GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR

DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 16-090

FREDDIE JONES,
Claimant–Respondent,

v.

DISTRICT OF COLUMBIA DEPARTMENT OF CORRECTIONS,
Employer-Petitioner.

Appeal from a June 17, 2016 Compensation Order
by Administrative Law Judge Gwenlynn D'Souza
AHD No. PBL 09-028C, DCP No. 0468-WC-84-0500015

(Decided November 3, 2016)

Harold L. Levi for Claimant
Frank MCDougald for Employer

Before HEATHER C. LESLIE, GENNET PURCELL, and JEFFREY P. RUSSELL, *Administrative Appeals Judges.*

HEATHER C. LESLIE for the Compensation Review Board.

DECISION AND PARTIAL REMAND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

Claimant injured his back, neck and shoulder on May 16, 1984. His claim for disability compensation under the District of Columbia Comprehensive Merit Personnel Act, D.C. Code § 1-623.01, *et seq.* (the "Act") was accepted by Employer, and Claimant has been receiving disability compensation and medical care.

Over the course of the approximately 32 years that Claimant has been receiving disability compensation, the work-related disability provisions of the Act have been administered by different internal and third-party entities. At the time that the disputes involved in the instant matter came arose, the Act was administered by the District of Columbia Office of Risk Management ("ORM") under the umbrella program title, "Public Sector Workers' Compensation Program" (" PSWCP" or the "Program").

On October 9, 2015, the Program issued a "Notice of Determination Regarding Workers' Compensation Benefits" ("NOD"). This was in response to Claimant's request to issue a determination regarding medical bills, mileage reimbursement, cost of living adjustments and retroactive payment of unpaid benefits. As Employer outlines, the NOD informed Claimant,

> ... that his compensation rate for prior years would be adjusted for cost of living increases he did not receive through 2007 and that he would receive a retroactive payment in the amount of $9,513.66 for the period October 9, 2012 to October 9, 2015. Claimant was also informed that he would not receive a retroactive payment for any period prior to October 9, 2012, because his claim was barred by the statute of limitations. Claimant was further informed that although he requested mileage reimbursement for 2,892 miles, he was only entitled to reimbursement for 332 miles. The remaining mileage was not awarded based on the doctrine of laches and the statute of limitations. Lastly, Claimant was informed that he would not be paid a $52,000 retroactive payment he alleged he was owed for the period December 4, 1996 to September 13, 2001 because (1) the claim was barred by the statute of limitations and (2) he had received Federal Civil Service (FCS) workers' compensation benefits during that period which would have sufficiently offset any amount of unpaid PSWC benefits he had not received during that same period.

Employer's Brief at 3 (Footnotes omitted).

The Claimant appealed and requested a formal hearing. A full evidentiary hearing occurred on February 11, 2016. Claimant sought an award "for travel reimbursement and temporary total disability ("TTD") benefits based on a calculation including night differential pay and cost of living adjustments ("COLAs"), from the relevant time period to the present and continuing, plus interest." Compensation Order ("CO") at 3. As outlined in the CO, the issues to be adjudicated were:

1. Whether the claim for TTD is barred in part by the applicable statute of limitation?
2. Whether the claim for TTD is barred by the doctrine of *res judicata*?
3. Whether the claim for TTD is barred by the doctrine of collateral estoppel?
4. Whether any claim is barred by the scope of the notice of determination?
5. Whether Employer miscalculated and understated Claimant's wage loss benefits?
6. Whether Employer is entitled to a credit for Federal Disability Retirement Payments?
7. Whether Claimant is entitled to interest?
8. Whether Employer is entitled to a credit based on a double recovery?
9. Whether the claim for travel reimbursement is barred by the doctrine of laches?
10. Whether claimant is entitled to reimbursement for travel?

CO at 3.

A CO was issued on June 17, 2016. The ALJ concluded:

> Based upon a review of the record evidence as a whole, the undersigned concludes the applicable statutes [sic] of limitations is D.C. Code § 1-623.34(f); part of the claim is barred by the doctrine of collateral estoppel; this administrative court may decide which request for reimbursement were received by the Office of Risk Management; Employer miscalculated wage loss benefits, which resulted in an underpayment; Employer is not entitled to a credit for Federal Disability Retirement Payments; Claimant is entitled to interest; Employer is not entitled to a credit based on double recovery; the Claimant [sic] for travel reimbursement is not barred by the doctrine of laches; and Claimant is entitled to travel reimbursement.

In light of the conclusions of law, the CO ordered:

> Claimant's claim for relief be, and hereby, is GRANTED in part and DENIED in part. Claimant is hereby granted an award for an underpayment including interest in the amount of $67,103.19 as calculated above, subject to any release of claims which becomes part of a settlement agreement. Claimant is awarded temporary total disability payments in the amount of $1017.57 from July 1, 2016 and continuing. Claimant is also awarded $690.88 for travel reimbursement.

Employer appealed. As Employer summarizes:

> The matter is now before the CRB pursuant to Employer's appeal of the CO. The issues presented here include whether the Department of Employment Services (DOES) has jurisdiction over Claimant's appeal, and if so, whether the ALJ acted in accordance with the law when she held that (1) Claimant is entitled to a retroactive payment from November 1993 to the present; (2) a 2% compound (rather that [sic] simple) interest on accrued benefits is appropriate; (3) the 4% salary increase that became effective October 11, 2009 and the 3% salary increases that became effective on April 7, 2013, October 5, 2014 and October 4, 2015 constituted cost of living increases; (4) the doctrine of collateral estoppel did not apply to the Decision and Remand Order of the Director dated December 18, 2000.

Employer's Brief at 6.

Claimant opposes the appeal, arguing the "CO is based on substantial evidence and is in accordance with the law" and must be affirmed. Claimant's brief at 7. Claimant did not appeal the amount of the underpayment or the travel reimbursement awarded.

ANALYSIS[1]

We note that recently, the CRB issued *Harrison v. D.C. Department of Corrections*, CRB No. 16-084 (October 20, 2016) ("*Harrison*") which addresses many of the same arguments Employer brings before us. Specifically, *Harrison* addressed the following arguments presented before the CRB in the case *sub judice*:

- That DOES lacked jurisdiction to address the October 9, 2015 NOD relying on Chapter XXII, arguing appeals are limited to modification of benefits that arise due to changes in Claimant's condition, thus, "D.C. Official Code § 1-623.24(f) does not provide the right to appeal to the DOES a correction in benefits based on an administrative error, as is the case here. Similarly, the statutory provision does not provide the right to appeal a determination regarding mileage reimbursement."

- That, the finding by the ALJ that Claimant is entitled to retroactive payment of benefits since November 1993 is in error as it is not in accordance with the applicable law, relying upon D.C. Official Code § 12-301 which provides the applicable statute of limitations as support. Employer also argues each bi-weekly payment constitutes a new cause of action to which the three year statute of limitations applies.

- That the ALJ's finding that the general salary increases effective April 7, 2013, October 5, 2014 and October 4, 2015 constituted COLAs is not in accordance with the applicable law.

In a very thorough and lengthy analysis, the CRB in *Harrison* rejected the above arguments. We need not reiterate the reasoning here, but point the parties to *Harrison*. Employer's arguments are rejected, pursuant to *Harrison*.

Harrison also addressed whether the ALJ's finding that Claimant is entitled to 2% compound interest on accrued benefits is not in accordance with the applicable law.[2] After analyzing *Rastall v. CSX Transportation*, 697 A.2d 46 (D.C. 1997), *Burke v. Groover Christie & Merritt*, 26 A.3d 292, 301 & n. 11 (D.C. 2011) and *Clark v. Verizon Commc'ns.*, OHA No. 92-793B, Dir. Dkt. 03-92 (Feb. 10, 2004), the CRB concluded:

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[1]The scope of review by the Compensation Review Board ("CRB") and this Review Panel as established by the District of Columbia Comprehensive Merit Personnel Act of 1978, as amended D.C. Code § 1-623.01 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. Code § 1-623.28(a). "Substantial evidence", as defined by the District of Columbia Court of Appeals ("DCCA"), is such evidence as a reasonable person might accept to support a particular conclusion. *Marriott Int'l. v. DOES*, 834 A.2d 882 (D.C. 2003) ("*Marriott*"). Consistent with this scope of review, the CRB and this panel are bound 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, supra,* 834 A.2d at 885.

[2] In *Harrison*, the ALJ awarded 4% compound interest.

> It has been the announced, expressed and applied interpretation of this agency at least since 2004 that the interest payable upon accrued benefits are subject to interest calculated on a simple and not a compound basis.

Harrison at 19.

Again, we point the parties to our detailed analysis in *Harrison*. We therefore remand the case with instructions to the ALJ to enter an award using simple interest.

Employer next argues the ALJ's reliance on the District of Columbia's website was not in accordance with the law, pursuant to *Gill v. Howard University Hospital*, CRB No. 09-112 (May 6, 2011). As the ALJ noted, in *Gill*, the CRB remanded the case as the ALJ took judicial notice of a medical term, using a questionable website for a medical definition. The CRB noted:

> "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." *Christopher v. Aguigui,* 841 A.2d 310, 311-12 n.2 (D.C. 2003) (quoting FED. R. EVID. 201(b)).

Such is not the case before us. The ALJ accepted that the District of Columbia website was accurate and that the information provided by the website to not require any specialized knowledge to understand. Employer does not point this panel to any evidence that the District of Columbia website could not be reasonably questioned, nor does the Employer point to any actual error the website contained. Lastly, Employer has shown no prejudice resulting from the ALJ's actions, hence any error that may have been committed is harmless. We reject Employer's argument.

Finally, Employer argues the ALJ erred in determining that the doctrine of collateral estoppel applies to the December 18, 2000 order of the Director wherein the Director noted Claimant had been receiving Civil Service Disability Retirement since September 1993. In so concluding, the ALJ first noted the December 2000 order did not decide whether the Employer was entitled to a credit. The Director only directed Claimant to make an election on which benefit Claimant wanted to received, which he did on July 19, 2001.

The ALJ also noted the CRB's decision in *Carry v. D.C. Department of Mental Health*, CRB No. 07-31 (March 14, 2007) ("*Carry*") where the CRB concluded:

> The Panel takes administrative notice that with the imposition of home rule by Congress, the District of Columbia Government Merit Personnel Act of 1978 was created as an entirely separate and distinct workers' compensation program for District of Columbia employees. However, District employees who were employed by the District prior to October 1, 1987 continued to enjoy, and still do, certain advantages of their former Federal status which includes participation in Federal health benefits and the Federal Civil Service Retirement System, which

> entitles the pre-1987 hires to Federal disability retirement benefits if applicable. As a result, DC employees hired before October 1, 1987, like Federal employees have been unable to participate in the Federal Insurance Contributions Act (FICA) and neither contribute nor are they able to apply for FICA social security benefits or social security disability benefits. Hence, Respondent's receipt of federal disability retirement benefits is essentially no different than an employee who requests social security disability benefits while receiving wage loss benefits for a work related injury.
>
> Thus, the Panel agrees with Respondent that since there is no dispute that Respondent commenced her employment with St. Elizabeth's Hospital in 1966 as a Federal employee, but the District of Columbia Government subsequently became responsible for the hospital, therefore, Respondent became a District of Columbia Government employee and with the imposition of home rule, District Gov't. employees were not covered under the FECA yet covered under 5 U.S.C. Part III, Subpart G, Chapter 83 (1) which defines employees to include an individual first employed by the government of the District of Columbia before October 1, 1987. Moreover, as Respondent also correctly asserts, because Respondent has not received any other District benefits she never had to make the selection mandated by § 1-623.16(b) of the Act. And, while the process the ALJ utilized in evaluating the parties arguments was incorrect, the ALJ arrived at the correct result, as the D.C. Comprehensive Merit Personnel Act of 1978, as amended, has no provision which requires that credit be taken for federal retirement benefits received.

Carry at 3-4.

We agree with the ALJ that *Carry* controls and that the ALJ was correct in not awarding a credit to Employer for payments made from December 1996 through September 2001, when Claimant elected to have his benefits reinstated.[3] We affirm this conclusion.

As we have addressed Employer's Application for Review, Employer's October 21, 2016 Motion to Stay the Compensation Order is moot.

CONCLUSIONS AND ORDER

The conclusion that DOES has jurisdiction over disputes concerning modifications of disability compensation awards involving adjustments in the amount of disability compensation payment amounts is in accordance with the law and is **AFFIRMED**.

The conclusion that Claimant is entitled to retroactive payment of benefits since December 1993 is supported by substantial evidence, is in accordance with the law, and is **AFFIRMED**.

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[3] We note, pursuant to D.C. Law 13-13, which amended D.C. 1-623.16(a), the ALJ did not award benefits from October 20, 1999 to July 19, 2001. Claimant did not appeal this finding.

The conclusion that the salary increases effective October 7, 2013, October 5, 2014, and October 5, 2015 triggered an entitlement by Claimant to a statutory increase in disability compensation pay is in accordance with law and is **AFFIRMED**.

The conclusion that the December 18, 2000 Opinion and Remand Order did not collaterally estop Claimant from receiving federal retirement benefits and workers' compensation benefits is **AFFIRMED**.

The determination that Claimant is entitled to 2% compound interest on accrued benefits is not in accordance with the law and is **REVERSED.** The matter is **REMANDED** with directions to the ALJ to enter an award using simple interest.

So ordered.