

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR



F. THOMAS LUPARELLO
INTERIM DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 14-011

HORACE HENSLEY,
Claimant–Petitioner,

v.

CHEECHI & COMPANY and
ATLANTIC MUTUAL INSURANCE COMPANY AND
PROPERTY & CASUALTY INSURANCE GUARANTY CORPORATION
Employer/Insurer-Respondents.

Appeal from an December 26, 2013 Order Denying Modification of Award
of Administrative Law Judge Nata K. Brown
AHD No. 92-359K, OWC No. 115568

Horace Hensley, Pro Se
Alan M. Carlo, for the Respondent

Before HEATHER C. LESLIE, MELISSA LIN JONES, ADMINISTRATIVE *Appeals Judges* and LAWRENCE
D. TARR, *Chief Administrative Appeals Judge*

HEATHER C. LESLIE, for the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

Claimant was a comptroller for Employer for 7 months, from May 1986 until December 11, 1986. Claimant had a pre-existing arthritic condition, ankylosing spondylosis. While working for this Employer in October and November 1986, Claimant began experiencing neck and back pain. He stopped working on December 11, 1986, and has not worked since.

This case has been the subject of many prior. Pertinent to the present review, on October 20, 1987, Claimant was awarded continuing temporary total disability benefits beginning on January 1, 1987. The hearing officer found that Claimant's work-related activities exacerbated his pre-existing ankylosing spondylitis condition, rendering him temporary totally disabled. *Hensley v. Cheechi & Co.*, H&AS No. 87-437, OWC No. 115568 (October 20, 1987).

In 1993, Claimant was found to be permanently and totally disabled. See *Hensley v. Cheechi & Co.*, OHA No. 92-359D, OWC No. 115568 (April 15, 1999).

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On March 18, 2003, the Director of the Department of Employment Services (DOES), who at that time decided appeals of workers compensation orders, reversed and remanded an Administrative Law Judge's (ALJ) 2002 decision that denied Claimant's request for home attendant care services administered by a relative, to assist with daily functions, such as getting in and out of bed, getting dressed and undressed, preparing daily meals and medication. The Director held

Claimant has a severe disabling inflammatory disease, ankylosing spondylitis (AS), involving at least the cervical spine, lumbar spine, hips, knees, ankles and wrist. This condition prevents Claimant from doing most daily routine tasks and his condition continues to degenerate.

Hensley v. Cheechi & Co., Dir. Dkt, No. 02-71, H&AS NO. 92-359E, OWC No. 115568 (March 18, 2003).

Claimant appealed the Director's decision to the District of Columbia Court of Appeals (DCCA). The DCCA dismissed the appeal without addressing the merits of the decision. In his opinion after the remand, the ALJ denied the claim, without prejudice, because neither party had submitted the issue of the reasonableness and necessity of the home attendant care services to Utilization Review. *Hensley v. Cheechi & Co.*, OHA 92-359E, OWC No. 115568 (March 28, 2007).

On February 3, 2010, another Compensation Order (CO) was issued, denying Claimant's request for expense reimbursement and awarded Claimant 20% penalties as a result of Employer's alleged failure to timely pay cost of living adjustments from February 22, 1990 through July 13, 1997. In that CO, the ALJ determined Claimant's bilateral hip and knee problems, recommended neck surgery, fibromyalgia, enthesopathy, restrictive lung disease, heart ailment, an eye condition, gastroenterology services, as well as problems with his ankles and wrists were not medically causally related to the work injury. *Hensley v. Cheechi & Co.*, OHA 92-359J, OWC No. 115568 (February 3, 2010). In a June 29, 2011 Decision and Order, the CRB affirmed the order's denial of expense reimbursement but reversed the award of penalties. *Hensley v. Cheechi & Co.*, CRB 10-075, OHA 92-359J (June 29, 2011). Claimant appealed the decision to the DCCA.

On August 16, 2012, the DCCA affirmed all but one of the CRB's holdings. The DCCA affirmed the CRB's determinations on the ALJ's findings regarding the claimant's failure to prove that the claimed medical conditions and services were causally related to the work accident, the CRB's determination that the employer did not act in bad faith, and the CRB's finding that the employer was not liable for the claimed reimbursements. *Hensley v. Cheechi & Co.*, 49 A.3d 1195 (August 16, 2012).¹

¹ As summarized by the DCCA and mentioned above, Claimant's injury and claim involve:

In May 1986, petitioner was hired by the Employer as a comptroller, a position that required him to work long hours while sitting at a desk looking at a computer screen. In December 1986, petitioner complained that sitting for such lengthy time periods at work had aggravated his AS, causing him to lose mobility in his spine. Petitioner was found to be temporarily totally disabled in 1987, and, in a 1993 compensation order, was determined to be permanently totally disabled as a result of the workplace-induced aggravation of his AS.

In the years since those determinations, petitioner's AS progressed, affecting various other parts of his

Claimant subsequently filed for a Formal Hearing requesting a modification of the prior February 3, 2010 in the fall of 2013. A scheduling order was issued and a pre hearing conference conducted on December 3, 2013.² On December 26, 2013, an Order Denying Motion for Modification, stating that the issue presented, modification of the February 3, 2010 CO, was *res judicata* pursuant to *Walden v. DOES*, 759 A.2d 186, 189 (D.C. 2000).

Claimant timely requested review of the ALJ's decision.

THE STANDARD OF REVIEW

In review of an appeal which is based not upon factual findings made on an evidentiary record, but rather is based upon review of the administrative record, the filings of the parties, and the orders, the Board must affirm the order under review unless it is determined to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. See, 6 Stein, Mitchell & Mezones, ADMINISTRATIVE LAW, § 51.93 (2001).

DISCUSSION AND ANALYSIS

Preliminarily, we note Claimant states that his "application for modification was for AHD 92-359J" and not the DCCA decision as noted by the Order. The Order states Claimant sought "modification of the District of Columbia Court of Appeals (hereinafter, DCCA order, issued on August 16, 2012, which affirmed the ruling of the Compensation Order Review board upholding the ALJ's order denying reimbursement to Claimant for the medical expenses and services in issue." Order at 1. (Footnote Omitted). It is clear that the Order analyzes whether or not Claimant is entitled to modify the February 10, 2010 CO and we will proceed accordingly and address the Claimant's contention that the denial to permit a hearing to proceed to a Formal Hearing is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.

A review of Claimant's arguments surround the legal ramifications of prior orders from the Administrative Hearings Division (AHD) and that the ALJ erred in not modifying the February 10, 2010 order, and argues many, if not all, of the same arguments that have been presented before not only to AHD, but also to the DCCA. Claimant argues that the February 10, 2010 order was in error

body. At a hearing before the ALJ on December 22, 2009, and in a post-hearing brief, petitioner pressed his claim that the Employer is obligated to reimburse him for expenses for medical treatment related to his bi-lateral hip and knee problems, recommended neck surgery, fibromyalgia, enthesopathy, restrictive lung disease, heart ailment, and an eye condition, and for gastroenterology services. He also cited problems with his ankles and wrists and requested reimbursement for costs incurred for home attendant services, shaving, and transportation. In addition, as already described, petitioner sought a 20% penalty award for the Employer's failure to make timely COLA payments.

The ALJ rejected petitioner's expense-reimbursement claim because he found, variously, that petitioner failed to prove that the medical conditions claimed to necessitate the expenses were caused or aggravated by his work for Employer; that some of the services were not reasonably necessary; and that petitioner failed adequately to document his claim. The ALJ concluded, however, that petitioner had established his entitlement to the 20% penalty for the Employer's having underpaid bi-weekly compensation for the period at issue. (Footnote omitted).

² A court reporter was not present and a hearing transcript is not available.

as the “Employer has been prohibited from using the ‘causal relation’ defense” and directs our attention to numerous prior orders. However, in addressing these arguments, the DCCA stated:

Contrary to petitioner's argument, the OWC's prior rulings were not a bar to the ALJ's various findings. In H&AS 92-359 (April 30, 1993), the hearing examiner rejected the Employer's claim that petitioner's condition was "different at this time," finding that the Employer's medical expert had made "virtually the same medical findings and conclusions on causality that he did in the 1987 medical report" that had been before the agency when the original (1987) Compensation Order awarding benefits was issued, and that the expert "gave no indication of whether [petitioner's] physical disability has improved, resolved, or worsened." In OHA No. 92-359D (April 15, 1999), the hearing officer found that the Employer had provided "no medical opinion evidence suggesting that the treatment [for which petitioner then sought reimbursement] is not related to the [1986] work injury." Similarly, in OHA No. 92-359F (June 10, 2003), the ALJ found that the Employer's medical expert had proffered no opinion "as to whether [petitioner's then-] current level of the disease . . . is the result of the natural progression" of petitioner's AS, and therefore concluded that petitioner's "current condition remains causally related to the injury he sustained while in the course of his employment in December 1986." Footnote omitted.

By contrast, in connection with the hearing that resulted in the February 3, 2010, Compensation Order, the Employer presented evidence that petitioner's medical conditions underlying his reimbursement claim are the result of the natural progression of his AS, rather than causally related to the 1986 work injury. As the ALJ noted, independent medical examiner Dr. Peter Oroszlan opined after examining petitioner in 2005 that petitioner's long hours sitting at work in 1986 "temporarily aggravated" his symptoms in his neck and low back," but that petitioner's employment did not "worsen" or "cause" his AS," and that "there is absolutely no medical justification to attribute any of [petitioner's] current signs and symptoms . . . to the previous claim." Dr. Oroszlan testified at his December 2005 deposition that neither petitioner's shoulder impairment nor his problems with his hips, knees and ankles, nor his cardiovascular and respiratory system problems, nor "any of his problem[s] that he's having at the present time" was "caused or aggravated by" the 1986 workplace injury.

Hensley v. Cheechi & Co, 49 A.3d at 1200-1201.

Claimant argues that an order of modification is necessary to correct a “manifest injustice on the claim for relief on the issue of medical required transportation, as well as other medical issues.”³ Claimant’s argument at 5. However, as the ALJ correctly noted,

“When a claim of any kind has been finally adjudicated on the merits, *res judicata* precludes the relitigation of the same claim between the same parties in subsequent litigation.” *Walden v. DOES*, 759 A.2d 186.

Order at 2.

³ We assume Claimant is referring to his bilateral hip and knee problems, recommended neck surgery, fibromyalgia, enthesopathy, restrictive lung disease, heart ailment, an eye condition, gastroenterology services, as well as problems with his ankles and wrists, all medical conditions outlined in the February 10, 2010 CO.

While manifest injustice is an exception to the doctrine of *res judicata*, such injustice does not exist in the case at bar. Claimant's case and evidence were fully analyzed not only at AHD, but also the CRB and the DCCA. The DCCA affirmed the denial of expense reimbursement, finding,

The ALJ's findings and reasoning discussed above are supported by the record, and thus we have no basis for disturbing the CRB's ruling upholding this portion of the Compensation Order.

Hensley v. Cheechi & Co, 49 A.3d at 1202.

It is outside of the scope of our jurisdiction to question or alter the opinion of the DCCA. As such, Claimant's argument is rejected.

We also reject Claimant's argument that a modification is necessary to correct the "manifest injustice on the claim for relief of the issue of payment indemnity." Claimant's argument at 6. As the Employer points out, that portion of the February 10, 2010 CO which awarded penalties was affirmed. Specifically, on November 27, 2012, the CRB in a Decision and Order affirmed the ALJ's award of penalties. The CRB affirmed the ALJ's conclusion that,

Claimant has established entitlement to a 20% penalty for unpaid compensation benefits for the period of February 22, 1990 to July 13, 1997. The penalty should be applied to the principal only excluding compounded interest.

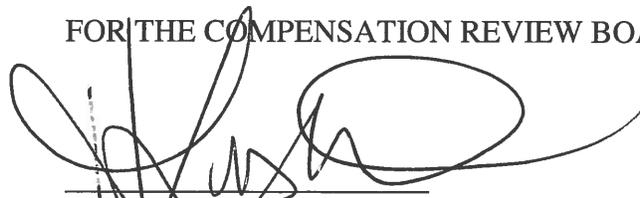
Hensley v. Cheechi & Co., CRB No. 10-075(R), DCCA No. 11-AA-0930, AHD No. 92-359J (November 27, 2012).

Moreover, Claimant in argument points out in support of his argument, an indemnity check issued on January 10, 2014 and alleges the amount paid was in error. However, as the Claimant sought to modify the February 10, 2010 CO, the amount paid presently is not relevant to what Claimant is trying to achieve. We reject Claimant's arguments.

CONCLUSION AND ORDER

The December 26, 2013 Order Denying Modification of Award is AFFIRMED,

FOR THE COMPENSATION REVIEW BOARD:



HEATHER C. LESLIE
Administrative Appeals Judge

April 22, 2014

DATE