

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 16-109

CONSTANCE WARE,
Claimant-Respondent,

v.

DISTRICT OF COLUMBIA DEPARTMENT OF CORRECTIONS
Employer-Petitioner.

Appeal from a July 19, 2016 Compensation Order on Remand
by Administrative Law Judge Gwenlynn D'Souza
AHD No. PBL 96-083F, DCP No. 761032-0001-1999-0003

Decided January 13, 2017

Harold L. Levi for Claimant
Rahsaan Dickerson for Employer

Before HEATHER C. LESLIE, GENNET PURCELL, and JEFFREY P. RUSSELL, *Administrative Appeals Judges.*

HEATHER C. LESLIE for the Compensation Review Board.

DECISION AND REMAND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

In a prior Decision and Order, the Compensation Review Board ("CRB") outlined Claimant's injury, treatment, and the procedural history of Claimant's claim as such:

Claimant worked for the Employer as a Correctional Officer. Claimant sustained a work-related injury on October 3, 1989. The then Office of Risk Management Disability Compensation Program (DCP), now Public Sector Workers' Compensation Program, (PSWCP) accepted the claim and awarded wage loss and medical benefits.

Claimant was paid temporary total disability benefits until September 30, 2011 when benefits were terminated. Employer sent a Notice of Determination (NOD) to Claimant's post office box on August 30, 2011, advising her that benefits were terminated. Claimant's counsel was faxed a copy of the NOD on October 17,

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2011. Claimant requested a reconsideration of this decision on October 26, 2011 through counsel. DCP issued a Final Decision on Reconsideration, stating Claimant's request for reconsideration was untimely.

Claimant requested a Formal Hearing, seeking restoration of benefits. Employer argued the Administrative Hearings Division (AHD) did not have jurisdiction to hear the case as the Claimant failed to timely request a formal hearing or reconsideration within the 30 day time period prescribed after issuance of the August 30, 2011 NOD. On March 4, 2013, a Compensation Order (CO) was issued, finding that service was not properly made upon Claimant or Claimant's counsel and remanded the case to the PSWCP with instructions to consider Claimant's request for reconsideration.

On May 31, 2013, a Final Decision on Reconsideration was issued by PSWCP. The Claimant's claim was again denied. In that denial, PSWCP again reiterated that it first believed Claimant's initial request for reconsideration was untimely. However, PSWCP also decided Claimant's appeal on the merits when it concluded that the medical evidence revealed a change of condition such that Claimant could return to work in a full duty capacity.

Claimant appealed the May 31, 2013 decision. A full evidentiary hearing occurred on June 25, 2014. Claimant sought an award of temporary total disability benefits from September 30, 2011 to the present and continuing and payment of causally related medical benefits. The issues to be resolved were the nature and extent of Claimant's disability, whether the Claimant's current condition is medically casually related to the work accident, and whether AHD has jurisdiction to adjudicate the claims put forth by the Claimant.

A CO was issued on July 17, 2014. In that CO, the ALJ concluded she did have jurisdiction to adjudicate Claimant's claim as the March 4, 2013 CO affirmatively determined that the NOD was not properly served upon Claimant. The CO determined the Employer was collaterally estopped from arguing the issue of the timeliness of Claimant's request for reconsideration. The CO further determined that Employer had failed to meet its burden of establishing Claimant was no longer disabled as a result of her work related injury and granted Claimant's request for disability benefits and payment of medical expenses.

Employer timely appealed. Employer argues first that the ALJ incorrectly applied the doctrine of collateral estoppel in declining to address the timeliness of the Claimant's request for reconsideration. Employer further urges this panel to find the March 4, 2013 order not in accordance with the law. Employer argues that even if AHD did have jurisdiction, the CO erred when it granted Claimant disability benefits as the ALJ did not properly analyze the burden shifting scheme. Finally, Employer argues the ALJ incorrectly applied the treating physician preference.

Claimant opposed Employer's Application for Review, arguing the denial of wage loss benefits is supported by the substantial evidence in the record and in accordance with the law.

Ware v. D.C. Department of Corrections, CRB No. 14-098 (December 12, 2014) ("DRO").

Having considered the parties arguments, the CRB affirmed the underlying Compensation Order's award of temporary total disability benefits, concluding,

The ALJ's conclusions are supported by the substantial evidence in the record and in accordance with the law. As such, we are constrained uphold a CO 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.

DRO at 7.

Employer appealed the order to the District of Columbia Court of Appeals but ultimately withdrew its appeal.

Also pertinent to the appeal, in 2004 after a labor market survey determined Claimant had a wage earning capacity of \$267.71 per week, Employer reduced Claimant's bi-weekly payments. This new rate was described as the lost wage earning capacity (LWEC) rate. Claimant appealed the LWEC determination however said appeal was dismissed as it was deemed untimely by an order issued in July 2007.

After the 2014 order, a dispute arose over how much Claimant should be paid pursuant to that order. Claimant requested a notice of determination requesting a change of Claimant's disability benefits from the LWEC rate to temporary total disability benefits Claimant received prior to the application of the LWEC rate. A Notice of Determination (NOD) was issued on November 16, 2015, denying Claimant's request. The NOD based its denial on an assertion that the July 17, 2014 Compensation Order ("CO") did not restore Claimant's disability benefits to the pre-LWEC rate.

Claimant requested a Formal Hearing which by consent proceeded through briefing. Claimant sought an award of temporary total disability benefits from September 30, 2011 to the present and continuing, plus interest, and a calculation of benefits. The issues to be adjudicated were whether the claim for relief was already decided in the prior CO and thus was res judicata, and what is the compensation rate and amount due.

A Compensation Order ("CO2") was issued on July 19, 2016. The ALJ determined that the issue of whether Claimant was temporarily and totally disabled was already decided in the earlier CO and thus Claimant was precluded from addressing the issue of nature and extent. The ALJ did determine the amount of award due pursuant to the CO2 at \$87,171.61.

Employer appealed. Employer argues 1) DOES lacks jurisdiction to entertain Claimant's appeal pursuant to D.C. Code § 1-623.24 ; 2) the CO2's award of full temporary total disability benefits is not in accordance with the law; and, 3) the CO2's award of a cost of living increase was not in accordance with the law and not supported by the substantial evidence of the record.

Claimant opposes the appeal, arguing the CO2 is supported by the substantial evidence in the record and in accordance with the law.

ANALYSIS¹

We note that recently, the CRB issued *Harrison v. D.C. Department of Corrections*, CRB No. 16-084 (October 20, 2016)(“*Harrison*”) which addresses some of the same arguments Employer brings before us. Specifically, *Harrison* addressed the following arguments presented before the CRB in the case *sub judice*:

- That DOES lacked jurisdiction to address the November 16, 2015 NOD relying on Chapter XXII, arguing appeals are limited to modification of benefits that arise due to changes in Claimant's condition, thus, “D.C. Official Code § 1-623.24(f) does not provide the right to appeal to the DOES a correction in benefits based on an administrative error, as is the case here. Similarly, the statutory provision does not provide the right to appeal a determination regarding mileage reimbursement.”
- That the ALJ's finding that the general salary increases effective April 7, 2013, October 5, 2014 and October 4, 2015 constituted COLAs is not in accordance with the applicable law.

In a very thorough and lengthy analysis, the CRB in *Harrison* rejected the above arguments. We need not reiterate the reasoning here, but point the parties to *Harrison*. Employer's arguments are rejected, pursuant to *Harrison*.

Harrison also addressed whether the ALJ's finding that Claimant is entitled to 4% compound interest on accrued benefits is not in accordance with the applicable law. After analyzing *Rastall v. CSX Transportation*, 697 A.2d 46 (D.C. 1997), *Burke v. Groover Christie & Merritt*, 26 A.3d 292, 301 & n. 11 (D.C. 2011) and *Clark v. Verizon Commc'ns.*, OHA No. 92-793B, Dir. Dkt. 03-92 (Feb. 10, 2004), the CRB concluded:

¹ The scope of review by the Compensation Review Board (“CRB”) and this Review Panel as established by the District of Columbia Comprehensive Merit Personnel Act of 1978, as amended D.C. Code § 1-623.01 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. Code § 1-623.28(a). “Substantial evidence”, as defined by the District of Columbia Court of Appeals (“DCCA”), is such evidence as a reasonable person might accept to support a particular conclusion. *Marriott Int'l. v. DOES*, 834 A.2d 882 (D.C. 2003) (“*Marriott*”). Consistent with this scope of review, the CRB and this panel are bound 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*, *supra*, 834 A.2d at 885.

It has been the announced, expressed and applied interpretation of this agency at least since 2004 that the interest payable upon accrued benefits are subject to interest calculated on a simple and not a compound basis.

Harrison at 19.

Again, we point the parties to our detailed analysis in *Harrison*. As the ALJ awarded 4% interest compounded annually after November 16, 2015, we are forced to remand the case with instructions to the ALJ to enter an award using simple interest.

The last argument Employer puts forth is whether the ALJ had jurisdiction to calculate the amount owed. Employer argues Claimant is not entitled to temporary total disability benefits as it was never before the ALJ who issued the CO and was definitely decided in the 2007 order. We disagree.

As the CO2 states:

In this case, Claimant seeks benefits, which are identical to the claim for temporary total disability benefits made previously, which resulted in an award on December 12, 2014, when Employer was a party to the action. Under these circumstances, this administrative court is precluded from addressing the claim for relief to the extent it is identical to the December 12, 2014 award of benefits.

CO2 at 4.

The CO awarded Claimant restoration of *temporary total disability* benefits from September 30, 2011 to the present and continuing. This is in response to Claimant's claim for relief and the issue presented at the Formal Hearing, the nature and extent of Claimant's disability. The ALJ did not reduce the benefit awarded to temporary partial disability benefits or any other lesser amount as Employer urges us to infer.

Employer appealed the order to the DCCA but then withdrew its appeal. As it stands, the award of *temporary total disability* benefits from September 30, 2011 to the present and continuing is a final order and is the law of the case. Employer makes several other arguments regarding the jurisdiction of the prior ALJ and the intention of the parties and the ALJ at the prior Formal Hearing. We decline to address these arguments as the CO is a final order which was affirmed by the CRB.

Employer further argues,

ALJ D'Souza's CO, which purportedly determines the payment due pursuant to ALJ's Jory's Compensation Order by assuming that an issue over which ALJ Jory had no jurisdiction was nevertheless decided, is a quintessential example of AHD conducting an impermissible review of its own decision.

Employer's brief at 18.

We only note that the NOD Claimant appealed was a direct result of Claimant's request for temporary total disability benefits at the pre-LWEC rate. The NOD erroneously determined Claimant was not entitled to temporary total disability at the rate requested. This NOD was appealed giving the ALJ jurisdiction to address the merits of the claim. The ALJ awarded the Claimant temporary total disability at the rate requested. While we may give pause at the procedural posture of the case and the choices of the Claimant to go this route, Employer did issue an NOD giving rise to the Formal Hearing and the resultant CO2.

CONCLUSION AND ORDER

The July 19, 2016 Compensation Order is **AFFIRMED** in part and **REVERSED** in part. The determination by the ALJ in the Compensation Order that Claimant is entitled to 4% compound interest on accrued benefits after November 16, 2015 is not in accordance with the law and is **REVERSED**, and the matter is **REMANDED** with directions to the ALJ to enter an award using simple interest. The Compensation Order is **AFFIRMED** in all other respects.

So ordered.