

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

Office of Hearings and Adjudication
COMPENSATION REVIEW BOARD



(202) 671-1394-Voice
(202) 673-6402-Fax

CRB No. 08-027

JAMES RICE,

Claimant–Petitioner,

v.

DISTRICT OF COLUMBIA DEPARTMENT OF MOTOR VEHICLES,

Employer–Respondent.

Appeal from an Order Denying a Fee Petition issued by
Administrative Law Judge Leslie A. Meek
AHD No. PBL 06-104, PBL/DCP Nos. 761019-0003-2004-0001

Harold L. Levi, Esquire, for the Petitioner

Andrea G. Comentale, Esquire, for the Respondent

Before JEFFREY P. RUSSELL, LINDA F. JORY and FLOYD LEWIS, *Administrative Appeals Judges*.

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

DECISION AND ORDER

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board pursuant to D.C. Official Code § 1-623.28, § 32-1521.01, 7 DCMR § 118, and DOES Director's Directive Administrative Policy Issuance No. 05-01 (Feb. 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 D.C. Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, D.C. Official Code § 32-1521.01. In accordance with the Director's Directive, the CRB replaces the Office of the Director in providing administrative appellate review and disposition of workers' and disability compensation claims arising under the D.C. Workers' Compensation Act of 1979, as amended, D.C. Official Code § 32-1501 *et seq.*, and the D.C. Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Official Code § 1-623.1 *et seq.*, 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.

BACKGROUND

This appeal follows the issuance of an 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 Order, which was filed on October 15, 2007, the Administrative Law Judge (ALJ) denied Petitioner's request that an attorney's fee be assessed against Respondent, on the grounds that the statutory basis for such an assessment should not be applied retroactively, and also denied the request in the alternative that a fee be assessed against the Claimant directly, on the grounds that the fee petition had not been served upon the Claimant and thus the Claimant had no opportunity to object to or otherwise respond to the requested fee assessment. Petitioner now seeks review of that Order pursuant to an Application for Review filed October 29, 2007.

As grounds for this appeal, Petitioner alleges as error that the denial of the assessment against Respondent is not in accordance with the law, because the application of the statutory amendment to this case, which provides for the assessment of an attorney's fee against the Employer under the Act in cases where there is a "successful prosecution" of a claim for benefits in which an attorney is retained by an employee, is not a prohibited retroactive application of the amendment, because the Compensation Order in which Petitioner was awarded benefits was issued the same day that the amendment became effective. Alternatively, Petitioner argues that the amendment ought to apply to this case even if it is found to be retroactive, because the law permits retroactive application of statutes that are "remedial" in connection with enabling or enhancement of the enforcement of substantive rights, so long as they do not alter the underlying substantive rights. Petitioner did not dispute or otherwise argue that the denial of an assessment against the Claimant directly was proper, and that ruling is therefore not before the CRB.

Respondent opposes the appeal, arguing that the application of the amendment authorizing an assessment of an attorney's fee against it in this case represents an improper retroactive application of a statute because, in the absence of a clear legislative intent to give a statute retroactive application, statutes are presumed to be intended to be applied prospectively only. Respondent also argues, in this regard, that the statutory requirement that such an assessment be made "in a Compensation Order" requires that the assessment request be made as part of the request for relief in the formal hearing process in which the underlying claim is adjudicated, thereby rendering all such requests of necessity improper in any case in which a formal hearing was conducted prior to the effective date of the amendment.

Because the law presumes that statutes are prospective only, and in the absence of a clear intent that a statute have retroactive application they are to be interpreted to be prospective only, we interpret the amendment to the Act have only prospective effect. Because Petitioner's request that an attorney's fee be assessed against Respondent in this case would require that the amendment be applied retroactively, in that a "successful prosecution" of a claim in this case depended upon the happening of an event that has already passed by the time that the amendment became effective, to wit, the termination of benefits that had been awarded administratively, the denial of the assessment against Respondent is affirmed.

ANALYSIS

As an initial matter, the scope of review by the Compensation Review Board (CRB) and this Compensation 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. *See*, D.C. Comprehensive Merit Personnel Act of 1978, as amended, D.C. Official Code § 1-623.01, *et seq.*, at § 1-623.28 (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 parties are in disagreement first as to whether this case presents a question of retroactive application of a new statute, with Respondent arguing that it does, and Petitioner arguing that it does not. That is, Petitioner argues that since the Compensation Order awarding re-instatement was issued on the day that the amendment became effective, that retroactivity is not an issue. Respondent urges us to view the requested application of the attorney’s fee provisions as being retroactive, and to deny the requested award due to the statute’s lack of specific and clear intent that it be applied retroactively, since under established rules of statutory interpretation, statutes are to be applied only prospectively in the absence of a clearly expressed legislative intent that they be retroactively.

The Court has recently had the opportunity to address what is and is not a retroactive application of a statute. In *Giant Food Inc., and Lula Lloyd, et al., v. District of Columbia Department of Employment Services*, --- A.2d ---, 2007 D.C. App. LEXIS 645, DCCA Nos. 04-AA-1337 and 04-AA-1374, (2007), (hereinafter, *Lloyd*) the Court pointed out, quoting from *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994), that:

[a] statute does not operate "retrospectively" merely because it is applied in a case arising from conduct antedating the statute's enactment or upsets expectations based on prior law. Rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment. The conclusion that a particular rule operates "retroactively" comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event.... [F]amiliar considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance.

Id. at 269-70. The question here, therefore, is whether the change in law "operate[d] retrospectively" with regard to Ms. Lloyd's injury, or whether it operated only prospectively, by reference to her retirement date.

Lloyd, supra, at _____. Thus, in this case, the statutory amendment permitting assessment of an attorney's fee against the government is not retroactive merely because it involves a "case" arising from an injury predating the amendment. A retroactive interpretation of the statute in this instance would be one that assesses attorney's fees against the government because of "events" predating the amendment, in circumstances that prior to the amendment no such assessment would have occurred.

Since prior to the amendment there were no circumstances under which such an assessment could have been made, we must determine from the statute what the events are that now make such an award possible. If those events had already occurred in this case prior to the effective date of the statute, then application of the statute in this case would be retroactive, requiring that we determine whether such retroactive application is what the council intended.

The amended statute provides that "If a person utilizes the services of an attorney-at-law in the successful prosecution of his or her claim ... there shall be awarded, in addition to an award of compensation, in a compensation order, a reasonable attorney's fee, not to exceed 20% of the actual benefit secured, which fee shall be paid directly by the Mayor or his designee to the attorney for the claimant"; in defining "successful prosecution of a claim" the statute provides that "'successful prosecution'" means obtaining an award that exceeds the amount that was previously awarded, offered, or determined [and includes] a reinstatement or partial reinstatement of benefits which were reduced or terminated".

Thus, in order for there to have been a "successful prosecution" of this claim, there must first have been a denial of benefits outright, or an initial award followed by a reduction or termination thereof, which is in fact the case before us.

Such a decision to terminate Petitioner's benefits was the necessary first event which led to the adjudication that was ultimately successfully prosecuted. That inciting event predated the effective date of the amendment and, therefore, if we were to interpret the new provision to have applicability in this case, we would be giving it retroactive effect under *Lloyd*.

The ALJ analyzed the case under *Reichley v. District of Columbia Department of Employment Services*, 531 A.2d 224 (D.C. 1987), and determined that the amendment in question ought not be given retroactive application. We need not consider whether the ALJ's analysis of the facts of this case comports with *Reichely*, however, because *Reichely* has no application in this case. *Reichely* dealt with the issue of whether a new *interpretation* of a statute (that is, an un-amended statute that had previously been interpreted in one manner, but was reinterpreted in a different manner) should be given retroactive application.

That is not the issue that we face in this case. Rather, we are presented with determining whether the new attorney's fee provisions, that is, the provisions of a new statute, are to be applied to this case, not whether some new interpretation of an existing statute ought to be applied retroactively.

On this subject, the District of Columbia Court of Appeals has held that “As a general rule, statutes operate prospectively, while judicial decisions are applied retroactively”; *Washington v. Guest Services*, 718 A.2d 1071 (D.C. 1998), at 1074, and citing *U.S. v. Security Indus. Bank*, 459 U.S. 70, 103 S. Ct. 407 (1982), which includes within it the quote “the first rule of [statutory] construction is that legislation must be considered as addressed to the future, not to the past”, itself citing and quoting from and *Union Pacific R. Co. v. Laramie Stock Yards Co.*, 231 U.S. 190, 199 (1913).

We are not unaware of the concept that in certain circumstances, statutory amendments may be given retroactive application. See, for example, 73 AM. JUR. 2d *Statutes* § 354 (1974) (“statutes relating to remedies or modes of procedure which do not create new or take away vested rights, but only operate in furtherance of the remedy or confirmation of such rights, do not normally come within the legal conception of a retrospective law, or the general rule against the retrospective operation of statutes”); 82 C.J.S. *Statutes* § 421 (1953) (“As a general rule statutes relating to remedies and procedure are given retrospective construction”). Also, “It is a well-settled principle of statutory construction that ‘civil laws retroactively adding to the means of enforcing existing obligations are valid’”, 2 SUTHERLAND, STATUTORY CONSTRUCTION § 41.09 (Sands 4th ed. 1986). This rule applies as long as vested or substantive rights are not altered or created by the statutory amendment. Thus, in this jurisdiction, the Court of Appeals has interpreted an amendment to the Uniform Reciprocal Enforcement of Support Act (URESAs), which added accrued arrearages to the definition of “support” sought to be recovered under its processes, to include arrearages that had accrued prior to the amendment. See, *Edwards v. Lateef*, 558 A.2d 1144 (D.C. 1989). In that case, however, unlike the case before us, the retroactivity involved arrearages that had accumulated, which were themselves by their very nature fixed and already determined obligations. The URESAs amendment did not alter or add to the amount of the fixed obligations of the delinquent parent, but merely permitted a new avenue through which such arrearages could be collected.

Although the amendment permitting an award of an attorney’s fee is undeniably an aid to claimants in seeking review of denied claims (including awards that are made then subsequently reduced or terminated), it does not create a new remedy for either a disabled worker under the Act or a method of obtaining benefits. It does, however, alter or change the rights and obligations of the parties which, under the old statute would have been in one amount, and under the new statute are in a different amount.

As previously discussed, therefore, a retroactive interpretation of the statute in this instance would be one that assesses attorney’s fees against the government because of “events” predating the amendment, in circumstances that prior to the amendment no such assessment would have occurred. Petitioner’s interpretation of the statute precisely that, a retroactive one, in that it attaches new consequences (liability for an attorney’s fee) to events that have already occurred (the termination of previously awarded benefits).

Were it the intention of the council to have made the provision applicable in such a case, the council could have made such an intention clear. Further, we agree with Respondent’s arguments pertaining to the lack of any such intention being evident in the legislative history, in which, as Respondent notes, it appears that the fundamental purpose of the amendment was to promote access to legal representation in connection with appeals of denials (or reductions) of benefits, and not to provide attorney’s fee assessments generally as a benefit in all cases of compensable injuries, nor to remedy

a problem created by the inability of claimants to pay an attorney's fee upon conclusion of an appeal.

Thus, we interpret the statute in conformance with the general rule, to be prospective only, meaning that it shall have applicability only to cases in which the termination or reduction decision, or the initial determination or award which is successfully challenged for inadequacy, occurs on or after March 30, 2007, the effective date of the legislation.

This interpretation is not only one that we view as being proper under standard rules of statutory construction, we also note that, as the ALJ discussed, applying the rule retroactively would pose unknown but potentially enormous costs in cases already adjudicated which resulted in awards greater than what was administratively determined. We also are reluctant to characterize as "remedial" a measure that imposes a cost upon the government (as opposed to a private party or entity of non-sovereign status) because such an analysis creates an inference that such an assessment is a penalty in response to some level of misconduct on the part of the government, in making an initial administrative denial or an administrative reduction or termination of benefits. While the amendment clearly is meant to encourage attorneys to assist claimants in the process of obtaining the maximum benefits to which they are entitled under the Act, we are hesitant to adopt an approach that would appear to characterize the assessment of an attorney's fee as a penalty imposed upon "the Mayor". Rather, we believe that the availability of such an assessment under the statutory scheme is best viewed as an additional benefit to which a claimant, under appropriate circumstances, would be entitled, noting that even in the absence of the amendment, the attorney would be entitled to the same fee, only it would be owed by the claimant directly. This view is substantiated further by the statutory command that such assessments be made in "a compensation order".

Thus, we hold that the amendment to the Act permitting an assessment against employer of an attorney's fee in D.C. Code § 1-623.27 (b)(2) is prospective only, and is to be applied only where the services of an attorney are retained to prosecute a claim under the in which the denial of benefits decision, or the decision to award benefits at a given rate is challenged as being insufficient under the Act, including therein the decision to reduce or terminate benefits previously awarded, was made on or after March 30, 2007, the effective date of the amendments.

Lastly, we take this opportunity to make clear that we do not accept Respondent's argument that the "compensation order" requirement compels the parties to include an attorney's fee request as an issue to be resolved at the time of the formal hearing or in the compensation order resulting from that formal hearing. The statute continues to require that attorney's fee petitions be "approved in the manner herein provided" (D.C. Code § 1-623.27 (d)(1)). Those approval procedures are governed by regulations found at 7 DCMR 109.1 through 109.6, and while it may be possible that in some instances an attorney and claimant may be in a position to present most if not all of the required information as set forth in the regulations to the ALJ at the time of the formal hearing, as a general matter the regulations require information and materials of sufficient complexity and detail as to not be summarily submitted. Further, requiring the submission of the materials required by the regulations, along with any opposing information submitted by the employer, would unduly burden the record in cases that do not result in the "successful prosecution" of a claim. It is not consistent

with the existence of the regulations cited that fee assessment requests are of necessity part of the underlying formal hearing process.

CONCLUSION

The denial of the request for an assessment of an attorney's fee against Respondent, said denial being contained within the Order of October 15, 2007, is, for the reasons set forth in the foregoing Decision and Order, in accordance with the law.

ORDER

The denial of the requested assessment of an attorney's fee against Respondent is affirmed.

FOR THE COMPENSATION REVIEW BOARD:

JEFFREY P. RUSSELL
Administrative Appeals Judge

December 20, 2007
DATE