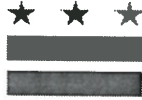


**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

**Department of Employment Services**

MURIEL BOWSER  
MAYOR



DEBORAH A. CARROLL  
ACTING DIRECTOR

**COMPENSATION REVIEW BOARD**

**CRB No. 14-119**

**MARIA POWELL,  
Claimant-Petitioner,**

**v.**

**DISTRICT OF COLUMBIA PUBLIC SCHOOLS,  
Employer-Respondent.**

Appeal from a September 22, 2014 Order of  
Administrative Law Judge Fred D. Carney, Jr.  
AHD No. PBL 13-005A, DCP No. 760002-0001-2003-0005

Kirk D. Williams for Claimant  
Eric Adam Huang for Employer

Before HEATHER C. LESLIE, LINDA F. JORY AND JEFFREY P. RUSSELL, *Administrative Appeals Judges.*

HEATHER C. LESLIE, for the Compensation Review Board,

**DECISION AND ORDER**

**FACTS OF RECORD AND PROCEDURAL HISTORY**

This case is before the Compensation Review Board (CRB) on the request of the Claimant for review of the Order issued September 22, 2014 by an Administrative Law Judge (ALJ) in the Administrative Hearings Division (AHD) of the District of Columbia Department of Employment Services (DOES). In that Order, the ALJ dismissed Claimant's March 27, 2014 Application for Formal Hearing as being untimely pursuant to D.C. Code § 1-623.24(b)(1).

For purposes of this appeal, the following dates are relevant:

- On September 20, 2012 the Employer, through the Office of Risk Management (ORM) sent Claimant a Notice of Determination (NOD) terminating Claimant's disability payments based upon the additional medical evaluation (AME) of Dr. Robert Gordon;

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- On September 28, 2012, Claimant filed a request for reconsideration with ORM;
- On October 11, 2012, Claimant applied for a Formal Hearing with the Administrative Hearings Division;
- On October 26, 2012, ORM sent Claimant a Final Decision on Reconsideration which upheld the NOD's termination of disability benefits;
- On May 29, 2013, a Formal Hearing was held. At the Formal Hearing, Employer moved to dismiss Claimant's Application for Formal Hearing as the application was filed before ORM had issued a final decision upon Claimant's request for reconsideration pursuant to D.C.M.R § 7-128.3;
- On June 11, 2013, Employer filed a Motion for Reconsideration of the decision to allow a Formal Hearing to proceed. Claimant did not respond.;
- On February 28, 2014, the ALJ issued an Order dismissing Claimant's Application for Formal Hearing pursuant to 7 DCMR § 128.3, concluding that Claimant did not exhaust her administrative remedies before filing for a Formal Hearing;
- On March 27, 2014, Claimant filed an Application for Formal Hearing, appealing the October 26, 2012 Final Decision on Reconsideration;
- On June 6, 2014, Employer filed a Motion to Dismiss Claimant's application as untimely. Claimant did not respond to Employer's motion; and
- On September 22, 2014, the ALJ issued an Order, dismissing without prejudice Claimant's Application for Formal hearing as out of time pursuant to D.C. Code § 1-623.24(b).

Claimant appealed the September 22, 2014 Order dismissing her Application for Formal Hearing. Claimant argues the ALJ erred in dismissing her application, stating it amounted to a "forfeiture of claim" and that nothing in the Act or regulations indicates the legislature contemplated this for a "minor procedural violation." Claimant's argument at 4. The Claimant also argues that she was "neither on notice nor able to file a subsequent application until the ALJ dismissed her initial application." Claimant's argument at 5.

Employer argues the Order should be upheld as the Claimant's application was untimely. Employer argues that contrary to Claimant's arguments, Claimant was apprised of her appeal rights when she received the NOD and Final Decision on Reconsideration.

#### 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 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. Code § 1-623.01, *et seq.*, (the Act), at § 1-623.28 (a), and *Marriott International v. DOES*, 834 A.2d 882 (D.C. 2003). Consistent with this standard of review, the CRB and this review panel are constrained to affirm 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 this panel might have reached a contrary conclusion. *Id.*, at 885.

#### DISCUSSION AND ANALYSIS

Claimant first argues that the remedy for violating 7 DCMR § 128 is dismissal of the hearing application and not forfeiture of right to consideration on the merits. Claimant correctly points out that 7 DCMR § 128.3 prohibits consideration of motions for reconsideration by ORM and an Application for Formal Hearing at the same time. Specifically, the regulation states:

In the event an employee or claimant submits both a request for reconsideration to the Program and a request for a hearing to the OHA, the employee shall be entitled only to the appeal process with the agency that first received the request. The other request shall not be considered by the other agency.

This prohibition is reflected in the NOD that Claimant received. The NOD specifically states:

If you disagree with this notice, you must act now by either (choose one): (1) requesting reconsideration as provided below, or (2) appealing this notice to: Chief, Office of Hearings and Adjudications, Department of Employment Services....

Claimant filed a reconsideration of the September 20, 2012 NOD on September 28, 2012. The request for Formal Hearing was filed afterwards, on October 11, 2012. As the regulation clearly states, the Claimant was entitled to only the appeal process with ORM, where the request for reconsideration was sent first. AHD (also referred to as the Office of Hearings and Adjudications or “OHA”) did not have authority to consider the Application for Formal Hearing. The subsequent February 28, 2014 dismissal of the Application for Formal Hearing was proper and in keeping with the clear intent of the regulations.

While certainly 7 DCMR § 128 does not prevent simultaneous filings as Claimant argues, the regulation certainly outlines the consequences for doing so. As Claimant concedes, the regulation’s prohibition on the exact course the Claimant chose is to “prevent the issuance of opposing decisions on contested issues.” Claimant’s argument at 4. Pursuant to the regulation, the District “may not consider the second filing.” Claimant’s argument at 5-6.

Moreover, the October 26, 2012 Final Decision on Reconsideration, states:

The Program hereby makes this decision a final order of the Program. **You may not appeal this Decision on Reconsideration, but you now have 30 days from**

**the date of this decision to file for a hearing with the Office of Hearings and Adjudications.**

This 30 day time frame is reflective of D.C. Code § 1-623.24(b)(1), quoted in the September 22, 2014 dismissal Order, which states:

Before review under § 1-623.28(a), a claimant for compensation not satisfied with a decision of the Mayor or his or her 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.

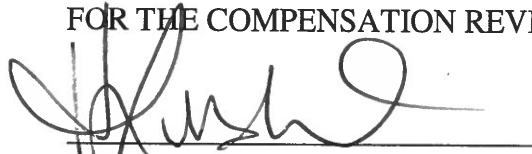
We reject Claimant's argument that she was "neither on notice nor able to file a subsequent application until the ALJ dismissed her initial application." Claimant's argument at 5. Claimant was apprised of her appeal rights clearly throughout the process, including choosing one of the two appeal processes outlined in the NOD and reflected in 7 DCMR § 128 as well as the consequences if she did appeal by requesting a reconsideration *and* a Formal Hearing. Claimant was on notice that the second filing, in this case the Application for Formal Hearing, was not to be considered by AHD. The Claimant was also on notice that she had to appeal the October 26, 2012 Final Decision on Reconsideration within 30 days and file for a Formal Hearing. This she did not do. We cannot agree with Claimant's characterization of the untimely filing of her appeal of the Final Decision on Reconsideration as a "minor procedural violation." Claimant's argument at 4.

The appeal rights in the NOD and Final Decision on Reconsideration were reflective of the regulations and statute, of which Claimant had access to. Claimant filed for a Formal Hearing of the Final Decision on Reconsideration outside of the 30 day time period. As such, dismissal of the Application for Formal Hearing was proper.

**CONCLUSION AND ORDER**

The September 22, 2014 Order dismissing Claimant's Application for Formal Hearing is **AFFIRMED**.

FOR THE COMPENSATION REVIEW BOARD:

  
HEATHER C. LESLIE  
Administrative Appeals Judge

March 6, 2015  
DATE