

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA M. MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 13-054

JAMES GREEN,
Claimant-Respondent,

v.

DISTRICT OF COLUMBIA DEPARTMENT OF CORRECTIONS,
Employer–Petitioner.

Appeal of an April 10, 2013 Compensation Order
issued by Administrative Law Judge Fred D. Carney, Jr.
AHD No. PBL 10-043A, ORM/DCP No. 30090837039-0001

Frank McDougald, Esquire, for the Petitioner
Michael J. Kitzman, Esquire, for the Respondent

Before JEFFREY P. RUSSELL, HENRY W. MCCOY, and MELISSA LIN JONES, *Administrative Appeals Judges*.

JEFFREY P. RUSSELL, for the Compensation Review Board.

DECISION AND ORDER

BACKGROUND

James Green was injured on August 26, 2008 while working for the District of Columbia Department of Corrections (DOC), the details of which are not pertinent here. The claim was accepted and Mr. Green was paid compensation benefits and was provided with ongoing medical care after filing a claim for workers' compensation pursuant to D.C. Code § 1-623.01, *et seq.*, (the Public Sector Workers' Compensation Act (PSWCA)). At all times relevant to this appeal, that program was administered by the Office of Risk Management (ORM), with claims being handled by a third party administrator, Sedgwick CMS, which in turn contracts out some of its functions, such as scheduling independent medical evaluations, to another entity, in this case, Med-Eval.

The PSWCP had Mr. Green evaluated by Dr. Robert E. Collins on April 21, 2009 for the purpose of an independent medical evaluation (IME). While Dr. Collins agreed that Mr. Green's condition was such that he could not work as a corrections officer, he was also of the opinion that Mr. Green's

original work injury had resolved, and that the incapacitating back condition was unrelated to the work injury.

Mr. Green underwent a surgical procedure to his back on October 7, 2010, which he claimed was causally related to the work injury and which he claimed incapacitated him from working as a corrections officer. The surgery was authorized by the PSWCP.

Thereafter, a dispute arose concerning whether Mr. Green's benefits should be suspended for failure to attend several IMEs. The PSWCP suspended those benefits as of May 4, 2011, and Mr. Green sought to have them restored at a formal hearing before an Administrative Law Judge (ALJ) in the Department of Employment Services (DOES) on September 26, 2011. That case was assigned AHD case number PBL 10-043A.

Before the ALJ issued a Compensation Order resolving the dispute concerning suspension for non appearance at the IMEs, the PSWCP arranged another IME, this one with Dr. Robert O. Gordon which was performed on October 4, 2011. He opined that Mr. Green's work injury had resolved prior to the October 7, 2010 surgery, and that neither the need for surgery nor any current incapacity is causally related to the work injury. Based upon this IME, the PSWCP issued a notice terminating Mr. Green's ongoing compensation benefits as of December 9, 2011.

Mr. Green sought to have his benefits restored. A formal hearing was held before the same ALJ on July 5, 2012. A Compensation Order was issued on September 26, 2012, in which the ALJ reinstated Mr. Green's benefits, finding that the PSWCP had failed to demonstrate that Mr. Green could return to work. However, the Compensation Order did not address whether the disabling condition was causally related to the work injury. *Green v. District of Columbia Department of Corrections*, AHD No. PBL 10-043B, PBL No. 30080837039-0001 (September 26, 2012).

That Compensation Order was appealed to the CRB, which reversed and vacated the Compensation Order, on the grounds that the ALJ failed to address the issue of whether the claimed disability was causally related to the original work injury, on the one hand, or had resolved as opined by Dr. Gordon. *Green v. District of Columbia Department of Corrections*, CRB No. 12-175, AHD No. PBL 10-043B, PBL No. 30080837039-0001 (February 2, 2013).

That remand is still pending in the hearings section of DOES. There has yet to be a determination as to whether any claimed disability from and after the date of surgery is causally related to the work injury.

Thereafter, on April 10, 2013, the ALJ issued a Compensation Order addressing the matters raised in the formal hearing held on September 26, 2011. In that Compensation Order, the ALJ determined that the PSWCP had failed to adequately establish that Mr. Green had received proper notice that the IMEs which he did not attend had been scheduled, and ordered that the suspended benefits be restored. In a footnote, however, the ALJ wrote:

The claim for this period [of the suspended benefits] is subject to Claimant being eligible for disability through the present and continuing. Note that Claimant was

terminated in December 2011, and the issue of termination is pending in PBL 10-043B.

Green v. District of Columbia Department of Corrections, AHD No. PBL 10-043A, DCP No. 30080837039-0001 (April 10, 2013).

The PSWCP appealed that Compensation Order to the CRB, and it is that appeal that we now address.

Because the Compensation Order in *Green v. District of Columbia Department of Corrections*, AHD No. PBL 10-043A, DCP No. 30080837039-0001 (April 10, 2013) constitutes an improper advisory opinion outside the authority of DOES to issue, it is reversed and vacated.

STANDARD OF REVIEW

The scope of review by the CRB, as established by the Act and as contained in the governing regulations, is generally limited to making a determination as to whether the factual findings of a written 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. *See*, D.C. Comprehensive Merit Personnel Act of 1978, as amended, D.C. Code § 1-623.01, *et seq.*, (the PSWCA), at § 1-623.28 (a), and *Marriott International v. DOES*, 834 A.2d 882 (D.C. 2003).

DISCUSSION

The authority of DOES to adjudicate claims arising under the PSWCA is found at D.C. Code § 1-623.24 (b)(1), which provides in pertinent part:

[A] claimant for compensation not satisfied with a decision of the Mayor or his designee under subsection (a) of this section is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on the claim before a Department of Employment Services Disability Compensation Administrative Law Judge.

Subsection (a) of that section reads in pertinent part:

The Mayor or his designee shall determine and make findings of facts and an award for or against payment of compensation under this subchapter within 30 days after the claim was filed

Nothing in the PSWCA authorizes a DOES ALJ to issue decisions on hypothetical or contingent issues. All that the statute authorizes is a review of a concrete claim for specific benefits to which a claimant is or is not entitled. *See, Heyward v. Metro Homes, Inc.*, CRB No. 12-123, AHD No. 12-145, OWC No. 682864 (September 25, 2012). Although *Heyward* is a case involving the private sector District of Columbia Workers' Compensation Act of 1979, as amended. D.C. Code §32-1501 *et seq.*, the underlying principles governing the nature of DOES's authority to issue Compensation

Orders and awards of compensation are in this instance analytically very similar. Neither act authorizes advisory decisions or hypothetically contingent awards.

As is evident from the above quoted footnote from the Compensation Order, the ALJ obviously recognized the contingent nature of the award. Why the ALJ decided to issue this Compensation Order prior to acting upon the much older and still pending remand and resolving the issue of “Claimant being eligible for disability benefits” as a matter of compensability is not clear to us. Nonetheless, in the absence of a determination concerning whether Mr. Green’s disabling condition in the time covered by this Compensation Order is causally related to the work injury, there can be no predicate for a legal determination that his benefits should or should not be suspended during that period. See, *Heyward v. Metro Homes, Inc.*, CRB No. 12-123, AHD No. 12-145, OWC No. 682864 (September 25, 2012).

CONCLUSION AND ORDER

The Compensation Order of April 10, 2013 constitutes an impermissible advisory opinion beyond the authority of the ALJ to issue, and is hence not in accordance with the law. The Compensation Order of April 10, 2013 is reversed and vacated.

FOR THE COMPENSATION REVIEW BOARD:

JEFFREY P. RUSSELL
Administrative Appeals Judge

October 31, 2013
DATE