COMPENSATION REVIEW BOARD

CRB NO. 12-116

JOHN J. MARSHALL,
Claimant-Petitioner,

v.
WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY and SEDGWICK CMS,
Self-Insured Employer and Third-Party Administrator, Respondents.

Appeal of a June 27, 2012, Order by
The Honorable David L Boddie
AHD No. 12-326, OWC No. 686356

Benjamin T. Boscolo, Esquire, for the Claimant
Donna J. Henderson, Esquire, for the Self-Insured Employer and Third-Party Administrator

Before LAWRENCE D. TARR, *Chief Administrative Appeals Judge,* HENRY M. MCCOY, and HEATHER C. LESLIE,[1] *Administrative Appeals Judges*.

LAWRENCE D. TARR, *Chief Administrative Appeals Judge*, for the Compensation Review Board.

DECISION AND DISMISSAL ORDER

OVERVIEW

This case is before the Compensation Review Board (CRB) on the request of the claimant, John J. Marshall, for review of a June 27, 2012 Order issued by Administrative Law Judge (ALJ) David L. Boddie that denied the claimant's request that the employer provide him with free copies of the medical records it obtains through discovery from a Veteran's Administration Hospital. For the reasons stated, we dismiss the Application for Review.

PROCEDURAL HISTORY AND BACKGROUND FACTS OF RECORD[2]

The claimant, John J. Marshall, a bus driver for the employer, the Washington Area Metropolitan Transit Authority (WMATA), injured his right hip, right leg and back after he experienced pain while operating one of the employer's buses on either October 16 or October 26**,** 2007.[3]

[1] Judge Leslie has been appointed by the Director of the Department of Employment Services (DOES) as a CRB member pursuant to DOES Administrative Policy Issuance No. 12-02 (June 20, 2112).

[2] Because there is no transcript, the background facts are taken from the unchallenged statements in the parties' memoranda.

In January 2012 the claimant had total hip replacement surgery at the Veterans' Affairs (VA) Hospital in Washington, D.C., and did not work from the date of surgery until April 23. 2012. The claimant has filed a claim for workers' compensation benefits alleging that his 2012 hip replacement surgery and disability are causally related to the 2007 injury at work.

During discovery the employer sought to obtain all of the claimant's treatment records from the VA hospital. The VA hospital's records are not subject to subpoena because the VA is part of the federal government. Therefore, to obtain the claimant's medical records, the employer would have to either obtain a signed authorization from the claimant or file a civil action for the records in federal district court.

The employer requested a written authorization from the claimant. The claimant refused to sign the authorization unless the employer provided him with a free copy of the records that it receives from the VA hospital. Because the claimant is a military veteran, he is able to receive copies of his records at no cost from the VA hospital. The employer did not agree to provide the claimant with free copies of his medical records and the claimant refused to sign the authorization.

On June 5, 2012, the employer filed a Motion to Compel Signed Authorization for Medical Records from Claimant or in the alternative, to dismiss the claimant's claim for benefits. On June 14, 2012, the claimant filed a Motion for a Protective Order in Opposition to the Employer's Motion to Compel.

On June 27, 2012, the ALJ issued an Order that granted the employer's motion to compel the signed authorization and denied the motion to dismiss the claim. The ALJ also determined that the parties would bear their own costs for obtaining the records. In pertinent part, the Order stated:

> Upon review and reconsideration of the Employer's Motion to Compel Signed Authorization for Medical Records from Claimant, and the arguments presented, the Motion is **granted.** The Claimant shall sign an authorization for the release of his medical records from the Veterans Administration Hospital. The parties will bear their own separate costs for the copying of the records.

Despite this Order, the claimant did not give the employer a signed authorization for the records. On July 18, 2012, the employer filed a motion for sanctions. Before the ALJ decided the motion for sanctions, the claimant, on July 26, 2012, filed a Motion to Stay Proceedings with the ALJ and a request for review with the CRB. In accordance with the ALJ's August 2, 2012 Order, proceedings before him are stayed pending this review.

ISSUES ON APPEAL

The principal issues we decide are whether the CRB has jurisdiction to hear this dispute now and if so, whether the ALJ correctly required the claimant to sign the authorization for the release of

[3] The claimant's Application for Formal Hearing and Application for Review state the accident occurred on October 26, 2007. However the claimant's Motion for Protective Order says the accident was on October 16, 2007. The employer's memorandum states the accident happened on October 16, 2007.

claimant's medical records without requiring the employer to give the claimant a free copy of the records.

Both parties acknowledge that the ALJ's June 27, 2012 Order relates to a discovery matter and is an interlocutory decision. The claimant argues that the CRB has jurisdiction to hear his appeal of the interlocutory order and further argues that the ALJ's Order is arbitrary, capricious, and an abuse of discretion. The employer challenges the CRB's jurisdiction to hear the appeal and argues that if the CRB has jurisdiction it should affirm the ALJ's Order.

DISCUSSION AND ANALYSIS

D.C. Code §32-1522 limits the CRB's appellate jurisdiction to reviewing compensation orders and final decisions. The claimant concedes that the ALJ's June 27, 2012 Order is an order relating to discovery and is neither a compensation order nor a final order. Generally, rulings on discovery orders are not directly appealable. See, fn. 2, *Waters v. WMATA*, CRB No. 11-011, OHA No. 08-235C, OWC No. 641421 (September 26, 2011).

The claimant asserts that such interlocutory orders as the June 27, 2012 Order may be appealable under limited circumstances. To support his argument, the claimant cites the decision by the District of Columbia Court of Appeals (DCCA) in *Finkelstein, Thompson, & Loughran and Enright v. Biopharma, Inc*., 774 A. 2d 332 (D.C. 2007) (*Finkelstein, Thompson & Loughran*), a case that involved an appeal of a Superior Court's denial of a motion to dismiss a civil complaint.

Although the *Finkelstein, Thompson & Loughran* decision did not involve a workers' compensation case or a discovery matter, we note that the Court of Appeals' jurisdiction with respect to Superior Court is similar to the CRB's jurisdiction. The DCCA has jurisdiction to review "final orders and judgments" of the Superior Court. See, D.C. Code §11-721 (a) (1) (1955).[4]

In *Finkelstein, Thompson & Loughran* the defendants sought interlocutory review by the DCCA of a Superior Court order that denied the defendant's motion to dismiss for failure to state a claim. The Court noted it has jurisdiction to review "final orders" and "The denial of a motion to dismiss a complaint is not a final order in this sense and hence is usually not immediately appealable." 774 A.2d 332 at 339. The Court further noted:

> Under the collateral order doctrine, however, a ruling such as the denial of a motion to dismiss may be appealable if it has "a final and irreparable effect on important rights of the parties." *Bible Way Church of Our Lord Jesus Christ of the Apostolic Faith v. Beards*, 680 A.2d 419, 425 (D.C. 1996) (internal quotation marks and citation omitted). To qualify for immediate appellate review, the ruling must satisfy three requirements: (1) it must conclusively determine a disputed question of law; (2) it must resolve an important issue that is separate from the merits of the case; and (3) it must be effectively unreviewable on appeal from a final judgment. 680 A.2d at 425-26; *see also In re Ti. B.*, 762 A.2d 20, 25 (D.C. 2000).

[4] The DCCA also has statutory authority to review certain interlocutory orders from the Superior Court, none of which involve discovery orders. See, D.C. Code 1171 (a) (2) (A-C) and (a) (3).

The claimant does not challenge that the ALJ's Order required him to sign a written authorization. Rather, the claimant's dispute is with that part of the ALJ's Order that stated, "The parties will bear their own separate costs for the copying of the records." The claimant, apparently using the *Finkelstein, Thompson & Loughran* decision as a template, asserts at what would be page 2 of his memorandum:

> The June 27, 2012 Order is an extraordinary order that warrants the CRB to set aside its normal policy of not hearing interlocutory orders. The Order meets the collateral order doctrine criteria. It conclusively determines a disputed question of law (whether Mr. Marshall may be required to pay reproduction costs for documents the Employer and insurer obtain through the discovery process). The order resolves an important issue separate from the merits of the case (which regards Mr. Marshall's entitlement to temporary total disability). Finally, the Order would be unreviewable on final appeal since Mr. Marshall would be forced to incur the immediate deprivation, paying costs of obtaining copies of the VA hospital document, in order for his Formal Hearing to go forward. The quasi-judicial nature of the Board and the regulations do not forbid the CRB from hearing the interlocutory order, as "compensation orders" that the CRB may hear include orders aside from final decisions.

The employer concedes that there are exceptions to the rule against direct appeals of discovery orders. The employer argues that the June 27, 2012 Order does not fall within any of the exceptions. Employer's memorandum at 5.

In the 2010 case of *McNair Builders, Inc. v. Taylor*, the DCCA pointed out that the scope of the collateral order doctrine was limited by a 2006 United States Supreme Court decision:

> Since our opinion in *Finkelstein, Thompson & Loughran*, the Supreme Court, in *Will v. Hallock*, has emphasized that the collateral order doctrine is "modest" in scope and described the conditions required for its application as "stringent." 546 U.S. 345, 349-50, 126 S. Ct. 952, 163 L. Ed. 2d 836 (2006). Specifically with respect to the third requirement, the Court cautioned that "not mere avoidance of a trial, but avoidance of a trial that would impair a substantial public interest" is required before an appellate court invokes jurisdiction on the ground that an order is otherwise "'effectively' unreviewable if review is to be left until later." *Id*. at 353. In *Will*, the Court held that the trial court's refusal to apply the "judgment bar" of the Federal Tort Claims Act to dismiss a *Bivens* action did not meet this standard and was thus not appealable under the collateral order doctrine. 546 U.S. at 353-54.

3 A.3d 1132, 1136.

The issue then is whether the June 27, 2012 Order meets the stringent conditions for which an otherwise non-appealable discovery order can be immediately appealed.

Our starting point is 7 DCMR §221.4. This regulation states:

> A Hearing or Attorney Examiner shall conduct impartial formal hearings on claims in accordance with the District of Columbia Administrative Procedure Act (§ 1-1601 et seq., D.C. Code, 1981 ed.) and issue compensation orders and other orders in accordance with the Act and this chapter. A Hearing or Attorney Examiner may use the Rules of Civil Procedure of the Superior Court of the District of Columbia as guidelines in matters of procedure not specifically addressed in the District of Columbia Administrative Procedure Act and the Act.

The Administrative Procedures Act is silent with respect to discovery matters. Therefore, we look to the Superior Court rules.

The claimant has not identified any provision of the Superior Court Rules (SCR) that requires a party receiving documents during discovery provide the opposing party, at no cost, copies of those documents nor has the claimant identified any judicial decision, statute, or regulation that has held a party gets free copies of requested discovery. Therefore, because this issue has not been shown to be a disputed question of law, the first requirement of the collateral order doctrine is not established.

The claimant also argues that the third requirement is met:

> Finally, the Order would be unreviewable on final appeal since Mr. Marshall would be forced to incur the immediate deprivation, paying costs of obtaining copies of the VA hospital documents, in order for his Formal Hearing to go forward.

Memorandum at what would be page 3.

We disagree -- it does not follow logically that the ALJ's Order would be unreviewable because the claimant would have to initially pay for the records.[5] The fact that the claimant must pay for copies of records that the employer obtains through discovery does not inhibit the claimant's ability to seek review of that decision at the appropriate time.

It would be preferable for the ALJ to memorialize the findings of the June 27, 2012 Order in the Compensation Order that will be issued in this case and we encourage him to do so. However, to insure that there is no confusion, the CRB specifically states that the claimant can appeal the ALJ's decision that he must pay for copies of records that the employer obtains through discovery upon the issuance of a Final Order or Compensation Order.

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[5] The claimant has not challenged the employer's statement that because the claimant is a veteran, he is entitled to copies of his records at no charge nor has the claimant challenged the employer's statement that he could inspect the medical records that are received pursuant to his authorization.

CONCLUSION AND ORDER

The Claimant has not proven that his request for review of the June 27, 2012 Order qualifies for immediate review under the collateral order doctrine. Therefore, the CRB does not have jurisdiction to review the June 27, 2012 Order. This case shall be returned to the Administrative Hearings Division.

FOR THE COMPENSATION REVIEW BOARD:

/s/ Lawrence D. Tarr

LAWRENCE D. TARR
Chief Administrative Appeals Judge

December 17, 2012
DATE