

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services
Labor Standards Bureau**

**Office of Hearings and Adjudication
Compensation Review Board**

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CRB No. 06-80

GAYNELL NIXON,

Claimant – Petitioner

v.

DISTRICT OF COLUMBIA HOUSING AUTHORITY,

Employer - Respondent.

Appeal from a Compensation Order of
Administrative Law Judge Henry W. McCoy
AHD No. PBL 06-013, OWC/DCP No. LTUNK0090

Sherman Robinson, Esq., for the Petitioner

Ross Buchholz, Esq., for the Respondent

Before LINDA F. JORY, FLOYD LEWIS and SHARMAN J. MONROE, *Administrative Appeals Judges*.

SHARMAN J. MONROE, *Administrative Appeals Judge*, on behalf of the Review Panel:

DECISION AND ORDER

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board pursuant to D.C. Official Code §§ 32-1521.01 and 32-1522 (2004), 7 DCMR § 230, and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005).¹

¹ Pursuant to Administrative Policy Issuance No. 05-01, dated February 5, 2005, the Director of the Department of Employment Services realigned the Office of Hearings and Adjudication to include, *inter alia*, establishment of the Compensation Review Board (CRB) in implementation of the District of Columbia Fiscal Year 2005 Budget Support Act of 2004, Title J, the D.C. Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, sec. 1102 (Oct. 1, 1994), *codified at* D.C. Code Ann. § 32-1521.01 (2005). In accordance with the Director's Policy Issuance, the CRB replaces the Office of the Director in providing administrative appellate review

BACKGROUND

This appeal follows the issuance of a Compensation Order from the Administrative Hearings Division (AHD) of the Office of Hearings and Adjudication (OHA) in the District of Columbia Department of Employment Services (DOES). In that Compensation Order, which was filed on July 31, 2006, the Administrative Law Judge (ALJ) denied the relief requested by the Claimant-Petitioner (Petitioner). The Petitioner now seeks review of that Compensation Order.

As grounds for this appeal, the Petitioner alleges as error that the Compensation Order is not supported by substantial evidence and is not in accordance with the law. In its response, the Respondent asserts that the Compensation Order is supported by substantial evidence and should be upheld.

ANALYSIS

As an initial matter, the standard of review by the Compensation Review Board (CRB) and this Review Panel, as established by the Act 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. Official Code §§ 1-623.28(a) and 32-1521.01(d)(2)(A). “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 Int’l. v. District of Columbia Department of Employment Services*, 834 A.2d 882 (D.C. App. 2003). Consistent with this standard of review, the CRB and this Review Panel are constrained 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*, 834 A.2d at 885.

Turning to the case under review herein, the Petitioner alleges that the ALJ erred in finding that the Respondent sustained its burden of proof to show that there was a change in the Petitioner’s physical condition. The Petitioner maintains the medical opinions that the condition of her foot has reached maximum medical improvement prove that her condition has not improved, but has become more symptomatic since the 1997 Compensation Order in this case was issued thus entitling her to continuing benefits for her foot. The Petitioner argues that the medical bills arising from her February 21, 2001 automobile accident are compensable under the positional risk test. She asserts that, but for her obeying the direction of her vocational rehabilitation counselor to attend an interview notwithstanding the weather conditions, her car would not have been struck by another car at a snow covered intersection. The Petitioner maintains that the presumption of D.C. Official Code § 36-321(1), as well as the notions of

and disposition of workers’ and disability compensation claims arising under the D.C. Workers’ Compensation Act of 1979, as amended, D.C. Code Ann. §§ 32-1501 to 32-1545 (2005) and the D.C. Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Code Ann. §§ 1-623.1 to 1.643.7 (2005), including responsibility for administrative appeals filed prior to October 1, 2004, the effective date of the D.C. Workers’ Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004.

fairness and humanity, support finding that her injury arose out of and in the course of employment and that her associated medical bills are compensable.

Additionally, the Petitioner argues that the ALJ improperly ignored the mandates of D.C. Official Code § 1-623.24(a-3)(1) which require that a claim for compensation is deemed accepted if the Mayor fails to issue a finding for or against the payment of compensation within 30 days after a claim is filed. The Petitioner maintains that since her request for reconsideration of the reduction of her benefits was filed on September 2, 2004 and since a decision on her request was not rendered until January 6, 2006, then she is entitled to a ruling in her favor. Finally, the Petitioner argues that the ALJ's ruling on the request for attorney's fees made at the formal hearing was contrary to the explicit language of D.C. Official Code § 1-623.27.

A review of the prior decision in this case reveals that the Petitioner was adjudged, based upon medical evidence showing that the Petitioner was still in need of medical treatment and unable to perform the physical aspects of her job, to be temporarily totally disabled as a result of her January 23, 1996 foot injury. *See Nixon v. District of Columbia Housing Authority*, H&AS No. PBL 97-13, ODC No. 363016 (October 8, 1997). As benefits were being paid when the Respondent notified the Petitioner that it intended to reduce her benefits, the burden was on the Respondent to demonstrate that there was a change in the Petitioner's medical condition to justify a modification in her benefits. [citation] Herein, the ALJ found, and the finding is supported by substantial evidence, that the Respondent sustained its burden. The evidence presented by the Respondent show that the Petitioner's condition has changed. The physicians who examined the Petitioner opined that the Petitioner's condition is no longer temporary, but has reached maximum medical improvement, and that the Petitioner is able to return to full time employment within certain physical restrictions.

In the decision, the ALJ found that the Petitioner's closed head injury did not arise out of and in the course of employment as it occurred while she was traveling from a job interview scheduled by her vocational rehabilitation counselor to her home. After reviewing the record, the Panel determines that the ALJ's finding is supported by substantial evidence and the law in this jurisdiction. The injury did not occur while the Petitioner was about the Respondent's business at a time or place where the Petitioner was expected to perform of her work duties. *See Kolson v. D.C. Department of Employment Services*, 699 A.2d 357, 360 (D.C. 1997). The Petitioner's argument that the presumption of D.C. Official Code § 36-321(1) supports an award in her favor is rejected. The aforesaid presumption is only applicable to cases filed under D.C. Workers' Compensation Act of 1979, D.C. Official Code § 36-301 *et seq.*; it is not applicable to cases file under Subchapter XXIII of the D.C. Government Comprehensive Merit Personnel Act of 1978, D.C. Official Code § 1-623.1 *et seq.* Likewise, the Petitioner's argument that the travel was part of her work making her a traveling employee is rejected. The Petitioner worked as a housing manager for the Respondent and there is no evidence in the record showing that traveling away from her worksite was part of her duties.

The Petitioner also argues that the ALJ improperly ignored the mandates of D.C. Official Code § 1-623.24(a-3)(1). After a review of the Act, its amendments and legislative history, the Panel rejects the Petitioner's argument.

The question of the effect of amendments to active legislation was examined by the Director in *Lloyd v. Giant Food*, Dir.Dkt. No. 03-70, OHA No. 97-110E, OWC Nos. 501519, 230297, 265731 (September 30, 2004), case brought under the District of Columbia Workers'

Compensation Act of 1979. After examining case law and the rules on statutory construction, the Director adopted the statutory construction analysis enunciated in *Mayo v. D.C. Department of Employment Services*, 738 A.2d 807 (D.C. 1999) and held that legislation is prospective in nature, unless there is statutory direction or legislative history for retroactive application. The Panel finds the analysis and reasoning in *Lloyd* sound and adopts it for application to the herein Act.

In the instant case, the Petitioner sustained an injury on January 23, 1996. At that time her D.C. Official Code § 1-623.24(a-3)(1) did not exist. The provision, which added a timeframe within which the Mayor or his or her designee must make findings of fact and an award for or against payment of compensation, became part of the herein Act via the Disability Compensation Effective Administration Amendment Act of 2004. The effective date of the Amendment Act is April 5, 2005. A review of the Amendment Act does not reveal any language from the D.C. City Council either directing that the provision be applied retroactively or reflecting a legislative intent to apply the new provision to cases already in process, as was the scenario in *Mayo, supra*. The Petitioner does not point to any language evincing retroactive effect. Given the rules of statutory construction, the Panel determines that D.C. Official Code § 1-623.24(a-3)(1), which became effective after the Petitioner sustained her injury, is not applicable to this case.²

On the issue of attorney's fees, the ALJ correctly stated the law in this jurisdiction. Attorney fees are considered the responsibility of the claimant and the assessment of the fees are against the award of compensation. *White v. D.C. Department of Housing and Community Development*, Dir.Dkt No. 98-20A, H&AS No. PBL No. 92-06, ODC No. 325142 (March 29, 2000) citing *In Re Herbert R. Rubenstein*, PAF No. 90-2 (April 11, 1991). Moreover, to receive an award, a party must comply with the requirements of 7 DCMR § 109 which indicates that a request for fees cannot be made until thirty (30) days after issuance of an award of compensation. Therefore, the Petitioner's request for attorney's fee made at a formal hearing is not ripe for a determination. See 7 DCMR § 109.1.

CONCLUSION

The Compensation Order of July 31, 2006 is supported by substantial evidence in the record and is in accordance with the law.

² Assuming arguendo that February 21, 2001 was accepted as the Petitioner's date of injury, the same conclusion would be reached as this date is before the effective date of the Amendment Act. However, as earlier stated, the ALJ's findings and conclusions with respect to the February 21st automobile accident are supported by substantial evidence and are in accord with the law.

ORDER

The Compensation Order of July 31, 2006 is hereby AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

SHARMAN J. MONROE
Administrative Appeals Judge

November 29, 2006
DATE