

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. 06-39

TERENCE K. WOLFE,

Claimant – Petitioner,

v.

WASHINGTON SPORTS AND ENTERTAINMENT/ MCI CENTER,

Self-Insured Employer – Respondent.

Appeal from a Compensation Order of
Administrative Law Judge Henry W. McCoy
AHD No. 04-405A, OWC No. 590946

Terence K. Wolfe, *Pro Se*, for the Petitioner

Joel E. Ogden, Esq., for the Respondent

Before LINDA F. JORY, FLOYD LEWIS and SHARMAN J. MONROE, *Administrative Appeals Judges*.

SHARMAN J. MONROE, *Administrative Appeals Judge*, on behalf of the 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 D.C. Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, sec. 1102 (Oct. 1, 1994), *codified at* D.C. Code Ann. § 32-1521.01 (2005). In accordance with the Director's Policy Issuance, the CRB replaces the Office of the Director in providing administrative appellate review

BACKGROUND

This appeal follows the issuance of an 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 Order, which was filed on October 28, 2005, the Administrative Law Judge (ALJ) dismissed the March 10, 2005 Application for Formal Hearing without prejudice and directed the Claimant-Petitioner (Petitioner) to remit court costs in the amount of \$175.00 by November 10, 2005. The Petitioner now seeks review of that Order.

As grounds for this appeal, the Petitioner alleges that the ALJ erred in imposing sanctions and in denying his request to appear at the formal hearing via telephone, and that consequently, the Order should be vacated.

ANALYSIS

As an initial matter, the standard 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. D.C. Official Code § 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. District of Columbia 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 herein, the Petitioner alleges that the ALJ did not have authority either statutorily or inherently to enter an order for sanctions. The Petitioner points to D.C. Official Code § 32-1528 as the only provision providing for the imposition of costs only after a finding of fact has been made that a proceeding was “instituted or continued without reasonable ground.” The Petitioner argues that since the ALJ found that there was insufficient evidence upon which to make a determination the instant proceeding was instituted without reasonable ground, then ALJ had no authority to impose sanctions against the Petitioner. Further, the Petitioner asserts that the sanction was imposed without a motion to dismiss or order to show cause per the instructions in the Scheduling Order. The Petitioner also asserts that, given that he lives 800 miles from the Washington, D.C. area, the ALJ erred in not permitting his

and disposition of workers’ and disability compensation claims arising under the D.C. Workers’ Compensation Act of 1979, as amended, D.C. Code Ann. §§ 32-1501 to 32-1545 (2005) and the D.C. 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 D.C. Workers’ Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004.

appearance via telephone without providing an explanation therefor and in dismissing his request for formal hearing.²

In order to resolve this appeal, the Panel takes administrative notice of the contents of the official file maintained by AHD. A review of the file shows that the Petitioner filed an Application for Formal Hearing on or about March 16, 2005. Thereafter, on March 25, 2005, the ALJ issued a Scheduling Order. On May 31, 2005, the Petitioner submitted a letter requesting leave to appear at the formal hearing by telephone. On June 3, 2005, the ALJ issued an Order to Show Cause wherein the ALJ, *inter alia*, denied the Petitioner's request to appear telephonically. (JPHS) On June 14, 2005, the Petitioner submitted a letter in response to the Order to Show Cause wherein he requested that the ALJ reverse the ruling on the telephonic appearance stating that the ruling, without reason, was tantamount to a denial of his right to a hearing. In an Order dated June 16, 2005, the ALJ indicated that the earlier ruling was based a need for the Petitioner's physical presence in the courtroom so that the ALJ could make "credibility findings upon which the compensation order will be based." On June 20 and again on June 21, 2005, the Petitioner informed the ALJ that he would not be appearing in person at the formal hearing.³ On the scheduled date and time for the formal hearing, June 22, 2005, the Petitioner did not appear and the ALJ consequently assessed \$175.00, the cost incurred by AHD for the court reporter, against the Petitioner pursuant to Paragraph 13 of the Scheduling Order.

In denying the Petitioner's request to appear telephonically, the ALJ stated that the Petitioner's physical presence was necessary to assess his credibility. Credibility determinations are an integral part of an ALJ's decision-making process and such determinations must be based, *inter alia*, the observation of the demeanor of witnesses. *See Santos v. A&A Hardware*, Dir.Dkt. No. 88-93, H&AS No. 86-272A, OWC No. 0075694, fn 2 (July 2, 1990); *See generally Mexicano v. D.C. Department of Employment Services*, 806 A.2d 198, 205 (D.C. 2002) (the hearing examiner is the judge of the credibility of witnesses). The need for a credibility determination is particularly appropriate, where as here, a request is being made for workers' compensation benefits predicated upon the presence of an ongoing disability and of a need for ongoing medical treatment. The ALJ did not abuse his discretion in this matter.⁴

In assessing costs, the ALJ cited, as authority, Paragraph 13 of the Scheduling Order; costs were not imposed pursuant to D.C. Official Code § 32-1528 as the Petitioner asserts. The Petitioner is correct in maintaining that Paragraph 13 does not specifically state that when the party requesting a hearing fails to appear, cost for the court reporter are assessable. However, AHD has inherent authority to manage its calendar and have an orderly disposition of its cases. To that end, the purpose of Paragraph 13 is to encourage the party who files the application, thereby initiating the adjudicatory processes and the associated costs of AHD, to be vigilant. Assessing the cost incurred for the court reporter when the party filing the Application for Formal Hearing fails to appear as ordered is consistent with this purpose. Further, over and above the language of the Scheduling Order, 7 DCMR § 221.4 provides the ALJ with authority

² The Petitioner also indicates that his Application for Review of a December 20, 2004 Compensation Order is still pending before the CRB. A Decision and Order in *Wolfe v. Washington Sports and Entertainment*, CRB No. 05-35, OHA/AHD No. 04-405, OWC No. 590946 issued on January 6, 2006.

³ It appears from the record that on June 20, 2005, the Petitioner left a message with a clerk in AHD and on June 21, 2005, faxed a confirmatory letter.

⁴ The Panel notes that 7 DCMR § 223.1 states that all formal hearings shall be attended by the interested parties and their representatives and any other persons deemed necessary and proper.

to use the Rules of Civil Procedure of the Superior Court of the District of Columbia as guidelines in matters of procedure not specifically addressed in the Act. Under D.C. SCR-Civil Rule 41(b), in addition to an involuntary dismissal, costs are assessable against a plaintiff who fails to prosecute an action.⁵

Herein, the Petitioner's request to appear telephonically was denied twice by the ALJ. The Petitioner failed to appear or to request a continuance or to withdraw his Application for Formal Hearing until a more convenient time for him. After a review of the record, the Panel discerns no error or abuse of discretion in the ALJ's actions.

CONCLUSION

The Order of July 2, 2004 is supported by substantial evidence in the record, is in accordance with the law and is not an abuse of discretion.

ORDER

The Order of July 2, 2004 is hereby AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

SHARMAN J. MONROE
Administrative Appeals Judge

June 13, 2006
DATE

⁵ The Panel notes that 7 DMCR § 223.2 authorizes an ALJ to dismiss an Application for Formal Hearing if the requesting party fails to appear at the formal hearing.