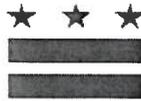


GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



ODIE DONALD, II
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 17-097

**MILDRED A. ROBINSON-TUFAIL,
Claimant-Petitioner,**

v.

**WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
Employer-Respondent.**

Appeal from an August 29, 2017 Order
by Administrative Law Judge Joan E. Knight
AHD No. 08-175A, OWC No. 626848

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2017 OCT 27 PM 1 13

(Decided October 27, 2017)

David M. Snyder for Claimant¹
Mark H. Dho for Employer²

Before LINDA F. JORY, GENNET PURCELL AND JEFFREY P. RUSSELL, *Administrative Appeals Judges.*

LINDA F. JORY for the Compensation Review Board.

DECISION AND REMAND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

Mildred Robinson-Tufail (“Claimant”), who lives in Bowling Green, VA, sustained a work-related injury on March 6, 2006 to her right shoulder. On September 6, 2011, Dr. James Tozzi, one of Claimant’s treating physicians opined that Claimant had reached maximum medical improvement, and had an 8% permanent partial impairment. Employer voluntarily paid Claimant permanent partial disability (“PPD”) benefits representing 8 % PPD to the right upper extremity on January 25, 2012.

¹ Claimant was represented by Michael Kitzman until approximately November 5, 2014.

² Employer was represented by Sarah O. Rollman until approximately October 27, 2016.

On January 27, 2012, Claimant filed an Application for Formal Hearing (“AFH”) with the Administrative Hearings Division (“AHD”) seeking a PPD schedule award of 35% to the right upper extremity based on an independent impairment rating issued, at Claimant’s request, by Dr. Michael Franchetti. A formal hearing was scheduled by AHD but not until August 1, 2012 at 11:00 a.m. On August 1, 2012, the formal hearing convened with Claimant and Counsel for Employer present but Counsel for Claimant was not present. Counsel for Employer called Counsel for Claimant by telephone and Counsel for Claimant advised her that his calendar showed the formal hearing was set for 1:00 p.m. Counsel for Employer thereafter consented to have the matter continued. An order subsequently issued setting the matter for a formal hearing on August 20, 2012 at 9:30 a.m.

The rescheduled Formal Hearing convened before the same ALJ on August 20, 2012 at 9:30 a.m. Claimant and her Counsel were present but Counsel for Employer was not. Counsel for Employer was contacted and she indicated that she had not received the August 7, 2012 order and requested that the matter be rescheduled again. Counsel for Claimant made an oral motion on behalf of Claimant to proceed on *ex parte* proof on Claimant’s AFH pursuant to 7 DCMR § 222.2, for the benefit of Claimant who had traveled over 100 miles at her own expense, for the second time.

The ALJ proceeded to conduct the Formal Hearing, admitting Claimant’s exhibits and eliciting testimony from Claimant, *ex parte*. Following the proceeding, on August 21, 2012, the ALJ issued a Show Cause Order (“SCO”) why the matter should not be decided on *ex parte* proof taken on August 20, 2012. The SCO further stated “Failure to respond shall be deemed acquiescence in proceeding to formal hearing on *ex parte* proof.” SCO at 2.

Employer filed a timely response, stating that Employer did not receive the August 7, 2012 order until August 23, 2012, three days after the August 20, 2012 hearing was set to go forward. Employer attached a copy of the certified mail receipt for Article Number 7008 1830 0001 5031 0111, which was signed by Sarah O. Rollman, who the administrative file indicates was to be served with the August 7, 2012 order.

The ALJ commenced a conference call on September 20, 2016, to discuss the status of this matter after four years of dormancy. An order subsequently issued stating in pertinent part:

Upon consideration of matter, [sic] it has been determined that a new formal hearing will commence on **November 3, 2016 at 9:00 A.M.** and it is hereby,

ORDERED the record in this case is reopened for a period of 30 days;

ORDERED that the parties shall file an amended Joint Pre-Hearing Statement and Stipulation Form by October 6, 2016;

ORDERED that the [sic] shall obtain medical opinions addressing whether Claimant is at maximum medical improvement with respect to the March 2, 2006 work injury and discovery shall be completed or by October 20, 2016; and, further

ORDERED that exhibits shall be filed on or by October 27, 2016.

September 26, 2016 Order at 1.

The Formal Hearing went forward on November 3, 2016. Claimant was represented by David M. Snyder and Employer was represented by Mark H. Dho. Claimant did not provide any live testimony. After discussions of the issues in this matter the parties were ordered to brief the issues of whether Claimant reached maximum medical improvement (“MMI”) as a result of the 2006 injury, what effect a subsequent injury had, and apportionment of PPD awards. *See* HT at 78.

An order issued on August 29, 2017 which dismissed Claimant’s AFH without prejudice.

Claimant filed Claimant’s Application for Review and Memorandum of Points and Authorities in support of Application for Review (“Claimant’s Brief”). Employer filed an Opposition to Claimant’s Application for Review (“Employer’s Brief”) on October 10, 2017.

ANALYSIS

Claimant initially argues:

As noted at the hearing on November 3, 2016, Ms. Tufail objected to any additional proceedings occurring and believes that a Compensation Order should be issued based upon the evidence submitted and testimony taken on August 20, 2012. There is no inherent authority for the agency to permit Metro what is essentially a “mulligan” or “second bite at the apple” to retry the case. The ALJ acted in accordance with the D.C. Municipal Regulations in permitting Ms. Tufail to proceed *ex parte*. 7 DCMR § 223.2 states that, “If the party who has not requested the hearing fails to appear, the case *shall* be decided on the evidence received at the hearing” (emphasis added). It was proper for the ALJ to originally continue the case upon Ms. Tufail’s request and Metro’s consent because that same subsection states, “If the party requesting the hearing fails to appear, the application for Hearing shall be dismissed *unless the other party objects and shows good cause why the application should not be dismissed*” (emphasis added). The good cause as to why the Application should not have been dismissed was due to both parties consenting to a continuance in light of the longstanding maxim that there is longstanding societal preference for a decision on the merits rather than dismissal based on procedural grounds. *See e.g. Boone v. Cedro Ltd.*, 908 A.2d 1165, 1157 (D.C. 2006).

The Administrative Hearings Division presented no grounds to explain why the Employer was entitled to introduce evidence four years after the formal hearing, AHD apparently assumed it had authority and did not address the basis of its power to make that decision. The decision to let the Employer argument [sic] that Ms. Tufail was not a maximum medical improvement at the time of the 2012 formal hearing is arbitrary, capricious and not in accordance with the law. Reversal is therefore required.

Claimant’s Brief at 4-5.

Employer asserts:

Claimant argues that the matter should be decided on the evidence submitted at the August 20, 2012 hearing. In support of that, Claimant makes some serious misrepresentation of facts. She first states that her attorney was merely late for the first hearing, whereas, he was actually a no-show. Under applicable law, at that point in time, the Hearing application should have been dismissed. No authority existed to continue the hearing.

Claimant then, contrary to all evidence in the case, represents that WMATA had received notice of the August 20, 2012 hearing. In fact, the evidence shows otherwise. Notice was received on August 23, 2012. Under applicable law, there is not authority to conduct an *ex parte* hearing where the opposing party does not have actual notice of the hearing and it would be error to award benefits to Claimant solely on *ex parte* evidence in this case.

Employer's Brief at 5.

7 D.C.M.R. § 222.4 states:

If the party applying for a formal hearing fails to perform pursuant to the Scheduling Order, without good cause, the application for formal hearing shall be dismissed. If the party who has not requested the formal hearing fails to perform pursuant to the Scheduling Order, the formal hearing may be scheduled for *ex parte* proof. A request by either party to set aside the dismissal of an application for formal hearing or to vacate an Order setting a formal hearing on *ex parte* proof may be granted where the Hearing Examiner has found the party's failure to comport with the Scheduling Order was for good cause.

Section 12 of the Scheduling Order specifically states:

The Agency shall issue a Show Cause Order to a party who fails to perform pursuant to this Scheduling Order, to remedy the failure to perform within 5 working days of receipt of the Order to Show Cause. If the failure is not remedied, the agency may take appropriate action, including dismissal for the Application for Formal Hearing without prejudice, or setting the matter for *ex parte* proof pursuant to D.C.M.R. § 222.4.

Thus, pursuant to AHD's Scheduling Order, we find the ALJ did err in her initial determination to go forward with the formal hearing on *ex parte* proof without providing Employer the opportunity to show good cause why it did not appear at the hearing. Nevertheless, the ALJ corrected her error by setting the matter for a *de novo* hearing albeit nearly five years later. The ALJ did not acknowledge Employer supported its position that Employer did not receive the order setting the matter for August 20, 2012 until August 23, 2012 with a copy of the certified mail receipt which includes counsel for Employer's signature and a receipt date of August 23, 2012. Yet, we reject Claimant's assertion that AHD presented no grounds to explain why the Employer was entitled to introduce evidence four years after the formal hearing.

However, we agree with Claimant that:

The Order of Dismissal erred when it stated that Ms. Tufail was required to demonstrate she was at maximum medical improvement in 2017, when she presented in 2012 that her injury was of a lasting and indefinite duration. The fact that the Agency inexplicably delayed for five years in resolving her claim did not change the legal standards used to resolve a claim for permanent disability.

Claimant's Brief at 5.

We are mindful that pursuant to D.C. Code § 32-1508(6)(A), if an injured worker sustains a subsequent injury which, when combined with a previous disability or physical impairment, causes substantially greater disability or death, the claim is compensable and shall be the responsibility of the employer as if the subsequent injury alone caused the disability.

However, as Claimant correctly argued at the formal hearing, the January 30, 2012 exacerbation is a separate injury and has no bearing on the claim at bar. We make no determination regarding the January 30, 2012 exacerbation in this order. The AFH was filed after OWC issued a decision with regard to the 2006 injury and it is undisputed that Claimant reached MMI on or about September 6, 2011, when the treating physician found claimant to have an 8% PPD. Despite the unfortunate fact that so much time has passed since the AFH was filed, the issue is the status of Claimant's disability when the AFH was filed. Claimant concedes that a subsequent injury has occurred and there is an indication that a claim for the subsequent injury was filed. However, there is no indication that an AFH has been filed with respect to the 2012 injury which if it were, the ALJ might possibly be asked to consolidate. Nevertheless, and as Claimant correctly argued:

The Act makes no limitation as to whether an injured worker is entitled to benefits for the prior disability, even in the face of a subsequent disability assuming that it results from a compensable, work-related injury. *See Providence Hospital v. DOES*, 163 A.3d 115, 119-120 (D.C. 2017)(*Poznanski*). Here, not one, but three physicians (both IME physicians chosen by the parties as well as Ms. Tufail's treating physician) opined that she had reached maximum medical improvement as a result of her injuries sustained on March 20, 2006. This determination of a disability of lasting and indefinite duration as a result of the March 20, 2006 work injury was the threshold question as to whether or not Ms. Tufail could pursue permanent partial disability benefits to the right arm as a result of that injury. *See Smith v. DOES*, 548 A.2d 95, 98 n. 7. As such, despite the fact that a subsequent injury may result in a greater disability at some undefined point in the future, she was entitled to pursue her claim for relief for the permanent partial disability benefits regarding the 2006 incident. *Poznanski* 163 A.3d at 119-120.

Claimant's Brief at 6.

We agree with Claimant and find the ALJ's statement that a "Claimant may not extrapolate a prior injury from a subsequent clinically exacerbated injury to the same body part, as in this case,

that may have impacted the status of the claimant's disability to seek an apportioned scheduled award" to be contrary to the law. We further find the ALJ's following conclusion is contrary to law and an abuse of discretion:

On the basis for the forgoing, the matter is not ripe for adjudication for a schedule award until such time Claimant has attained maximum medical improvement to her right shoulder exacerbation injury.

Order at 5.

CONCLUSION AND ORDER

The August 29, 2017 Order dismissing Claimant's January 12, 2012 Application for Formal Hearing without prejudice is not in accordance with the law and an abuse of discretion and it is accordingly **VACATED**. The matter is remanded to the Administrative Hearings Division for the issuance of a Compensation Order based on a determination of Claimant's right arm impairment as a result of the March 2006 work related injury without consideration of the 2012 exacerbation.

So ordered.