GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR

LISA M. MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 12-138

DONNA DIXON-CHERRY,

Claimant–Respondent/Cross-Petitioner,

v.

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,

Employer – Petitioner/Cross-Respondent.

Appeal from a Compensation Order by
The Honorable Nata Brown
AHD No. PBL 11-039, DCP No. 30110149849-0001

Frank McDougald, Esquire for the Petitioner/Cross-Respondent
Harold Levi, Esquire for the Respondent/Cross-Petitioner

Before HEATHER C. LESLIE,[1] LAWRENCE TARR, and MELISSA LIN JONES *Administrative Appeals Judges*.

HEATHER C. LESLIE, *Administrative Appeals Judge*, for the Compensation Review Board.

DECISION AND ORDER

OVERVIEW

This case is before the Compensation Review Board (CRB) on the request for review filed by the Employer - Petitioner (Employer) of the July 19, 2012, Compensation Order (CO) issued by an Administrative Law Judge (ALJ) in the Office of Hearings and Adjudication of the District of Columbia Department of Employment Services (DOES). In that CO, the ALJ granted, in part, the Claimant's request for temporary total disability benefits and causally related medical expenses. We AFFIRM.

[1] Judge Heather C. Leslie is appointed by the Director of DOES as an interim Board Member pursuant to DOES Administrative Policy Issuance No. 12-02 (June 20, 2012).

FACTS OF RECORD AND PROCEDURAL HISTORY

The Claimant was a social worker for the Employer, providing counseling for special education students. In the fall of 2009, the Claimant worked at Spingarn High School, whose principal was Blanca Reyes. The Claimant alleges that Principal Reyes began a pattern of harassment which affected the Claimant's ability to perform her counseling duties. The Claimant began to miss work due to stress and anxiety.

In October 2009, the Claimant became aware of an email Principal Reyes had sent to the Deputy Chancellor requesting the school's social workers be released from their duties due to performance issues. The Claimant alleged harassment from Principal Reyes that, along with the email, caused her stress and anxiety to such an extent that on November 1, 2009 the Claimant sought medical treatment with her primary care physician. On November 19, 2009, the Claimant followed up with psychiatrist Dr. Jared S. Putnam. The Claimant was diagnosed with major depression and generalized anxiety disorder.

The Claimant subsequently came under the care and treatment of Dr. Teresa Trabue, a psychologist, who in October 2010, suggested the Claimant may have a workers' compensation injury. Thereafter, the Claimant filed the Employer and Employee First Report of Injury or Occupational Disease on November 1, 2010.

On February 16, 2011 the Office of Risk Management (ORM) controverted the claim because of insufficient information to make a compensability decision. On May 16, 2011, the Claimant retired. On July 6, 2011, ORM issued a Notice of Determination denying the Claimant's claim under D.C. Code § 1-623.02(b).

A Formal Hearing was held on December 8, 2011. At the Formal Hearing the Claimant requested an award temporary total disability benefits from November 1, 2009 to the present and continuing and payment of casually related medical bills. The Employer raised the issues of whether the Claimant provided timely notice, whether claimed injury was medically causally related to the work injury, and whether the Claimant was eligible to receive benefits under the current statute. A CO was issued on July 19, 2012 awarding the Claimant's claim for relief in part. The ALJ found that D.C. Code § 1-623.02(b), first enacted on September 24, 2010, was intended to apply prospectively addressing future mental stress injuries. The ALJ also found that the Claimant was entitled to temporary total disability benefits from November 1, 2009 through May 15, 2011 and disallowed benefits thereafter as the Claimant elected to receive retirement benefits after that date.

The Employer timely appealed on August 20, 2012. On appeal, the Employer argues first, that the ALJ erred in awarding benefits when the Claimant filed her stress claim after the September 24, 2010 enactment of D.C. Code § 1-623.02(b). Second, the Employer argues that the ALJ erred in concluding the Claimant's sustained work related stress claim on November 1, 2009.

The Claimant filed an opposition to the Employer's application for review and a cross application for review. The Claimant argues the ALJ erred in finding the Claimant "decided to

elect" retirement benefits over that of workers' compensation benefits and pursuant to D.C. Code § 1-623.16(b), disallowed benefits after May 15, 2011, the date of retirement.

On September 5, 2010, the Employer opposed the cross application for review and submitted a motion to stay the July 19, 2012 CO. On September 11, 2012, the Claimant opposed the motion to stay.

THE STANDARD OF REVIEW

The scope of review by the CRB is limited to making a determination as to whether the factual findings of the Order are based upon substantial evidence in the record and whether the legal conclusions drawn from those facts are in accordance with the applicable law.[2] Section 1-623.28(a) of the District of Columbia Government Merit Personnel Act of 1978, as amended, D.C. Official Code § 1-623.1 *et seq*. ("Act"). Consistent with this standard of review, the CRB must uphold a Compensation Order that is supported by substantial evidence, even if there is substantial evidence in the record to support a contrary conclusion, and even where the CRB might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

DISCUSSION AND ANALYSIS

The Employer argues several issues, including the substantial evidence in the record does not support a work related stress injury. While several issues, including the date of injury and notice were raised at the Formal Hearing, a review of the Notice of Determination indicates the Claimant's claim was denied because,

> Your injury is not compensable under D.C. Official Code § 1-623.02(b), which states that "no claim shall be allowed under this act for mental stress or an emotional condition or disease resulting from a reaction to the work environment or to an action taken or proposed by the employee agency involving the following: (1) Employee's work performance, assignments, or duties; … [or] (4) Transfer."

Employer's Exhibit 2.

Thus, the Employer controverted the Claimant's claim solely based on D.C. Official Code § 1-623.02(b). Further, at no time did the Employer controvert that the injury occurred. The hearing transcript shows that after discussion with the ALJ, Employer's counsel agreed that the only two issues that were contested were timely notice and whether the Claimant's claim was compensable pursuant to D.C. l Code § 1-623.02(b). Hearing Transcript (HT) at 7-8. Indeed, Employer's counsel indicated that if the injury is stress, then "I can stipulate to the event that she says caused her stress." HT at 7. To argue on appeal that the ALJ did not find the Claimant suffered a work related event, when the Employer stipulated to the event, is disingenuous at best.

D.C. Code § 1-623.02(b), as amended on September 24, 2010 provides,

> No claim shall be allowed under this act for mental stress or an emotional condition or disease resulting from a reaction taken or proposed by the employing agency involving the following:

[2] "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 International v. DOES,* 834 A.2d 882 (D.C. 2003).

(1) Employee's work performance. Assignment, or duties;

(2) Promotion or denial of promotion;

(3) Adverse personnel action;

(4) Transfer;

(5) Retrenchment or dismissal; or

(6) Provision of employment benefits.

(c) Pursuant to § 1-602.04(a), the limitation of liability described in subsection (b) of this section shall not apply to an employee whose date of hire was before January 1, 1980.

Prior to the September 24, 2010, D.C. Code § 1-623.02 reads,

> The District of Columbia government shall pay compensation as specified by this subchapter for the disability or death of an employee resulting from personal injury sustained while in the performance of his or her duty, unless the injury or death is:
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> (1) Caused by willful misconduct of the employee;
> (2) Caused by the employee's intention to bring about the injury or death of himself or of another; or
> (3) Proximately caused by the intoxication of the injured employee.

The ALJ found the September 2010 amendment to statute to be prospective, stating,

> On this subject, the District of Columbia Court of Appeals has held that "As a general rule, statutes operate prospectively, while judicial decisions are applied retroactively"; *Washington v. Guest Services*, 718 A.2d 1071 (D.C. 1998), at 1074, and citing *U.S. v. Security Indus. Bank*, 459 U.S. 70, 103 S. Ct. 407 (1982), which includes within it the quote "the first rule of [statutory] construction is that legislation must be considered as addressed to the future, not to the past", itself citing and quoting from and *Union Pacific R. Co. v. Laramie Stock Yards Co.*, 231 U.S. 190, 199 (1913). *See, In the Matter of James Rice v. District of Columbia Department of Motor Vehicles*, CRB No. 08-027, AHD PBL 06-104 (December 20, 2007).

CO at 4.

We affirm and find the ALJ to be correct in concluding the statute to be prospective in nature. We reject the Employer's assertion that the statute addresses claims filed after September 24, 2010. As the statute states above, no claim shall be filed for mental stress or an emotional condition or disease *resulting from* a reaction to the work environment. (Emphasis added). A claim is derived from a work place injury, in this case an injury occurring on November 1, 2009. The Employer's selective reading of the statute, arguing it pertains specifically to claims and not injuries is rejected.

Moreover, as we discussed in *Rice v. DC Dept. of Motor Vehicles*, CRB No. 08-027, AHD No. PBL 06-104 (December 20, 2007),

> We are not unaware of the concept that in certain circumstances, statutory amendments may be given retroactive application. See, for example, 73 AM. JUR. 2d *Statutes* § 354 (1974) ("statutes relating to remedies or modes of procedure which do not create new or take away vested rights, but only operate in furtherance of the remedy or confirmation of such rights, do not normally come within the legal conception of a retrospective law, or the general rule against the retrospective operation of statutes"); 82 C.J.S. *Statutes* § 421 (1953) ("As a general rule statutes relating to remedies and procedure are given retrospective construction"). Also, "It is a well-settled principle of statutory construction that 'civil laws retroactively adding to the means of enforcing existing obligations are valid'", 2 SUTHERLAND, STATUTORY CONSTRUCTION § 41.09 (Sands 4th ed. 1986). This rule applies as long as vested or substantive rights are not altered or created by the statutory amendment.

It is clear by the nature the statutory amendments to D.C. Code § 1-623.02(b), that they are not intended to relate to remedies and procedure and certainly do not confirm prior rights Claimant's enjoyed under D.C. Code § 1-623.02. In fact, the amended statute imposes new and more restrictive standards to psychological claims arising from a Claimant's employment. Retroactive application of the statute would potentially attach new consequences to an injury that predated the amendment to the statute -- the injury would not be compensable because it originated out of a potential personnel action. Thus, we interpret the amendment to D.C. Code § 1-623.02(b) to be prospective only, applying to injuries after the September 24, 2010 enactment and any claims arising out of those injuries.

We also reject the Employer's contention that the "grandfather" provision excluding Employee's hired after January 1, 1980 is evidence that the City Council's intent in limiting benefits. As the Claimant correctly points out, in conjunction with § 1-602.04[3] referred to in subsection c,

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[3] § 1-602.04, titled Status of employees employed by the District of Columbia government on the date that this chapter becomes effective as provided in § 1-636.02; retention of existing rights states,

> (a) Persons employed by the District of Columbia government serving on the date that this chapter becomes effective, as provided in § 1-636.02, shall be guaranteed rights and benefits at least equal to those currently applicable to such persons under provisions of personnel law and rules and regulations in force on the date immediately prior to the date that this chapter becomes effective as provided in § 1-636.02.
>
> (b) All provisions of existing contracts between the District government and labor organizations shall be honored until their expiration.
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> (c) On January 1, 1980, all persons employed by the District of Columbia government, including those persons employed by the District of Columbia government on the date that this chapter becomes effective as provided in § 1-636.02, shall automatically transfer into the appropriate personnel system as established pursuant to subchapters VIII and VIII-A of this chapter or § 1-609.04 or § 1-609.09. The classification of and compensation for the position assumed upon transfer, and the rights and benefits inhering in such position, shall be at least equal to the classification, compensation, rights and benefits associated with the position from

protects benefits conferred to former federal employees who became District employees after home rule was granted. What the Employer is suggesting is that the Council disallowed over thirty years of potential claims. We find no merit in this assertion.

In a cross appeal, the Claimant argues it was in error for the ALJ to conclude she "elected" retirement benefits as workers' compensation benefits were not available to her at the time, thus there was no election made.

D.C. Code § 1-623.16(b), titled Limitation of Right to Receive Compensation provides,

> An individual entitled to benefits under this subchapter because of his or her injury who is also entitled to receive from the District of Columbia government under a provision of a statute other than this subchapter, payment or benefits for that injury or death (except proceeds of an insurance policy), because of service by him or her (or in the case of death, by the deceased) as an employee or in the armed forces, shall elect which benefits he or she will receive. The individual shall make the election within 1 year after the injury or death or within a further time allowed for good cause by the Mayor. The election when made is irrevocable, except as otherwise provided by statute.

In applying the above statute and considering the Claimant voluntarily retired on May 15, 2011, the ALJ stated,

> When Claimant was made aware by Dr. Trabue that, because her injury was work-related, she should be eligible for workers' compensation benefits, Claimant filed a claim on November 1, 2010. On February 16, 2011, her claim was controverted, but a Notice of Determination had not been issued. While her workers' compensation claim was pending, on May 16, 2011 Claimant voluntarily retired. Though she had a workers' compensation claim pending, and her eligibility for workers' compensation benefits had not yet been determined, Claimant decided to elect to receive retirement benefits instead of workers compensation benefits. Once that election was made, pursuant to D.C. Code, § 1-623.16(b), it was irrevocable.

CO at 6.

While we sympathize with the Claimant having to make a difficult choice, to either wait and see if she is successful in her workers' compensation case or choose the immediate relief of

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> which said employee is transferred. The rights and benefits protected under this subsection shall be only those applicable to said employees under the provisions of personnel laws and rules and regulations in force on December 31, 1979: Provided, however, that no employee covered under the provision of this subsection shall be reduced in pay except as provided in subchapter XXIV of this chapter.
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> (d) After January 1, 1980, persons employed by the District of Columbia government on the date that this chapter becomes effective as provided in § 1-636.02 and who transfer into the appropriate personnel system, pursuant to subsection (c) of this section, shall be governed by the provisions of this chapter, with the exception of subsection (e) of § 1-608.01 and subsection (d) of § 1-608.01a.
>
> (e) Employees hired on or after the date that this chapter becomes effective as provided in § 1-636.02 shall be governed by all the provisions of this chapter without exception.

retirement benefits, the law is clear that an injured worker cannot receive both workers' compensation benefits and retirement pay at the same time. The Claimant voluntarily retired and is presently receiving retirement benefits. Under the statute, the Claimant is not able to receive disability benefits. We affirm the ALJ's conclusion.

Finally, as we have rendered a decision on the merits of the appeal, the Employer's motion to stay is rendered moot.

CONCLUSION AND ORDER

The findings of fact and conclusions of law contained in the July 19, 2012 Compensation Order is supported by substantial evidence in the record and is in accordance with the law. It is **AFFIRMED.**

FOR THE COMPENSATION REVIEW BOARD:

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HEATHER C. LESLIE
Administrative Appeals Judge

November 27, 2012
DATE