

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR



DEBORAH A. CARROLL
ACTING DIRECTOR

COMPENSATION REVIEW BOARD

CRB 14-134

**FRANCES JOHNSON,
Claimant-Petitioner,**

v.

**DISTRICT OF COLUMBIA DEPARTMENT OF PUBLIC WORKS,
Employer.**

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2015 MAR 17 AM 11 07

Appeal from an October 20, 2014 Compensation Order on Remand by
Administrative Law Judge Fred D. Carney, Jr.
AHD No. PBL 10-029A, DCP No. 30081118088-0001

Robert K. Magovern for Claimant¹
Sonia L. Weil for Employer²

Before JEFFREY P. RUSSELL, MELISSA LIN JONES, and LINDA F. JORY, *Administrative Appeals Judges.*

JEFFREY P. RUSSELL, *Administrative Appeals Judge*, for the Compensation Review Board.

DECISION AND ORDER

BACKGROUND AND FACTS OF RECORD

The following procedural history is taken from the prior Compensation Review Board (CRB) Decision and Remand Order, issued pursuant to a mandate of the District of Columbia Court of Appeals (DCCA), which granted a Consent Motion to Remand Case For Further Administrative Proceedings (the consent motion):

The claimant, Frances Johnson, worked for the District of Columbia Department of Public Works. Ms. Johnson alleged she sustained multiple work-related injuries

¹ Claimant was represented by William J. Howard at the two formal hearings that were conducted in this case. Mr. Magovern represents Claimant in this appeal.

² Justin Zimmerman represented the Employer in prior proceedings. Sonia L. Weil is representing the Employer in this appeal, under the supervision of Andrea Comentale, pursuant to Rule 49(c) of the District of Columbia Court of Appeals.

24, 2008, she filed a claim for benefits that was denied by the employer on December 18, 2008 because the claimant abandoned her claim because she failed to file supporting documentation [footnote omitted]. The notice denying the claim advised the claimant that she could request reconsideration within 30 days.

The claimant disputed that she failed to file the documentation but did not request reconsideration until November 13, 2009, 11 months later. The employer denied the claimant's reconsideration request on December 16, 2009, because it was untimely filed. The employer's denial, titled "Final Decision on Reconsideration," advised the claimant that she had 30 days from December 16, 2009, to request a formal hearing with the Office of Hearings and Adjudication (OHA).

The claimant did not file a request for hearing with the OHA. Instead, on January 5, 2010, the claimant filed her Application for Hearing (AFH) with the Office of Workers' Compensation (OWC). OWC sent the AFH to the employer which, in turn, sent the AFH to OHA. The AFH was received by OHA on January 20, 2010, more than 30 days after the Final Decision on Reconsideration issued.

On January 25, 2010, OHA sent the claimant a letter telling her that OHA "received an incomplete Application for Formal Hearing from you on January 20, 2010" but that the Application was incomplete because it failed to include certain required documentation. The claimant re-filed her Application with the proper documentation on January 27, 2010.

ALJ Fred D. Carney, Jr. held two hearings [footnote omitted]. The first hearing involved extensive discussions between counsel and the ALJ. No evidence was taken. Towards the end of the first hearing, the claimant advised the ALJ that she wanted to withdraw her application for formal hearing. The next day, September 9, 2010, the ALJ entered the following Order:

On September 8, 2010, Frances Johnson, [sic] verbally requested to withdraw her application for formal hearing to allow her adequate time to prepare. Based on Claimant's request the application for formal hearing is hereby DISMISSED without prejudice. Claimant may re-file her application at a later date.

The claimant re-filed her AFH and an evidentiary hearing was held on December 13, 2010 before the same ALJ.

Consistent with the discussions at the beginning of the second hearing, the ALJ's March 15, 2011, CO listed the following issues for determination:

1. Whether Claimant is barred from seeking a formal hearing for untimely application for formal hearing.
2. Whether Claimant's current impairments if any, are causally related to her

employment.

3. Whether Claimant filed a timely claim for benefits.

4. Determine the nature and extent of Claimant's disability if any.

The ALJ determined that the claimant did not file her AFH within the requisite time:

The evidence of record indicates that Claimant filed an earlier request for a formal hearing on the December 16, 2009 denial. The administrative file indicates that on January 20, 2010, a Staff Assistant, with AHD wrote a letter to Claimant in which she informed Claimant that her application for formal hearing was received on January 20, 2010 and it was incomplete. The administrative file further indicates that on January 27, 2010, AHD received a facsimile with the December 16, 2009 Final Decision of Reconsideration attached to complete Claimant's Application for Formal Hearing. Claimant's application for formal hearing is marked received January 27, 2010, which is beyond thirty days of the December 16, 2009 decision.

CO at 3.

Therefore, the ALJ dismissed the claimant's AFH:

Based upon a review of the record evidence as a whole, I find and conclude that Claimant's application for formal Hearing was received out side of the statutory timeframe allotted to request a formal hearing. Therefore Claimant's Claimant's [sic] Application for Formal Hearing was untimely and Employer's motion to dismiss must be GRANTED.

Id. at 4.

The CRB affirmed. *Johnson v. District of Columbia Department of Public Works (DCPW)*, CRB No. 11-026 (December 12, 2011). The claimant appealed the CRB's decision to the DCCA.

During the pendency of the appeal, the parties submitted a Consent Motion, in which they asked that the matter be remanded and:

Following the remand from this Court, the CRB is to remand the case to the Administrative Law Judge for further proceedings, Respondent [employer] intends to request that the Administrative Law Judge make findings and render a decision concerning the timeliness of [claimant's] November 13, 2009 Request for Reconsideration. It is [claimant's] position that the issue of the timeliness of petitioner's November 13,

2009 Request for Reconsideration has been waived by [employer], litigated and decided both by the Administrative Law Judge and the CRB. [Claimant] therefore believes that this issue can no longer be raised before the Administrative Law Judge. [Employer] disagrees. If this issue is resolved favorably to [claimant], the Administrative Law Judge will then address the merits of petitioner's claim for public sector workers' compensation. If it is not, the case will be concluded.

The Consent Motion was accepted by the DCCA. The CRB's decision was vacated and "the case remanded to the administrative agency for further proceedings consistent with the statements made in respondent's motion."

Johnson v. D.C. Department of Public Works, CRB No. 11-026(R), AHD No. PBL 10-029A, DCP No. 30081118088-0001 (October 2, 2012), at 2 – 4.

On remand from the DCCA, the CRB determined, as a matter of law, that (1) the issue of whether the timely reconsideration request had been fully litigated was answered in the negative and (2) the issue had not been waived by Employer.

The CRB directed that the ALJ determine whether the claim is barred because the claimant did not timely file a reconsideration request, and if the ALJ determines the claim is not barred, consider the applicability of *Sisney v. DC Public Schools*, CRB No. 08-200, AHD No. PBL 08-066, DCP No. 007970 (July 2, 2012), a case that was decided while this matter was pending appeal before the DCCA, to this case.

On November 25, 2014, the ALJ issued a Compensation Order on Remand, in which he determined that the claim was barred due to Claimant's failure to timely file a request for reconsideration.

Claimant appealed the Compensation Order on Remand, arguing that the CRB improperly decided issues that should have been considered by the ALJ, that the CRB's decision that the untimely reconsideration claim had not been abandoned by Employer after being fully litigated is incorrect, that two cases cited by the ALJ are inapposite because they dealt with timely claims filing, a defense abandoned by Employer, that the ALJ should have solicited additional evidence, argument and/or briefing prior to issuing the Compensation Order on Remand, and that the facts of this case compel a conclusion that any technical failures on the part of Claimant with respect to the untimely filing of the request for reconsideration be waived.

Employer opposes the appeal, arguing that there was but one issue before the ALJ, that being the timeliness or untimeliness of the request for reconsideration, that the ALJ made findings of fact on that issue, concluded that the request was not filed within 30 days, those facts were supported by uncontroverted evidence in the record, and that the conclusion that the claim is barred is in accordance with the law.

Because the ALJ's factual findings are supported by substantial evidence, and because the legal conclusion drawn therefrom is in accordance with the law, the Compensation Order on Remand is affirmed.

ANALYSIS

The scope of review by the CRB as established by D.C. Comprehensive Merit Personnel Act of 1978, D.C. Code § 1-623.01, *et seq.*, at § 1-623.28(a), is limited to making a determination as to whether the factual findings of a Compensation Order are based upon substantial evidence in the record, and whether the legal conclusions drawn from those facts are in accordance with the law. *See also Marriott International v. DOES*, 384 A.2d 882 (D.C. 2002).

Consistent with that standard, the CRB is constrained to affirm a Compensation Order that is supported by substantial evidence, even if there is substantial evidence to support a contrary conclusion. *Id.*, at 885.

Turning to the appeal now before us, we start by noting that the case was remanded by the DCCA to the CRB with specific, limited instructions. The court stated:

On consideration of respondent's (Employer's) consent motion to remand this case, it is

ORDERED that respondent's motion to remand is granted and the order on appeal is hereby vacated and the case is remanded to the administrative agency for further proceedings consistent with the statements made in respondent's motion.

Johnson v. DOES, DCCA No. 12-AA-9, Order of August 11, 2012.

The Consent Motion to Remand contained the following:

Following the remand from this court, the CRB is to remand the case to the Administrative Law Judge for further proceedings, Respondent intends to request that the Administrative Law Judge make findings and render a decision concerning the timeliness of petitioner's November 13, 2009 Request for Reconsideration. It is petitioner's position that the issue of the timeliness of petitioner's November 13, 2009 Request for Reconsideration has been waived by respondent, litigated and decided by both the Administrative Law Judge and the CRB. Petitioner therefore believes that this issue can no longer be raised before the Administrative Law Judge. Respondent disagrees. If this issue is decided favorably to petitioner, the Administrative Law Judge will then address the merits of petitioner's claim for public sector workers' compensation. If it is not, the case will be concluded.

Consent Motion to Remand, July 23, 2012, at 2.

In executing the court's instructions, the CRB issued a Decision and Remand Order on October 2, 2012. It too was specific and limited in its instructions:

The CRB first determines that the employer has not waived the issue of whether claimant's reconsideration request was timely. Throughout the evidentiary hearing counsel for employer asserted that the claim was not timely because the claimant did not ask for reconsideration within 30 days.

We further hold that this issue was not litigated and decided. Neither the ALJ's CO nor the CRB's Decision and Order state any decision on this issue. ... The CO only determined whether the [Application for Formal Hearing] was timely, an issue no longer contested by the employer.

Therefore, we must remand this case to the Office of Hearings and Adjudication for a determination as to whether the claim is barred because claimant did not timely file a reconsideration request.

Johnson v. DC Department of Public Works, supra, pp. 4 - 5.

Claimant argues in this appeal that the two determinations made by the CRB should have been presented to the ALJ for a decision. We disagree: the CRB's assessment that neither the Compensation Order or the Decision and Order affirming it contained any resolution of the issue concerning whether the request for reconsideration was timely, hence it is beyond question that it had not been litigated to conclusion. Further, it is similarly without question that Employer raised the matter at both formal hearings. Any contrary conclusion by the ALJ would, by necessity, be erroneous and subject to reversal by the CRB. See, Joint Prehearing Statement, October 28, 2010, p. 2, "Contested Matters"; Hearing Transcript (HT), September 8, 2010 (HT I), p. 29, HT December 13, 2010 (HT II), p. 12.

Further, the DCCA remand was to the agency, not the ALJ and in it the court directed that the issues identified in the consent motion be resolved. Neither the remand order nor the consent motion specified that any issues that were appropriate for resolution by the CRB should be directed to the ALJ. Moreover, the pertinent text of the Consent Motion is set forth above, and it does not include any request that the issue of waiver be addressed on remand. The sole issue for resolution on remand pursuant to that Motion is "the timeliness of petitioner's November 13, 2009 Request for Reconsideration."

Claimant contends further that the ALJ and the CRB were obligated to solicit additional briefing, evidence, or argument, prior to issuing the Compensation Order on Remand. Again, we must disagree; the issue to be decided by the ALJ was part of the case at the time of both hearings. Both parties had the opportunity to present evidence and argument on that issue at those times.

All that remained for the ALJ to decide was whether the request for reconsideration was timely. That required fact findings concerning when the Notice of Denial was issued, and when the Request for Reconsideration was filed. Although Claimant argues that the record contained other evidence, or that other evidence could have been presented that should have resulted in a contrary finding than that made by the ALJ, we point out that our role is to determine whether the facts found by the ALJ are supported by substantial evidence, and if the legal conclusion reached by the ALJ is consistent with those findings. We are not permitted to substitute our judgment for that of the ALJ.

In this case, not only does the record support the facts as found by the ALJ on this issue, they are not disputed in this appeal.

Accordingly, we affirm the Compensation Order on Remand.

CONCLUSION AND ORDER

The ALJ's factual findings are supported by substantial evidence, the legal conclusion drawn therefrom is in accordance with the law, and the Compensation Order on Remand is affirmed.

FOR THE COMPENSATION REVIEW BOARD:



JEFFREY P. RUSSELL
Administrative Appeals Judge

March 17, 2015
DATE