

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA MARÍA MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 13-069

**SHERRY FELDER,
Claimant–Petitioner,**

v.

**DISTRICT OF COLUMBIA PUBLIC SCHOOLS,
Self-Insured Employer-Respondent.**

Appeal from a Compensation Order by
Administrative Law Judge Linda F. Jory
AHD No. PBL09-037A, DCP No. 200712352288-0001

Justin M. Beall, Esquire for the Petitioner
Frank McDougald, Esquire for the Respondent

Before MELISSA LIN JONES and HENRY W. MCCOY, Administrative Appeals Judges and
LAWRENCE D. TARR, Chief Administrative Appeals Judge.

MELISSA LIN JONES for the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

On December 10, 2007, Ms. Sherry Felder was injured at work. Ms. Felder received workers' compensation disability benefits until August 14, 2008 when the Disability Compensation Program¹ ("DCP") issued a Notice of Determination terminating her temporary total disability compensation benefits.

The Notice of Determination states Ms. Felder could request reconsideration no later than the 30th day after the date of the Notice of Determination or could appeal the decision to the Department of Employment Services' Office of Hearings and Adjudication, Administrative Hearings Division² ("AHD") pursuant to §1-623.24 of the District of Columbia Government

¹ Effective October 1, 2010, the Disability Compensation Program changed its name to the Public Sector Workers' Compensation Program.

² As of February 2011, the Administrative Hearings Division changed its name to Hearings and Adjudication.

Comprehensive Merit Personnel Act of 1978, as amended, D.C. Official Code §1-623.1 et seq. (“Act”). On December 30, 2008, more than thirty days after the issuance of the Notice of Determination, Ms. Felder filed a request for reconsideration with DCP.

In response, on February 10, 2009, DCP issued a Final Decision on Reconsideration. The Final Decision on Reconsideration denied Ms. Felder’s request for reconsideration because her request was not timely; the original decision to terminate temporary total disability compensation benefits was upheld.

On March 4, 2009, less than thirty days after the issuance of the Final Decision on Reconsideration, Ms. Felder requested a formal hearing. Her request was granted, and following the formal hearing, an administrative law judge (“ALJ”) issued a Compensation Order granting Ms. Felder’s request for temporary total disability compensation benefits from August 15, 2008 to the date of the formal hearing and continuing as well as causally related medical expenses.³

D.C. Public Schools (“Employer”) appealed the September 25, 2009 Compensation Order. In a Decision and Remand Order dated May 20, 2011, the Compensation Review Board (“CRB”) vacated the Compensation Order and remanded the matter because “the ALJ made no findings of fact on the critical issue of whether or not Ms. Felder actually did receive the August 14, 2008 Notice of Determination.”⁴

A different ALJ held a second formal hearing and issued a Compensation Order on May 7, 2013.⁵ Because Ms. Felder received the August 14, 2008 Notice of Determination, her December 30, 2008 request for reconsideration is not timely, and the ALJ concluded AHD lacks jurisdiction over her claim.

Ms. Felder appeals the May 7, 2013 Compensation Order. She argues the finding that she received the Notice of Determination is not supported by the record which indicates “Employer failed to make additional efforts to notify [her] of her termination of benefits when the registered mail that Employer had sent was returned unclaimed.”⁶ Ms. Felder also argues the award of temporary total disability benefits in the September 25, 2009 Compensation Order (vacated by the CRB in its May 20, 2011 Decision and Remand Order) is supported by substantial evidence in the record.

In opposition, Employer asserts Ms. Felder disagrees with the weight the ALJ gave the evidence in the record, but the May 7, 2013 Compensation Order is supported by substantial evidence and is in accordance with the law. Employer requests the CRB affirm the Compensation Order.

³ *Felder v. D.C. Public Schools*, AHD No. PBL09-037, DCP No. 200712352288-0001 (September 25, 2009).

⁴ *Felder v. D.C. Public Schools*, CRB No. 10-011, AHD No. PBL09-037, DCP No. 200712352288-0001 (May 20, 2011), p. 4.

⁵ Although the decision is titled a Compensation Order, it clearly was issued in response to the remand ordered by the CRB in *Felder v. D.C. Public Schools*, CRB No. 10-011, AHD No. PBL09-037, DCP No. 200712352288-0001 (May 20, 2011).

⁶ Claimant-Respondent’s [*sic*] Memorandum of Points and Authorities in Support of Application for Review of May 7, 2013 Compensation Order, unnumbered p. 5.

ISSUES ON APPEAL

1. Is there substantial evidence in the record to support the finding that Ms. Felder received the August 14, 2008 Notice of Determination?
2. Is the conclusion that AHD lacks jurisdiction over Ms. Felder's claim in accordance with the law?

ANALYSIS⁷

A Notice of Determination terminating Ms. Felder's temporary total disability compensation benefits issued on August 14, 2008, and there is no dispute Ms. Felder requested reconsideration of that Notice of Determination on December 30, 2008, more than thirty days after its issuance. The law requires Ms. Felder exhaust administrative procedures; if she failed to do so by timely requesting reconsideration or a formal hearing, AHD is without jurisdiction to consider her case on its merits.⁸

At a formal hearing held on July 8, 2009, Ms. Felder claimed she had not received the Notice of Determination. The resulting Compensation Order did not include findings of fact as to whether Ms. Felder had received the Notice of Determination; therefore, the CRB remanded this matter with instructions that the ALJ "make proper findings as to whether Ms. Felder received the August 14, 2008 Notice of Determination and whether she exhausted all applicable administrative procedures."⁹

In response, following a second formal hearing, an ALJ made specific findings of fact that Ms. Felder received the Notice of Determination:

The NOD was sent by regular mail and by certified mail and a copy was sent to the ORM. I find ORM received their copy on August 27, 2008. I find claimant called ORM on August 26, 2008 and her mother was also on the telephone line. Claimant advised ORM's representative, Mary Fleming, that she would most likely be submitting either a Request for Reconsideration or an application for a formal hearing due to the NOD terminating her benefits. Ms. Fleming sent an email on the same day advising the claims supervisor of the telephone conversation.

⁷ 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 applicable law.⁷ Section 1-623.28(a) of the Act. Consistent with this standard of review, the CRB is constrained to uphold a Compensation Order on Remand 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. *Marriott International v. DOES*, 834 A.2d 882, 885 (D.C. 2003).

⁸ *Marsden v. DOES*, 58 A.3d 472 (D.C. 2013).

⁹ *Felder v. D.C. Public Schools*, CRB No. 10-011, AHD No. PBL09-037, DCP No. 200712352288-0001 (May 20, 2011).

The NOD sent by certified mail was returned to Sedgwick. I find that based on the telephone conversation with Mary Fleming, claimant received the NOD sent by regular mail.^[10]

In addition, the ALJ relied upon claim file entries

which were kept contemporaneously with the events that occurred in 2008 [and which] in the undersigned's opinion establish that claimant did receive the NOD, despite her testimony that she did not receive it. It is not conceivable to the undersigned that a claims supervisor would document a conversation that did not take place.^[11]

The ALJ made credibility determinations comparing Ms. Felder's testimony to the other record evidence and rejected Ms. Felder's testimony that she did not receive the Notice of Determination:

Based on the evidence submitted at the formal hearing, the undersigned concludes that claimant did in fact have the NOD when she contacted the Office of Risk Management on August 26, 2008. This conclusion is based on the submission of the entries in claimant's file by the claims personnel. The entries in claimant's file are logged in with the initials of the person making the entry and the date as well as the time is entered.^[12]

Ms. Felder disputes the facts as found by the ALJ. Because the ALJ's findings of fact are supported by substantial evidence in the record, as is the credibility ruling,¹³ the CRB lacks authority to change either one.¹⁴

Ms. Felder makes much of an argument that "when certified mail comes back unclaimed, an employer is required to take additional steps to provide notice, especially when the notice is regarding the termination of a statutory right,"¹⁵ however, this argument overlooks the facts that the ALJ found (1) Employer also sent a copy of the Notice of Determination by regular mail which Ms. Felder received and (2) Ms. Felder contacted Employer by phone in August 2008 indicating her intent to request reconsideration of the Notice of Determination. The evidence supports the ALJ's finding that even though Ms. Felder did not claim the certified letter, she received the Notice of Determination, and we find no merit to the argument that Employer had to take any additional steps to provide notice.

¹⁰ *Felder v. D.C. Public Schools*, AHD No. PBL09-037A, DCP No. 200712352288-0001 (May 7, 2013), p. 4.

¹¹ *Id.* at p. 4.

¹² *Id.*

¹³ An ALJ's credibility determinations are entitled to deference. *Dell v. DOES*, 499 A.2d 102, 106 (D.C. 1985).

¹⁴ *Marriott, supra.*

¹⁵ Claimant-Respondent's [*sic*] Memorandum of Points and Authorities in Support of Application for Review of May 7, 2013 Compensation Order, unnumbered p. 7.

Finally, Ms. Felder briefly mentions some objections she claims were improperly overruled at the formal hearing. The grounds for the objections and the allegedly improper bases for the ALJ's rulings on the objections have not sufficiently been supported by legal argument; therefore, given the flexibility an ALJ has when accepting evidence into the record and when conducting a formal hearing, these rulings will not be addressed by this tribunal.

CONCLUSION AND ORDER

The finding that Ms. Felder received the August 14, 2008 Notice of Determination is supported by substantial evidence, and the conclusion that AHD lacks jurisdiction over Ms. Felder's claim is in accordance with the law. The May 7, 2013 Compensation Order is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

MELISSA LIN JONES
Administrative Appeals Judge

July 26, 2013
DATE