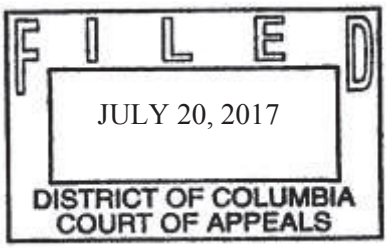
DISTRICT OF COLUMBIA COURT OF APPEALS

No. 16-AA-668



HORACE E. HENSLEY, PETITIONER,

v.

DISTRICT OF COLUMBIA
DEPARTMENT OF EMPLOYMENT SERVICES, RESPONDENT,

and

CHEECHI & COMPANY, *et al.*, INTERVENORS.

On Petition for Review from an Order of the
Compensation Review Board
(CRB-194-15)

(Submitted May 11, 2017 Decided July 20, 2017)

Before FISHER, THOMPSON, and BECKWITH, *Associate Judges*.

MEMORANDUM OPINION AND JUDGMENT

PER CURIAM: *Pro se* petitioner Horace Hensley seeks review of a May 5, 2016, Decision and Order of the Department of Employment Services ("DOES") Compensation Review Board (the "CRB" or the "Board") that affirmed a November 20, 2015, order by a DOES Administrative Hearing Division ("AHD") Administrative Law Judge ("ALJ"). The ALJ's order denied two motions that petitioner had filed on September 28, 2015: his "Motion to Lift Stay Dated January 17, 2014 – AHD No. 92-359K" (hereafter, the "Motion to Lift Stay and Schedule Status Conference") and his "Motion to Rescind AHD No. 92-359K, December 26, 2013, Order Denying Motion to Compel Discovery" (hereafter, the "Motion to Rescind"). We are constrained to reverse and remand.

I.

The procedural history of this case is long and complex, and we need not repeat it here, except to say that petitioner has received worker's compensation benefits since the late 1980s after work for his employer, intervenor Cheechi & Company ("the Employer"), aggravated his pre-existing ankylosing spondylitis. Petitioner was found to be temporarily totally disabled in 1987 and, in a 1993 compensation order, to be permanently totally disabled, and in the years thereafter has been engaged in ongoing disputes with the Employer and its insurance carrier (the "Carrier") about whether various medical services are compensable as causally related to the work injury and about the timeliness of the Employer's payments of benefit amounts and the applicability of statutory penalties for delayed payments. The background is more fully described in this court's decisions in *Hensley v. District of Columbia Dep't of Emp't Servs.*, 49 A.3d 1195 (D.C. 2012) ("*Hensley I*"), and *Hensley v. District of Columbia Dep't of Emp't Servs.*, No. 14-AA-507 (Memorandum Opinion and Judgment, April 22, 2015) ("*Hensley II*").

The Motion to Lift Stay and Schedule Status Conference. On January 17, 2014, petitioner filed a motion to stay proceedings in the matter designated as AHD No. 92-359K. We see no indication in the agency record that this motion was ever ruled upon. On September 28, 2015, petitioner filed his Motion to Lift Stay and Schedule Status Conference, in which he requested that "his Stay *request* of January 17, 2014 *be lifted* and a Status Conference be scheduled" (emphasis added). It thus appears that what petitioner actually sought to do through his September 28, 2015, motion was to withdraw his request for a stay (*not* to have the AHD lift a stay the agency had granted) and to request a status conference (presumably regarding discovery, which, as discussed below, was another subject of the September 28, 2015, motion). In the November 20, 2015, Order, the ALJ denied the Motion to Lift Stay and Schedule Status Conference, stating (1) that there was no record of a motion to stay dated "January 17, 2004 [sic] in the AHD file" and (2) that petitioner's request for a status conference "ha[d] already been granted[,]" in that "[t]he parties appeared at AHD on December 2, 2013 for a Pre-Hearing Conference[.]"

The Motion to Rescind. The record indicates that during the December 2, 2013, pre-hearing conference, petitioner submitted a Motion to Compel Discovery, seeking documentation about medical bills and cost-of-living increases paid or unpaid by the Employer/Carrier and documents from petitioner's prior counsel. In an order dated December 26, 2013, the ALJ denied the Motion to Compel Discovery, noting that the Employer represented that it had paid every medical bill it had received and had paid all applicable penalties and increases, reasoning that it was petitioner's

responsibility to submit any remaining unpaid bills and to contact his prior counsel for information from counsel's file, and stating that there was no evidence that any cost-of-living adjustments were due to petitioner. Thereafter, in filing his September 28, 2015, Motion to Rescind, petitioner argued that the ALJ's December 26, 2013, Order denying his Motion to Compel Discovery was "not supported by substantial evidence and was arbitrary and capricious." The ALJ's November 20, 2015, Order disposed of the Motion to Rescind by explaining that "the CRB affirmed the Order Denying Motion to Compel Discovery, and the DCCA declined to hear [petitioner's] petition."

The CRB's Decision and Order. On May 5, 2016, the CRB affirmed the ALJ's November 20, 2015, Order. The CRB first observed that petitioner's application for review referenced several past orders and cautioned that petitioner was not permitted to re-litigate issues that (years earlier) had been presented to and resolved by the agency and this court. The CRB then quoted and "agree[d] with the ALJ." In addition, referring to a "December 26, 2013[,] Order[,]" the CRB stated that "[r]e-litigation of any issues presented to the ALJ, and decided . . . in the December 26, 2013 Order . . . is barred by principles of *res judicata*. The CRB and DCCA affirmed the order which is now final and not rescindable[.]"

This petition for review followed.

II.

When presented with a petition for review of a CRB decision, this court has the task of determining whether the decision is "[a]rbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Georgetown Univ. v. District of Columbia Dep't of Emp't Servs.*, 971 A.2d 909, 915 (D.C. 2009) (internal quotation marks omitted); *see also* D.C. Code § 2-510 (a)(3)(A) (2012 Repl.). Our review of the CRB's legal rulings is *de novo*. *Reyes v. District of Columbia Dep't of Emp't Servs.*, 150 A.3d 1277, 1279 (D.C. 2016). While "we review the decision of the Board, not that of the ALJ," we "cannot ignore the [ALJ] order which is the subject of the Board's review." *Marriott at Wardman Park v. District of Columbia Dep't of Emp't Servs*., 85 A.3d 1272, 1276 (D.C. 2014) (internal quotation marks omitted).

III.

Petitioner's *pro se* brief consists mostly of quotes from earlier administrative decisions, and we agree with the Employer that it is difficult to determine from a review of the brief exactly what contentions petitioner is presenting for our review. It is clear, however, that our review is limited to the CRB's May 5, 2016, Decision and Order affirming the ALJ's November 20, 2015, Order, and so we have reviewed those for any obvious error.

We agree with the CRB that it appears that petitioner is attempting to re-litigate issues that were resolved against him in prior CRB decisions and/or in decisions of this court. For that reason, we are loath to extend the life of this litigation by ordering a remand to the CRB. We conclude that we must do so, however, because of factual errors that affected the ALJ's and CRB's rulings.[1]

In denying petitioner's Motion to Rescind, both the CRB and the ALJ reasoned that "the CRB affirmed the [December 26, 2013] Order Denying Motion to Compel Discovery, and the DCCA declined to hear [petitioner's] petition." However, the record shows that there were *two* December 26, 2013, Orders, one entitled "Order Denying Motion for Modification of Award" and the other — the one in issue here — entitled "Order Denying Motion to Compel Discovery." The December 26, 2013, Order that the CRB affirmed and this court upheld in *Hensley II* was the "Order Denying Motion for Modification of Award." We see in the record no evidence that the CRB and this court upheld (or even reviewed) the December 26, 2013, Order Denying Motion to Compel Discovery. Accordingly, the ALJ's and CRB's rationale for rejecting petitioner's Motion to Rescind (which essentially sought, reconsideration of the denial of his motion for discovery) was mistaken. Although the reasons the ALJ gave in her December 26, 2013, Order denying the Motion to Compel Discovery may be sound, we cannot affirm the CRB's decision upholding the ALJ's denial of the Motion to Rescind when it rests on a factual error that is apparent from the record. *Cf. Kralick v. District of Columbia Dep't of Emp't Servs*., 842 A.2d 705, 711 (D.C. 2004)

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[1] In ruling on the Motion to Lift Stay and Schedule Status Conference, the ALJ could find in the AHD record no Motion to Stay dated January 17, *2004*. However, the record contains petitioner's motion dated January 17, *2014*. By itself, the ALJ's error with respect to whether and when a motion to "[l]ift [s]tay" was filed does not warrant a remand because, as explained above, it appears that no stay was ever entered by the AHD and that petitioner was really seeking to withdraw his motion for a stay.

(remanding because the agency's decision "rest[ed] upon an incorrect factual premise"); *see also Jones v. District of Columbia Dep't of Emp't Servs*., 519 A.2d 704, 709 (D.C. 1987) (explaining that an administrative order can be sustained "only . . . on the grounds relied on by the agency" and that this court may not "substitute our judgment for that of the agency").

Relatedly, we must also remand with respect to the denial of petitioner's request to have a status conference scheduled. The ALJ's rationale for denying the request was that the request "ha[d] already been granted" and thus was moot because "the parties appeared at AHD on December 2, 2013 for [the] Pre-Hearing Conference" that resulted in the December 26, 2013, Order denying the Motion to Compel Discovery (which the ALJ erroneously believed had been upheld by the CRB and this court.) Given that petitioner was requesting a new status conference at the same time he asked the ALJ to rescind her earlier discovery ruling, we surmise that petitioner sought the status conference to pursue his renewed interest in discovery. Whatever petitioner's objective in requesting the scheduling of a status conference through his September 30, 2015 motion, we think it was not a sufficient answer to the request to say that there had been a conference nearly two years earlier in December 2013. Petitioner's request may have warranted denial for other reasons, but we cannot affirm the CRB's decision upholding the ALJ's ruling when both appear to have been premised on the erroneous assumption that the CRB and this court had upheld the ALJ's December 26, 2013 discovery ruling and rendered it "not rescindable." As with the ruling on the Motion to Rescind, a remand is required for the agency to revisit its reasoning in ruling on petitioner's motion requesting a status conference.

Accordingly, we are constrained to remand this matter to DOES to reconsider the Motion to Rescind and the Motion to Lift Stay and Schedule Status Conference.[2]

So ordered.

ENTERED BY DIRECTION OF THE COURT:

JULIO A. CASTILLO
Clerk of the Court

[2] We do so even though we recognize that there may be no ongoing proceeding in which discovery and a status conference are available.