

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA M. MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 11-070

**DIANE GARNETT,
Claimant–Petitioner,**

v.

**DISTRICT OF COLUMBIA DEPARTMENT OF TRANSPORTATION,
Self-Insured Employer—Respondent**

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2011 OCT 25 PM 11 27

Appeal from a Order by
Administrative Law Judge Fred D. Carney, Jr.
AHD No. PBL 05-015C, DCP No. 761021000120040024

Diane Garnett, *Pro Se*, Petitioner¹
Frank Mc Dougald, Esquire, for the Respondent

Before: HENRY W. MCCOY, HEATHER C. LESLIE², and JEFFREY P. RUSSELL³, *Administrative Appeals Judges*.

HENRY W. MCCOY, *Administrative Appeals Judge*, for the Compensation Review Panel.

DECISION AND REMAND ORDER

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board (CRB) pursuant to D.C. Official Code §§ 32-1521.01 and 32-1522 (2004), 7 DCMR § 230, *et seq.*, and the Department of

¹ Prior to this appeal, Claimant was represented in proceeding before AHD by William J. Howard, Esq.

² Judge Leslie has been appointed by the Director of DOES as an interim CRB member pursuant to DOES Policy Issuance No. 11-03 (June 13, 2011).

³ Judge Russell has been appointed by the Director of the DOES as an interim CRB member pursuant to DOES Administrative Policy Issuance No. 11-01 (June 23, 2011).

Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005).

PROCEDURAL HISTORY AND FACTS OF RECORD

On September 22, 2004, Claimant sustained a work-related injury. On March 2, 2005, Claimant's claim for compensation was accepted for injury for a bruised coccyx, a right shoulder contusion and a cervical strain.

On November 17, 2006, Claimant received a "Notice of Intent to Terminate Disability Compensation Payments" stating an intent to close her disability compensation claim and terminate her benefits as of December 9, 2006. On December 6, 2006, Claimant filed an Application for Formal Hearing (AFH) with the Administrative Hearings Division (AHD)⁴, which was assigned case number AHD No. PBL 05-015A. A Scheduling Order was issued on January 9, 2007 setting a formal hearing for March 5, 2007.

On March 5, 2007, a formal hearing was convened before Administrative Law Judge (ALJ) Fred D. Carney, Jr., with the claim for relief being reinstatement of benefits. On February 29, 2008, Judge Carney issued a Compensation Order granting the claim for relief. *Garnett v. D.C. Public Schools*, AHD No. PBL 05-006, DCP No. LTDMOPS004830 (February 29, 2008).⁵

On October 8, 2010, Claimant received a letter from the Office of Risk Management (ORM) in response to her claim for permanent disability to each leg. Claimant was informed that she would not be compensated for permanency to her legs as her claim had been accepted for the bruised coccyx, right shoulder contusion, and cervical strain.

On November 5, 2010, Claimant filed an AFH⁶, which was assigned case number AHD No. PBL 05-015B. On November 15, 2010, ALJ Heather Leslie issued a Scheduling Order setting a formal hearing for February 7, 2011. After failing to file a Pre-Hearing Order within 30 days of the Scheduling Order, Claimant was ordered to show cause on December 17, 2010 why her application should not be dismissed. As no response was received, Claimant's application was dismissed without prejudice on December 23, 2010.

On April 20, 2011, Claimant filed another AFH⁷, which was assigned case number AHD No. PBL 05-015C and Judge Carney issued a Scheduling Order on April 22, 2011 setting a

⁴ The Administrative Hearings Division (AHD) has been now renamed Hearings and Adjudication.

⁵ The Scheduling Order and Joint Pre-Hearing Order signed by Judge Carney designate the case number as PBL 05-015A and the Employer as the D.C. Department of Transportation. There is nothing in the record under review to show how or why the case number and the designated employer changed for purposes of the Compensation Order.

⁶ The AFH had attached to it a copy of the October 8, 2010 ORM letter denying compensation for permanency to the legs.

⁷ Attached to the AFH was a copy of the March 2, 2005 Notice of Determination accepting Claimant's initial claim and the October 8, 2010 ORM letter denying compensation for permanency to the legs with a Certificate of Service.

formal hearing for July 13, 2011. On May 19, 2011, Employer filed a Motion to Dismiss asserting Claimant's April 2011 AFH was not timely filed insofar as it was not filed within 30 days of the Notice of Determination (NOD) that was issued on October 8, 2010.⁸

On June 2, 2011, Claimant filed an opposition to Employer's motion arguing that she previously had a hearing scheduled on the issue of permanency that was dismissed and that she has now requested another hearing. On June, 22, 2011, Judge Carney issued an order for Claimant to show cause on or before June 30, 2011 why Employer's motion should not be granted. On June 30, 2011, Claimant filed a letter response independent of her counsel of record asking for the hearing to proceed as scheduled.

On June 30, 2011, Judge Carney, after noting that Claimant had attached a copy of her March 2005 claim acceptance, issued an Order dismissing Claimant's AFH as untimely filed.⁹ Judge Carney reasoned that Claimant failed to attach to her AFH a final decision from the Disability Compensation Program (DCP) that was issued less than 30 days from the date of her request for a hearing.

On July 28, 2011, Claimant, proceeding *pro se*, filed for reconsideration of Judge Carney's June 30, 2011 dismissal of her AFH. Claimant argued that she had initially filed for a formal hearing on November 5, 2010 to contest the October 8, 2010 NOD denying compensation for disability to her legs and due to the failure of counsel to file the required Pre-Hearing Order, the AFH was dismissed. On August 5, 2011, Judge Carney denied Claimant's request for reconsideration and for an expedited hearing.

On July 28, 2011, Claimant also filed an Application for Review seeking reversal of the June 30, 2011 order dismissing her AFH and a remand to AHD. Claimant argues that ineffective and negligent counsel failed to file appropriate responses to a Scheduling Order and orders to show cause that allowed her November 5, 2010 and April 20, 2011 applications to be dismissed.

STANDARD OF REVIEW AND ANALYSIS

As the Order on review is not one based on an evidentiary record produced at a formal hearing, the applicable standard of review by which we assess the determination reached by the Hearings and Adjudications section of the Office of Hearings and Adjudication is whether the decision is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.¹⁰

⁸ Although the October 8, 2010 ORM letter does not carry a heading designating it specifically as a Notice of Determination (NOD), the record does contain a Certificate of Service from the same claims examiner who signed the letter in which she certifies that "on this 8th day of October, 2010, a true and correct copy of the foregoing Notice of Determination" was mailed to Claimant.

⁹ On July 14, 2011, Judge Carney issued a revised dismissal order to correct the name of the counsel of record.

¹⁰ See, 6 Stein, Mitchell & Mezines, *Administrative Law*, § 51.03 (2001).

The Order under review was precipitated by Employer's Motion to Dismiss filed on May 19, 2011 in response to Claimant's April 20, 2011 AFH. In its motion, while Employer acknowledged that Claimant had submitted the October 8, 2010 NOD with her AFH, because her application was filed on March 18, 2011¹¹, it was "several months after the NOD" and therefore untimely, pursuant to § 1-623.23.24(b)(1)¹² and therefore AHD lacked jurisdiction.

In his June 30, 2011 Order, the ALJ noted that Claimant had attached to her April 2011 AFH her March 2, 2005 Notice of Determination Regarding Original Claim for Compensation, wherein Claimant's claim for a bruised coccyx, a right shoulder contusion and a cervical strain was accepted and benefits were being paid. Nonetheless, the ALJ determined that Claimant had failed to attach to her application a final decision from the DCP that was issued less than 30 days from the date of a her application for a hearing and on that basis granted Employer's motion to dismiss because the AFH was untimely filed.

In finding that Claimant had not attached to her application a final decision from the DCP, the ALJ neglected to take into consideration the October 8, 2010 letter from ORM denying Claimant compensation for a permanent disability to her legs, notwithstanding that the date of this letter formed the crux of Employer's argument that Claimant's AFH was untimely filed. To compound this error, the ALJ found in his August 5, 2011 Order on Reconsideration, that there was "no final decision denying Claimant a permanency rating" and "[U]ntil there is a final decision to deny Claimant the requested benefits, there is no justiable (sic) issue for a formal hearing." These findings are not supported by substantial evidence in the record and the ALJ committed error in so finding.

It must first be noted that after Claimant received the October 8, 2010 NOD from ORM, she filed an AFH on November 5, 2010. Due to the failure of her counsel of record to file a Pre-Hearing Order on her behalf, her application was dismissed without prejudice on December 23, 2010. Accordingly, for the purposes of Employer's May 19, 2011 Motion to Dismiss, Claimant had met the requirement of § 1-623.23.24(b)(1) by filing for a hearing within 30 days of receiving a NOD. When Claimant re-filed her application on April 20, 2011, her right to file was still preserved and was timely.

The ALJ, by using the March 2005 acceptance of claim letter to make a determination that Claimant had not filed within 30 days, committed error. The ALJ committed further error in finding there was no final decision denying Claimant compensation for a permanent disability to

¹¹ Although it was not part of the record file provided by AHD, Employer's motion referenced and attached an April 5, 2011 letter from AHD indicating that Claimant's counsel (William J. Howard, Esq.) had filed an incomplete AFH on March 18, 2011 and requested that he forward either a Final Decision on Reconsideration or a Notice of Determination from ORM. It is unclear why the April 5th letter was deemed necessary insofar as the copy in the record of the April 20, 2011 AFH has attached to it the October 8, 2010 letter denying compensation for permanency to the legs and date-stamped "March 18, 2011" and a copy of the Certificate of Service designating that letter an a Notice of Determination (the date-stamp is not legible).

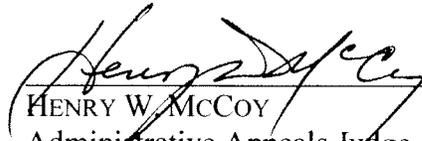
¹² D.C. Official Code § 1-623.23.24(b)(1) states in pertinent part: "...a claimant for compensation not satisfied with a decision of the Mayor or his or her designee under subsection (a) of this section is entitled, on request made within 30 days after the date of the issuance of the decision to a hearing before the Department of Employment Services Disability Compensation Law Judge."

her legs. The October 8, 2010 letter for ORM clearly states that Claimant is being denied compensation for permanency to the legs and is accompanied by a Certificate of Service specially referencing the letter as a Notice of Determination. Given this record evidence, Claimant's April 20, 2011 AFH on her claim for permanent disability to her legs was timely filed. It was error for the ALJ to grant Employer's motion to dismiss.

CONCLUSION AND ORDER

The Order of June 30, 2011 is arbitrary, capricious, an abuse of discretion and otherwise not in accordance with the law. It is therefore VACATED and this matter is REMANDED to AHD for the issuance of a new Scheduling Order.

FOR THE COMPENSATION REVIEW BOARD:


HENRY W. MCCOY
Administrative Appeals Judge

October 25, 2011

DATE