

**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. 07-31**

**MILDRED CARRY,**

**Claimant - Respondent**

**v.**

**D. C. DEPARTMENT OF MENTAL HEALTH**

**EMPLOYER - PETITIONER**

Appeal from a Compensation Order of  
Administrative Law Judge Howard W. Cummins  
AHD PBL No. 06-079, DCP No. 761010-0001-2001-0004

Ross Buchholz, Esquire, for the Petitioner

Harold L. Levi, Esquire, for the Respondent

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

LINDA F. JORY, *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, Department of Employment Services (DOES) Director's Directive, Administrative Policy Issuance 05-01(February 5, 2005)<sup>1</sup>.

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<sup>1</sup>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 to 32-1545 (2005) and the D.C. Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Official Code §§ 1-623.1 to 1-643.7 (2005), 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 a Compensation Order by an Administrative Law Judge (ALJ) of the Office of Hearings and Adjudication's Administrative Hearings Division (AHD). In that Compensation Order, (CO) which was filed on December 29, 2006, the ALJ, determined the Disability Compensation Program (DCP) improperly terminated Petitioner's disability and medical benefits. The ALJ also concluded that there is no statutory bar or other impediment to Respondent simultaneously receiving Social Security disability benefits and DC. Workers' Compensation benefits.

Employer-Petitioner, filed an Application for Review (AFR) of the December 29, 2006 Compensation Order, asserting the CO is not supported by substantial evidence and not in accordance with the law.

Claimant – Respondent, through the assistance of counsel, filed a response to the AFR asserting the Compensation Order is in accordance with the law and should, therefore, be affirmed.

## ANALYSIS

As an initial matter, the scope of review by the Compensation Review Board (CRB) and this Review Panel (the 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, (the Act) 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 scope of review, the CRB and the Panel are bound 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, in support of its allegation that the CO is not supported by substantial evidence, Petitioner asserts the ALJ's decision to grant Respondent a total right knee replacement based upon the opinions of the treating physicians is error as the reports fail to mention conditions which clearly could have required right knee replacement, i.e., osteoarthritis and obesity. Petitioner also asserts that Respondent's age should have been a factor which the treating physician failed to mention also.

The Panel concludes, on this issue, Petitioner has done nothing more than assert reasons why the ALJ might have ruled differently, had the ALJ accepted Petitioner's views as to the weight accorded to the evidence presented. While it is true that there is other evidence in the record that could have supported a contrary result, we may not substitute our judgment for that of the ALJ,

whose decision is clearly supported by substantial evidence and consistent with the weight afforded the opinion of the treating physician. *See Marriott*, 834 A.2d at 885; *Kralick, supra*.

Petitioner further asserts that the Decision that Respondent could simultaneously receive D.C. Gov't. Disability Benefits and Federal Disability Benefits is not in accordance with the law.

At the outset, the Panel must note that the ALJ inconsistently referred to the compensation Respondent received from a source other than the DC disability program as (1) federal Civil Service Retirement disability benefits; (2) OPM Social Security disability retirement benefits; (3) regular disability retirement benefits; (4) federal disability retirement benefits from U.S. OPM; and Social Security disability benefits. Review of the CO reveals that while the ALJ may have been confused about what type of benefit Respondent had received and what "Act" i.e. private or public sector to apply to the instant claim for benefits<sup>2</sup>, the ALJ reached the proper result by determining that there is no statutory bar or other impediment to [Respondent] simultaneously receiving [disability retirement benefits from the United States Office of Personnel Management (USOPM)] and D. C. Workers' Compensation Benefits.

In so concluding, the Panel agrees with Respondent's position that contrary to Petitioner's view, District Government employees are not covered by the Federal Employee's Compensation Act, 5 U.S.C. §8101 *et seq.* (FECA) which is in fact the federal government's workers' compensation act. As Respondent points out "Under FECA it certainly is the case that an injured Federal worker who is receiving federal injury wage-replacement compensation may not simultaneously receive Federal disability retirement, social security disability or retirement benefits under the statute covering those benefits. However, again, as Respondent concedes, she is not a Federal employee.

As Respondent asserts, and the ALJ agreed, with the advent of D.C. home rule, the District of Columbia was required to "establish a merit system to replace that previously mandated by the federal government to include legislation to cover 'appointments, promotions, discipline, separations, pay, unemployment compensation, health, disability and death benefits' ". See D.C. Code §10242(3)(1987).

The Panel takes administrative notice that with the imposition of home rule by Congress, The District of Columbia Government Merit Personnel Act of 1978 was created as an entirely separate and distinct workers' compensation program for District of Columbia employees. However, District employees who were employed by the District prior to October 1, 1987 continued to enjoy, and still do, certain advantages of their former Federal status which includes participation in Federal health benefits and the Federal Civil Service Retirement System, which entitles the pre-1987 hires to Federal disability retirement benefits if applicable. As a result, DC employees hired before October 1, 1987, like Federal employees have been unable to participate in the Federal Insurance Contributions Act (FICA) and neither contribute nor are they able to apply for FICA social security benefits or social security disability benefits. Hence, Respondent's receipt of federal disability retirement benefits is essentially no different than an

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<sup>2</sup> The ALJ incorrectly referred to provisions of the private sector act such as §36-308 when describing the "merit system" mandated by D. C. Council after the District of Columbia Home Rule Act (DCHRA)

employee who requests social security disability benefits while receiving wage loss benefits for a work related injury.

Thus, the Panel agrees with Respondent that since there is no dispute that Respondent commenced her employment with St. Elizabeth's Hospital in 1966 as a Federal employee, but the District of Columbia Government subsequently became responsible for the hospital, therefore, Respondent became a District of Columbia Government employee and with the imposition of home rule, District Gov't. employees were not covered under the FECA yet covered under 5 U.S.C. Part III, Subpart G, Chapter 83 (1) which defines employees to include an individual first employed by the government of the District of Columbia before October 1, 1987. Moreover, as Respondent also correctly asserts, because Respondent has not received any other District benefits she never had to make the selection mandated by § 1-623.16(b) of the Act. And, while the process the ALJ utilized in evaluating the parties arguments was incorrect, the ALJ arrived at the correct result, as the D.C. Comprehensive Merit Personnel Act of 1978, as amended, has no provision which requires that credit be taken for federal retirement benefits received. .

#### **CONCLUSION**

The Compensation Order of December 29, 2006 supported by substantial evidence and is in accordance with the law.

#### **ORDER**

The Compensation Order of December 29, 2006 is hereby **AFFIRMED**.

FOR THE COMPENSATION REVIEW BOARD:

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LINDA F. JORY  
Administrative Appeals Judge

March 14, 2007

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