

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services
Labor Standards Bureau

Office of Hearings and Adjudication
COMPENSATION REVIEW BOARD



(202) 671-1394-Voice
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CRB No. 05-236

DEBRA DANIELS,

Claimant – Petitioner

v.

D.C. WATER & SEWER AUTHORITY,

Self-Insured Employer – Respondent

Appeal from a Compensation Order of
Administrative Law Judge Anand Verma
OHA No. 04-086, OWC No. 590151

Debra Daniels, *Pro Se*¹

Douglas A. Datt, Esq., for the Respondent

Before SHARMAN J. MONROE, LINDA JORY, and FLOYD LEWIS, *Administrative Appeal 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).²

¹ The record indicates that Benjamin T. Boscolo appeared at the formal hearing on behalf of the Petitioner. He, however, withdrew his appearance via letter filed February 11, 2005.

² 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 and disposition of workers' and disability compensation claims arising under the D.C. Workers' Compensation Act

BACKGROUND

This appeal follows the issuance of a Compensation 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 Compensation Order, which was filed on March 15, 2005, the Administrative Law Judge (ALJ) awarded temporary total disability benefits from July 27, 2003 through August 23, 2003, an underpayment of \$307.44 for the period July 12, 2003 through July 26, 2003 and causally related medical expenses incurred between July 22, 2003 and August 23, 2003. The ALJ denied benefits from August 23, 2003 to the present and continuing. The Claimant-Petitioner (Petitioner) now seeks review of that Compensation Order.

Although she seeks a review, the Petitioner does not allege any errors in the Compensation Order.

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. App. 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.

On May 19, 2005, the Petitioner filed a letter to the CRB indicating that the purpose of the letter was “to notify of an appeal/review of the decision” of ALJ Verma, that the decision of ALJ Verma was sent to wrong address for her and that she will be filing the Application for Review on Monday, May 16, 2005. The Petitioner’s letter was dated May 14, 2005; the envelope containing the letter was postdated May 16, 2005. No further correspondence or pleading was submitted by the Petitioner.

On June 17, 2005, the Self-Insured Employer-Respondent (Respondent) filed a Motion to Dismiss, or in the Alternative, Opposition to the Claimant’s “Application for Review”. Therein,

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.

the Respondent asserts that the Petitioner failed to file an Application for Review as she indicated in her letter and, moreover, failed to file an Application for Review and supporting Memorandum of Points and Authorities within 30 days of the date of the Compensation Order. The Respondent avers, *assuming arguendo* that the Compensation Order was mailed to the wrong address, the Petitioner received notice of the Compensation Order by May 14, 2005 and her Application for Review should have been filed 30 days thereafter, or by June 13, 2005. Consequently, the Respondent asserts that the Petitioner's application is untimely and moves that this matter be dismissed as a matter of law. In the alternative, the Respondent asserts that if the Petitioner's May 14, 2005 letter is considered a timely Application for Review, the Petitioner failed to file a Memorandum of Points and Authorities and the Respondent is unable to address any errors alleged by the Petitioner. The Petitioner did not file a response to the Respondent's Motion.

The question before the Panel at this juncture is whether the Petitioner's May 14, 2005 letter constitutes a timely filed Application for Review. If her Application for Review is untimely, then the Panel is without authority to address the Petitioner's appeal. *See Gooden v. The Washington Post*, CRB (Dir. Dkt.) No. 04-44, OHA No. 97-25A; OWC No. 279073 (March 14, 2005). Nevertheless, the filing of a timely appeal is not a jurisdictional prerequisite to appellate review, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling when equity so requires. *See Covington v. Metro Pet Pals LLC*, CRB (Dir.Dkt.) No. 03-96, OHA No. 02-448A, OWC No. 583242 (March 18, 2005).

A review of the official AHD file reveals that the Application for Formal Hearing, filed in December 2003, shows the Petitioner's address as "3319 Martin Luther King Avenue, S.E., #B-1, Washington, D.C. 20032". At the formal hearing held on February 24, 2004, the Petitioner testified that she no longer resided at the Washington D.C. address and gave her current address as "2132 Alice Avenue, Oxon Hill, Maryland 20748." Transcript at p. 25. The review also reveals that in a letter dated February 9, 2005, Mr. Boscolo withdrew his appearance as counsel for the Petitioner. His letter notes that a copy was sent to the Petitioner. There is no indication in the file that the Petitioner contacted AHD after Mr. Boscolo filed his withdrawal letter.

The Compensation Order in this case was issued on March 15, 2005. The certificate of service attached to the Compensation Order shows that it was sent, via certified mail, to Mr. Boscolo and to the Petitioner at the Martin Luther King Avenue S.E. address. The certified mailing was returned to AHD unclaimed with a handwritten notation "forward: 1137 7th Street N.E., Washington, D.C. 20002-3614". In her May 14, 2005 letter of appeal/review sent to the CRB, the Petitioner lists her address as "1509 Benning Road, # 32, Washington, D.C. 20002".

With the February 9, 2005 withdrawal letter, Mr. Boscolo is no longer the Petitioner's agent for service in this case and mailing the Compensation Order to him does not constitute service of the Compensation Order on the Petitioner. *See Greenwood's Transfer & Storage Co. v. D.C. Department of Employment Services*, 553 A.2d 1246 (D.C., 1989). At this juncture, in order to serve, *i.e.*, reasonably inform, the Petitioner, the Compensation must be mailed directly to the Petitioner at her last known address of record. *See* D.C. Official Code § 32-1520 (e). Although the agency in not sending the Compensation Order to the Petitioner's last known address, the

Panel determines, on this record, that the error does not require a remand or any other corrective action.

The Compensation Order sent to the Petitioner was returned to the agency in its certified mail envelope postmarked March 15, 2005 with the notation, “forward: 1137 7th Street N.E., Washington, D.C. 20002-3614”. Therefore, even if the agency had sent the Compensation Order to “2132 Alice Avenue, Oxon Hill, Maryland 20748”, the Compensation Order would have been returned because the Petitioner no longer resided at that address. It is reasonable to assume that the certified mail was returned to the agency within 30 days, but no later than 60 days, after its mailing. Given this assumption, if the agency had re-sent the Compensation Order to “1137 7th Street N.E., Washington, D.C. 20002-3614”, it would have been returned because the address on the Petitioner’s May 14, 2005 letter is different from this forwarding address.³

When Mr. Boscolo withdrew his appearance as counsel, it became incumbent upon the Petitioner to keep the agency apprised of her address changes so that the agency could provide her with notices and other correspondence relating to her case in a timely manner. By not doing so, and apparently changing her address twice since the formal hearing, the Petitioner essentially precluded the agency from timely providing her notices.

The Panel recognizes that leniency may be appropriate with dealing with a *pro se* litigant. See *MacLeod v. Georgetown University Medical Center*, 736 A.2d 977 (D.C. 1999). However, the Petitioner here had previously retained counsel, was free to retain new counsel on a contingency fee basis,⁴ and was not lulled by the agency into not filing her appeal within the 30-day timeframe. See *Gooden, supra*. The Panel would be inclined to waive the 30-day period if the Petitioner had made contact with the agency after she was no longer represented by counsel and notified the agency, in writing, of her address changes. She did not do so. The Panel notes that while the Petitioner indicates that she would be filing “the application for review Monday, May 16th, 2005”, to date she has not done so. Accordingly, the Panel determines that the Petitioner’s Application for Review is untimely.

CONCLUSION

The May 14, 2005 Application for Review is untimely filed and the Respondent’s Motion to Dismiss is granted.

³ It appears that within a 90-day period, the Petitioner changed her address twice.

⁴ See D.C. Official Code § 32-1530 (e).

ORDER

The May 14, 2005 Application for Review is untimely filed and is DISMISSED.

FOR THE COMPENSATION REVIEW BOARD:

SHARMAN J. MONROE
Administrative Appeals Judge

July 27, 2005
DATE