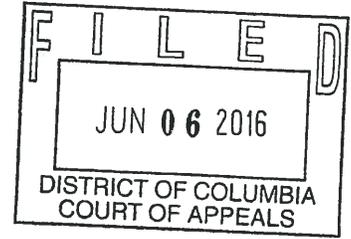


**District of Columbia
Court of Appeals**



No. 15-AA-896

ROSALIND M. FOWLER,

Petitioner,

CRB34-15

v.

D.C. DEPARTMENT OF
EMPLOYMENT SERVICES
(WORKER'S COMPENSATION),

Respondent.

ORDER

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2016 JUN 8 PM 2 15
W

On consideration of respondent's motion to remand this case, and the petitioner's consent to respondent's motion to remand, it is

ORDERED that respondent's motion is granted and this petition for review is hereby dismissed, and the case is remanded to the agency for further proceedings consistent with the statements made in respondent's motion. It is

FURTHER ORDERED that the Clerk shall issue the mandate forthwith.

BY THE COURT:

A handwritten signature in black ink, appearing to read "Eric T. Washington".

ERIC T. WASHINGTON
Chief Judge

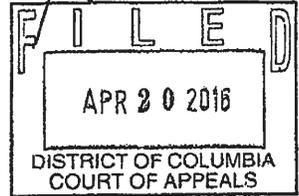
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Suite 300
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No. 15-AA-896

MRMD

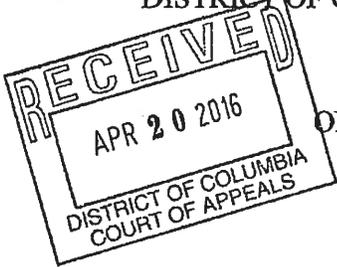
IN THE DISTRICT OF COLUMBIA COURT OF APPEALS



ROSALIND FOWLER,
PETITIONER,

v.

DISTRICT OF COLUMBIA DEPARTMENT OF EMPLOYMENT SERVICES,
RESPONDENT.



ON PETITION FOR REVIEW OF AN ORDER OF
THE COMPENSATION REVIEW BOARD

MOTION TO REMAND

ORIGINAL

The District of Columbia Department of Employment Services (“DOES”) moves this Court to remand the instant matter to the Compensation Review Board (“CRB”), with instructions for the CRB to reinstate the portion of the January 30, 2015 Compensation Order that found Rosalind Fowler had timely sought reconsideration by the District of Columbia Office of Risk Management (“ORM”) of its January 17, 2012 rejection of her claim for benefits. Counsel for Ms. Fowler, during an initial conversation with the undersigned, appeared to consent to the relief DOES is requesting here, but he has not responded after the undersigned forwarded a draft of this motion for his review.

BACKGROUND

Ms. Fowler was a 60-year-old staff assistant with the District’s Department of Motor Vehicles (“DMV”) on February 16, 2010, when she slipped on plastic wire used to bind boxes of copy paper while she was in the DMV storage room. R. 174, 180. Ms.

Fowler fell on her right side and fractured her right elbow. R. 174, 181-82. ORM, which administers the District's Public Sector Workers' Compensation Program ("Program") pursuant to Subchapter XXIII of the Comprehensive Merit Personnel Act of 1978 ("CMPA"), D.C. Code § 1-623.01 *et seq.* (2012 Repl.), accepted a claim for benefits by Ms. Fowler with respect to her elbow on March 17, 2010, R. 174, and referred her for treatment with Dr. Robert Collins. R. 135.

After Ms. Fowler reported feeling pain in her right hip and back during their various appointments, R. 136, 195-96, Dr. Collins indicated on November 7, 2011 that he believed Ms. Fowler's pain in these body parts was related to her fall on February 16, 2010. R. 196. Thereafter, Ms. Fowler notified the DMV of her back and hip injury in December 2011. R. 128-30, 181-82, 198. ORM treated Ms. Fowler's report as a claim for benefits, and assigned it a claim number different than the one that had been accepted for Ms. Fowler's elbow. R. 198; *see also* R. 183. However, Ms. Fowler also resubmitted claim forms to ORM from February 2010, and in one of her submissions, she mistakenly referenced the date of her fall as having occurred in February 2011, rather than 2010. R. 139, 143-44.

On January 17, 2012, a claims examiner with ORM issued a letter to Ms. Fowler under the new claim number, stating:

Please be advised that we are in receipt of a claim for your accident of February 16, 2010 which was reported the following day on February 17, 2010 ([Old] Claim # 30100273993-0001). The description of accident indicated that 'you were replacing toner cartridges when your feet got caught in the plastic wrap of copier paper causing you to trip and fall fracturing your right elbow.' Please find enclosed a copy of your acceptance letter dated March 17, 2010 for the right elbow only.

R. 202. The letter further advised Ms. Fowler of her right to request to an administrative hearing before an ALJ. R. 202.

On February 16, 2012, Ms. Fowler submitted a request for reconsideration of the January 17, 2012 letter, noting that she had in fact filed an additional claim for her back and hip in December 2011. R. 204; *see* 7 DCMR § 3134.5 (2011) (allowing claimants 30-days to seek reconsideration of final determinations by the Program rather than seeking an administrative hearing).¹ On March 15, 2012, the Program issued a “Final Decision on Reconsideration,” where it found Ms. Fowler’s reconsideration request to be untimely because it had not been requested within 30 days of the original March 17, 2010 determination. R. 207-08.

At a subsequent hearing before an administrative law judge (“ALJ”) that Ms. Fowler had requested, the parties agreed during a pre-hearing colloquy that the ALJ did not have jurisdiction to decide the merits of any request by Ms. Fowler for benefits arising from her back and hip injuries because ORM had not in fact reached the substantive issues in either of its determinations in January and March 2012. R. 93-94, 97, 100-01, 103; *see Newby v. D.C. Pub. Schs.*, CRB No. 10-162, 2012 WL 5305704, at *2 (Sept. 11, 2012) (“As a general principle, the only matters that DOES has authority to review are matters upon which [ORM] has rendered a decision.”). The ALJ was

¹ This regulation has been repealed, effective July 27, 2012. 59 D.C. Reg. 8766 (July 27, 2012).

therefore unclear as to the relief being requested by Ms. Fowler,² so he recessed the matter to give her an opportunity to fashion a claim that would be within the ALJ's jurisdiction. R. 103-09. Upon return, Ms. Fowler asked the ALJ to find that her hip and back injuries were causally related to her February 2010 accident, but also indicated that one issue for the ALJ to decide was the timeliness of her request for ORM to reconsider its January 17, 2012 denial of her claim. R. 109-11. The DMV not only agreed, but asserted that it was the only issue for the ALJ to handle. R. 100-01, 112-13, 120-21.

The ALJ decided to hear evidence on causation, and on January 30, 2015, issued a Compensation Order in Ms. Fowler's favor on the issue. R. 77-78. Prior to ruling on that issue, the ALJ also determined that Ms. Fowler's request for reconsideration with ORM had been timely, although he relied on regulations that had not been in effect at the time of Ms. Fowler's request in February 2012. R. 75-76 (citing provisions of 7 DCMR §§ 111, 128, which were adopted on July 27, 2012).

On appeal by the DMV, the CRB vacated the Compensation Order in a July 7, 2015 decision because at the time of the hearing before the ALJ, Ms. Fowler had not sought underlying disability benefits or payment of her medical bills that would have provided the ALJ with authority to adjudicate the issue of whether her injuries were causally related to her work injury. R. 26-27. In addition, the CRB held that Ms.

² Pre-hearing forms submitted to the ALJ indicated that Ms. Fowler sought "clarification" of the ALJ's jurisdiction. R. 210-11. During the pre-hearing colloquy, Ms. Fowler explained that she wanted a declaratory ruling that ORM had not issued a substantive denial of her claim. R. 106-07.

Fowler's request for the ALJ to clarify his jurisdiction sought only an advisory opinion that an ALJ is powerless to provide. R. 27.

Ms. Fowler timely petitioned this Court to review the CRB decision.

DISCUSSION

In her brief, Ms. Fowler does not ask this Court to overturn the CRB's vacatur of the ALJ's Compensation Order as it respects the ALJ's consideration of whether her hip/back injury was caused by her February 2010 fall. Fowler Br. 4. Ms. Fowler concedes that she had not sought specific benefits at the hearing because she was precluded from arguing the merits of her claim under the CMPA when ORM had not first done so. Fowler Br. 3-4.

However, Ms. Fowler asserts that the CRB erred in not recognizing that the ALJ could have ruled on the issue of whether her request for ORM to reconsider its January 17, 2012 decision was timely, pursuant to *Marsden v. D.C. Department of Employment Services*, 58 A.3d 472 (D.C. 2013). Fowler Br. 4. DOES agrees.

In *Marsden*, the claimant, who had fallen on the job after becoming unconscious, asked ORM to reconsider its denial of her claim for benefits well after the 30-day deadline to have requested reconsideration. 58 A.3d at 473. ORM therefore denied her request as untimely, and Ms. Marsden timely sought administrative review of that denial. *Id.* A DOES ALJ awarded her benefits, believing he had jurisdiction over the merits because Ms. Marsden's application for review of the ORM reconsideration was timely. *Id.* The CRB reversed and this Court affirmed, because allowing Ms. Marsden to have the merits of her claim reviewed by an ALJ no matter how long after ORM had ruled "by

the simple expedient of filing an untimely request for reconsideration by ORM and then . . . timely seeking review of ORM's denial" would "effectively nullif[y] the carefully drawn time limits reflected in the regulatory scheme." *Id.* at 473-74. However, this Court assumed that "a claimant whose request for reconsideration is denied by ORM as untimely could obtain review of the correctness of that denial, by filing a timely request that [an ALJ] review the denial." *Id.* at 474 n.1.

Here, while Ms. Fowler's pre-hearing statement did not specifically state that she was challenging the correctness of ORM's calculations of timeliness, she sufficiently raised the issue at the end of the pre-hearing colloquy. R. 111-13. Thus, under *Marsden*, the ALJ had the authority to review ORM's timeliness ruling.

Because the CRB did not address the timeliness issue, R. 12, this Court would ordinarily remand for the CRB to apply *Marsden* and review the ALJ's determination on timeliness in the first instance under the proper regulations. *Genstar Stone Prods. Co. v. D.C. Dep't of Emp't Servs.*, 777 A.2d 270, 272 (D.C. 2001). However, the record is clear that the earliest date that ORM could be said to have denied Ms. Fowler's claim as to her back/hip injury was January 17, 2012, and the date that Ms. Fowler filed for reconsideration with ORM was February 16, 2012. R. 202, 204. It is clear that Ms. Fowler filed her request within the 30 days required by 7 DCMR § 3134.5 (2011), so this Court should simply direct the CRB on remand to reinstate the ALJ's conclusion in that regard. *See Howard Univ. Hosp. v. D.C. Dep't of Emp't Servs.*, 881 A.2d 567, 574 (D.C. 2005) (noting that a remand may be unnecessary "where the result is clearly ordained by law"). This will then cause ORM to reconsider Ms. Fowler's claim on its merits. Should

ORM deny her claim, Ms. Fowler can then re-engage the review process under the current regulations.

CONCLUSION

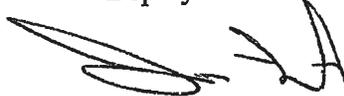
This Court should remand the instant case to the CRB, with instructions for the CRB to reinstate only that portion of the January 30, 2015 Compensation Order which concluded that Ms. Fowler had timely requested that ORM reconsider its January 17, 2012 letter to Ms. Fowler concerning ORM Claim No. 30111224763-0001.

Respectfully submitted,

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Attorney General for the District of Columbia

TODD S. KIM
Solicitor General

LOREN L. ALIKHAN
Deputy Solicitor General



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April 2016