

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. 05-044

MELVIN B. LEE,

Claimant – Respondent

v.

D.C. DEPARTMENT OF PUBLIC WORKS,

Employer – Petitioner.

Appeal from a Compensation Order of
Administrative Law Judge Fred D. Carney
OHA No. PBL 03-32A, OWC No. 0019969

Ross Buchholz, Esq., for the Petitioner

Roosevelt F. Brown, Esq., for the Respondent

Before LINDA F. JORY, SHARMAN J. MONROE and JEFFREY P. RUSSELL, *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 § 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

BACKGROUND

This appeal follows the issuance of a Final Compensation Order by the Assistant Director for Labor Standards of the District of Columbia Department of Employment Services (DOES), approving and adopting a Recommended Decision from the Administrative Hearings Division (AHD). In that Final Compensation Order, which was filed on December 28, 2004, the Administrative Law Judge (ALJ) awarded wage loss benefits from November 17, 2002 to the present and continuing. The Employer-Petitioner (Petitioner) now seeks review of that Compensation Order.²

As grounds for this appeal, Petitioner alleges as error that the decision does not rationally flow from the findings made, is contrary to the law and is not supported by substantial evidence.

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 § 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. 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, Petitioner alleges that the ALJ’s conclusion that the Respondent’s May 2003 Application for Formal Hearing was timely filed does not rationally flow from the finding that the Third Party Administrator (TPA) sent the Respondent a Notice of Denial on or about September 1999.³ The Petitioner argues that the Respondent was not denied

prior to October 1, 2004, the effective date of the D.C. Workers’ Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004.

² Along with its January 29, 2005 Petition for Review, the Petitioner requested additional time to submit a Memorandum in support thereof. Although the regulations previously governing appeals required that the memorandum be filed with the Application for Review, it was the policy of the Director, Department of Employment Services to routinely grant requests for extension of time to file a memorandum. However, the policy was abolished with the institution of the CRB, which assumed the appellate responsibilities of the Director, in light of the new statutorily imposed time constraints for issuing decisions. Nevertheless, as the Petitioner’s memorandum was received before this matter was assigned for review, the Petitioner’s request is granted and its memorandum is accepted on its merits.

³ Although other issues were raised and resolved in the Compensation Order, the Petitioner is only appealing the findings and conclusions with respect to timely filing of the Application for Formal Hearing.

due process with respect to notice of a right to a formal hearing under the circumstances of this case. As factual support for its argument, the Petitioner points to the finding that on or about September 1999, the TPA sent the Respondent a Denial Order which contained the formal hearing notice, the finding that checks subsequently sent to the same record address for the Respondent were cashed and the lack of evidence that the Denial Order was returned to the TPA. The Petitioner cites *Carroll v. D.C. Department of Employment Services*, 487 A.2d 622 (1985) as legal support for its argument. The Petitioner maintains that *Dozier v. D.C. Department of Employment Services*, 498 A.2d 577 (1985), upon which the ALJ relied in finding that the Respondent received the Denial Order on April 17, 2003 and that the May 8, 2003 Application for Formal hearing was timely received within thirty days thereof, is inapplicable to this case.

The pivotal issue presented for resolution below was whether the Respondent's failure to file his Application for Formal Hearing within 30 days of the issuance of the Final Order of Denial obviates his right to a formal hearing on the merits of his case. After reviewing the evidence and the case law, the ALJ concluded that the Respondent's May 8, 2003 Application for Formal Hearing was timely filed although the Final Order of Denial was issued in September 1999.

The Petitioner herein submitted into evidence a copy of a Final Order of Denial, dated August 6, 1999 and September 2, 1999, which terminated the Respondent's disability benefits as a consequence of his failure to attend an independent medical examination (IME) scheduled by the Petitioner. Employer Exhibit No. 1. The Final Order reflected the last known address for the Respondent. However, when the Order was prepared, the Respondent no longer resided at his address of record as he was incarcerated. The ALJ found:

On or about September 1999, I find the TPA sent claimant a Denial Order notifying him that his benefits were being terminated based on his failure to submit to multiple previously scheduled independent medical examinations. . . . I find that when the TPA issued the 1999 Denial Order and notices of claimant's rights to request a formal hearing, claimant was incarcerated.

Recommended Decision at p. 3.

The ALJ found, based upon the Respondent's testimony, that the Respondent received the Final Order of Denial and the notice of his appeal rights on April 17, 2003 when it was sent via facsimile to his attorney and that the period to file an Application for Formal Hearing began to run on that date. The ALJ further found that the May 8, 2003 Application for Formal Hearing was filed within thirty (30) days thereof and was, therefore, timely. *See* Recommended Decision at pp. 3-4.

In resolving the issue of whether the Application for Formal Hearing was timely filed, the ALJ placed the burden of showing that the Respondent received adequate notice of his hearing rights in accordance with due process on the Petitioner. The ALJ noted that due process requires the Petitioner to provide notice reasonably calculated to afford the Respondent with an opportunity to be heard. The ALJ concluded:

Here employer has presented evidence which indicates that there was a discrepancy regarding when the Denial Order was actually mailed. Was it August 6, 1999, the date typed below Ms. Tolbert's name as the claims examiner? Or was it mailed on September 2, 1999 as indicated in handwriting under John Fitzhugh's signature? (EE No. 1). Ms. Tolbert testified she did not remember when it was mailed without referring to the date on the order. Therefore it is determined that the agency has no evidence other than the date appearing on the Denial Order that could verify that it was mailed on either date or if it was mailed at all. Further the order [Final Order of Denial] does not indicate, nor does the record evidence show, that a notice informing claimant of her (sic) right to request a formal hearing was sent with the Denial Order.

...

Employer has produced no documentation, proof or allegation that claimant was sent notice that he had thirty days from the Denial Order to request a formal hearing. Therefore, the notice was not adequate to meet the standards of due process.

Recommended Decision at pp. 5-6, 7.

On review of the record, the Panel determines the conclusions in the decision below do not rationally flow from the findings made therein. *See Muhammad v. D.C. Department of Employment Services*, 774 A.2d 1107 (2001). The ALJ found that in September 1999, the Petitioner sent the Respondent a Denial Order and found that in 1999, the Petitioner issued the Respondent notices of his rights to request a formal hearing. However, the ALJ concluded that the Petitioner did not produce any evidence that the Final Order of Denial was mailed and did not show that a notice informing the Respondent of his appeal rights was sent with the Final Order of Denial.

The Panel is unable to discern exactly what the ALJ is deciding. Is the ALJ using the terms “sent”, “issued” and “mailed” synonymously or is the ALJ using the terms to describe different actions? If the terms are being used synonymously, then there is a contradiction between the findings of fact and the conclusions of law. If the terms are being used to describe different actions, then the differences need to be made clearer. A clarification or reconciliation is crucial in this case given that the ALJ’s decision to find the Respondent’s Application for Formal Hearing timely is based upon the status of the Final Order of Denial. This matter must be remanded for a reconciliation of the findings and conclusions made.

Also, the Panel determines the finding that the Petitioner issued the Respondent notices of his rights to request a formal hearing in 1999 is not based upon substantial evidence in the record. The Final Order of Denial addressed to the Respondent, which was submitted into evidence, contains the notation “Enclosure: Hearing Rights”, but there were no hearing rights attached thereto. *See Employer Exhibit No. 1. See generally Dozier v. D.C. Department of Employment Services*, 498 A.2d 577 (1985) (when the record is devoid of any proof of mailing, the agency has not satisfied its obligation to afford the claimant a “reasonable opportunity for fair hearing”).

The Panel rejects the Petitioner's implication that the Notice of Determination by Examiner's language entitled "Right to Reconsideration of Decision" satisfies its obligation to provide notice of appeal rights. Neither the Notice nor its reconsideration rights are equivalent to a Final Order and its appeal rights. *See* 7 DCMR § 7-106.

CONCLUSION

The Final Compensation Order of December 28, 2004 is not supported by substantial evidence in the record and is not in accordance with the law.

ORDER

The Final Compensation Order of December 28, 2004 is hereby VACATED and the case REMANDED. This matter is remanded for further proceedings as may be necessary to make findings of fact based upon substantial evidence in the record and issue conclusions of law which flow rationally from the findings of fact.

FOR THE COMPENSATION REVIEW BOARD:

SHARMAN J. MONROE
Administrative Appeals Judge

January 19, 2006
DATE