals Judge*, for the Compensation Review Board.²

DECISION AND REMAND ORDER

ISSUES ON APPEAL

1. Did the Office of Hearings and Adjudication ("OHA") have jurisdiction over Mr. White's claim?
2. Is the September 18, 2012 Compensation Order supported by substantial evidence and in accordance with the law?

¹ Judge Russell has been appointed by the Director of the Department of Employment Services as a temporary CRB member pursuant to Administrative Policy Issuance No. 12-01 (June 20, 2012).

² Jurisdiction is conferred upon the Compensation Review Board ("CRB") pursuant to D.C. Code §1-623.28, 7 DCMR §118, and the Department of Employment Services Director's Administrative Policy Issuance No. 05-01 (February 5, 2005).

FACTS OF RECORD, PROCEDURAL POSTURE, AND ANALYSIS³

In 1981, Mr. Raymond White was injured in a work-related motor vehicle accident. His claim for disability compensation benefits was accepted by the Disability Compensation Program (“DCP”).⁴

In April 2003, Mr. White was scheduled to participate in vocational rehabilitation. His sessions were to begin on May 3, 2004, but he failed to attend that first session. In response, a letter was sent to Mr. White indicating that he was not in compliance and that it was imperative he attend vocational rehabilitation. Mr. White continued to miss sessions until May 14, 2004 when a letter was sent informing him that he was being terminated from the vocational rehabilitation program for failure to cooperate.

On June 4, 2004, DCP issued a Notice of Intent to Suspend Disability (“Notice”). The exact title of this document cannot be ascertained because the only copies available to the CRB are blank on the right-hand side of every page.

On July 16, 2004, DCP may have faxed another copy of the Notice to Mr. White’s attorney. Employer asserts it did so; Mr. White is silent as to receipt of a July 16, 2004 fax.

On September 3, 2004, Mr. White filed a request for a formal hearing before OHA. He withdrew that request but filed another request in 2007. The 2007 request also was withdrawn, and a third request was filed in 2009.

On July 9, 2009, Judge Henry W. McCoy convened a formal hearing and requested a copy of the Final Determination⁵ that would give OHA jurisdiction over Mr. White’s claim. “The only document repeatedly filed by Claimant has been an illegible copy of the notice of intent to suspend benefits.”⁶ Judge McCoy held that the illegible Notice dated June 4, 2004 was not a Final Determination sufficient to confer jurisdiction upon OHA:

Claimant was advised of the requirement to obtain and submit the final determination prior to filing a subsequent Application for Formal Hearing (AFH) and that he should cease and desist from filing any further applications until said document was in-hand.

³ The scope of review by the CRB is limited to making a determination as to whether the factual findings of the appealed 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. Code §1-623.01 et seq., at §1-623.28(a). Consistent with this standard of review, the CRB is constrained to uphold a Compensation Order that is supported by substantial evidence, even if there also is contained within the record under review substantial evidence to support a contrary conclusion and even if the CRB might have reached a contrary conclusion. *Marriott International v. DOES*, 834 A.2d 882, 885 (D.C. 2003).

⁴ Effective October 1, 2010, the Disability Compensation Program’s name was changed to the Public Sector Workers’ Compensation Program (“PSWCP”).

⁵ The term “Final Determination” is used generically to refer to any final decision rendered by PSWCP including but not limited to a Denial of Award of Compensation Benefits, a Notice of Loss of Wage Earning Capacity, or a Notice of Intent to Suspend or to Terminate Disability Compensation Benefits.

⁶ *White v. D.C. Department of Parks and Recreation*, AHD No. PBL99-039E, DCP No. 002295 LT4-PARK000644 (July 10, 2009).

Agency counsel was urged to assist in this endeavor. It is difficult for the undersigned to comprehend how the ORM/DCP can justify the obvious and blatant disregard for the injured employee by not issuing a final determination in this matter when the notice of intent was issued and benefits were suspended on or about July 6, 2004. It should not take the government five (5) years to make and issue a final decision.

However, insofar as Claimant does not have a notice of final determination as required to proceed to a formal hearing, for good cause shown, it is hereby ORDERED that the Formal Hearing scheduled for July 9, 2009 was cancelled; Claimant's February 17, 2009 AFH is hereby DISMISSED WITHOUT PREJUDICE; and, the case is REMANDED to the Disability Compensation Program for such further action as may be warranted (i.e., the issuance of a Notice of Final Determination) and with the right to Claimant to re-file at that time.^[7]

Employer asserts it faxed the Notice to Mr. White's attorney on July 16, 2004; however, evidence supporting this position, if it exists, should have been presented at the July 2009 formal hearing to support Employer's jurisdictional argument at that time. It was not, and neither party appealed Judge McCoy's Order. Thus, the Order's holding that as of July 9, 2009 OHA did not have jurisdiction because DCP had not issued a Final Determination constitutes the law of the case.

The review of this issue, however, cannot stop there. On March 2, 2012, the PSWCP issued a letter reiterating its position that

[t]he June 4, 2004 notice informed you that your benefits were being suspended for failure to participate in vocational rehabilitation, and that if you disputed this conclusion and wished to request reconsideration, "you must act now." The notice went on to state that your options for appeal included filing for reconsideration, in which case your benefits would continue pending reconsideration, or filing for a hearing before the Administrative Hearings Division at the Department of Employment Services, in which case your benefits would not continue pending the appeal. The notice then gave you specific instructions on how to proceed with an appeal, including the deadlines for doing so. You were required to file for reconsideration or for a hearing with [*sic*] thirty (30) days.

[The Office of Risk Management] has no record of your filing for reconsideration of the June 4, 2004 notice. According to a note in the file, as of September 9, 2004, you had not filed for reconsideration, despite the fact that the Program extended your benefits for two additional pay periods in anticipation of your doing so, based upon conversations with your attorney. According to the records of the Office of Hearings and Adjudication, you filed an application for formal hearing (AFH) on September 3, 2004, ninety-one (91) days after the deadline, and on November 9, 2004 you voluntarily withdrew the AFH. You re-filed the AFH on June 20, 2007, but never filed a pre-hearing order or otherwise prosecuted that case and on August 27, 2007, the second AFH was dismissed. You filed again on February 17, 2009 and the hearing that followed resulted in the July 10, 2009 order described above.

⁷ *Id.*

Pursuant to the Public Sector Workers' Compensation Program statute and regulations, once an eligibility determine (ED) issued "the ED is effective unless the employee succeeds on a request for reconsideration under section 3134 or the Program revises the ED." 7 DCMR 3132.10. Thus, your failure to timely file for reconsideration made the June 4, 2004 notice a final notice of determination.

PSWCP's March 2, 2012 letter appears to be an attempt to overrule Judge McCoy's Order holding that the June 4, 2004 Notice is not a Final Determination. PSWCP is without authority to attempt such an act.

Furthermore, in response to a petition for mandamus filed with the D.C. Court of Appeals, the PSWCP represented to that tribunal that the March 2, 2012 letter is the Final Determination Mr. White was seeking in order to pursue his claim before OHA:

On further consideration of the petition for writ of mandamus, this court's January 13, 2010, order directing respondents to file a response, respondents' response, and it appearing that on March 2, 2012, the Office of Risk Management provided petitioner with written notice of its determination, it is

ORDERED that the petition for writ of mandamus is denied as moot as petitioner obtained the requested relief.^[8]

That Employer now attempts to argue before this tribunal that the March 2, 2012 letter is not a Final Determination is inconsistent and is without merit. The CRB finds that OHA had jurisdiction to hold the July 2, 2012 formal hearing to adjudicate Mr. White's claim for restoration of disability compensation benefits.

Following the July 2, 2012 formal hearing, Judge Fred D. Carney, Jr. issued a Compensation Order granting Mr. White restoration of his wage loss benefits.⁹ Employer appeals the merits of this Compensation Order on the grounds that the administrative law judge ("ALJ") relied upon the wrong section of the District of Columbia Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Code §1-623.1 *et seq.* ("Act") given that Mr. White's benefits were suspended, not reduced; Employer requests the Compensation Order be reversed.

In response, Mr. White asserts that even if the Compensation Order is not in accordance with the law, PSWCP's Notice still is defective. Mr. White requests the Compensation Order be sustained.

Turning to the issue of failure to cooperate with vocational rehabilitation, the ALJ seems to rely upon a premise that the March 2, 2012 Final Determination is defective because it "did not inform Claimant that to reinstate his benefits he only needed to contact his claims adjuster and schedule the

⁸ *White v. D.C.*, PBLE 039-99 (D.C. March 16, 2012).

⁹ *White v. D.C. Parks and Recreation*, OHA No. PBL99-039E, DCP No. 002295LT4PARK-000644 (September 18, 2012).

vocational rehabilitation sessions and attend them as directed.”¹⁰ Initially, we cannot agree that such actions alone would necessarily suffice to cure Mr. White’s alleged failure to cooperate. The ALJ, however, has failed to make any findings of fact or conclusions of law regarding whether Mr. White did or did not fail to cooperate with vocational rehabilitation.

Furthermore, although the ALJ is correct that pursuant to §1-623.13(b) of the Act Employer is required to offer proof of wage-earning capacity,

If an individual, without good cause fails to apply for and undergo vocational rehabilitation when so directed under §1-623.04, the Mayor may review such failure under §1-623.28. If the Mayor, upon review, finds that in the absence of such failure the wage-earning capacity of the individual would probably have substantially increased, the Mayor may reduce prospectively the monetary compensation of the individual in accordance with what would probably have been his or her wage-earning capacity in the absence of the failure, until such time as the individual in good faith complies with the direction of the Mayor[.]

subsection (c) of that same provision mandates a finding of when Mr. White was hired:

If an employee hired after December 31, 1979, without good cause, fails to apply for or undergo vocational rehabilitation when so directed under §1-623.04, his or her right to compensation under this subchapter shall be suspended until the noncompliance ceases.

In addition, while it is true that modifications of a claimant’s disability compensation benefits may be made contemporaneously with the provision of notice that payment of compensation has been suspended due to the claimant’s failure to participate in vocational rehabilitation,¹¹ the ALJ has made no findings regarding (1) when or if PSWCP issued the required notice or (2) if the March 2, 2012 Notice satisfies this statutory requirement. Importantly, the Act requires notice that “[p]ayment of compensation has been suspended due to the claimant’s failure to participate in vocational rehabilitation,”¹² not notice of an ability to cure and not a statement that failure to cooperate in vocational rehabilitation results in a voluntary limitation of income.

In order to conform to the requirements of the D.C. Administrative Procedures Act (“APA”),¹³ (1) the agency’s decision must state findings of fact on each material, contested factual issue; (2) those findings must be based on substantial evidence; and (3) the conclusions of law must follow rationally from the findings.¹⁴ Thus, when an ALJ fails to make factual findings on each materially

¹⁰ *Id.*

¹¹ Section 1-623.24(d)(3)(E) of the Act.

¹² *Id.*

¹³ D.C. Code §2-501 *et seq.* (2006).

¹⁴ *Perkins v. DOES*, 482 A.2d 401, 402 (D.C. 1984).

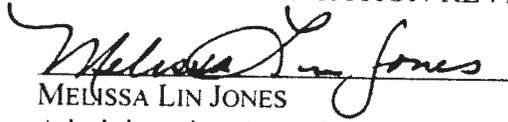
contested issue, an appellate court is not permitted to make its own finding on the issue; it must remand the case for the proper factual finding.¹⁵

The CRB is no less constrained in its review of Compensation Orders.¹⁶ Moreover, the determination of whether an ALJ's decision complies with the APA requirements is a determination that is limited in scope to the four corners of the Compensation Order under review. Thus, when, as here, an ALJ fails to make express findings on all contested issues of material fact, the CRB can no more "fill the gap" by making its own findings from the record than can the Court of Appeals but must remand the case to permit the ALJ to make the necessary findings.¹⁷

CONCLUSION AND ORDER

OHA had jurisdiction over Mr. White's claim; however, the September 18, 2012 Compensation Order is not supported by substantial evidence and is not in accordance with the law. The Compensation Order is VACATED, and this matter is remanded for further proceedings consistent with this Decision and Remand Order. Given the numerous factual inaccuracies, contradictions, and inconsistencies in the Compensation Order, the CRB strongly recommends that on remand this matter be considered anew based upon the posture and law set forth in this Decision and Remand Order.

FOR THE COMPENSATION REVIEW BOARD:


MELISSA LIN JONES
Administrative Appeals Judge

December 28, 2012

DATE

¹⁵ *King v. DOES*, 742 A.2d 460, 465 (Basic findings of fact on all material issues are required; only then can the appellate court "determine upon review whether the agency's findings are supported by substantial evidence and whether those findings lead rationally to its conclusions of law.")

¹⁶ See *WMATA v. DOES*, 926 A.2d 140 (D.C. 2007).

¹⁷ See *Mack v. DOES*, 651 A.2d 804, 806 (D.C. 1994).