



PRESTON JONES,	:	
	:	
Claimant	:	
	:	
v.	:	Dir. Dkt. No. 87-17
	:	H&AS No. 86-597
GEORGE HYMAN CONSTRUCTION	:	OWC No. 80876
COMPANY,	:	
	:	
Self-Insured	:	
Employer	:	
	:	

Appeal from the Compensation Order of Michael D. Schaff, Hearing Examiner

Alan M. Perlman, Esquire
for the Claimant

D. Stephenson Schwinn, Esquire
for the Employer

DECISION OF THE DIRECTOR ON REMAND

I. Preliminary Statement

This proceeding arises out of a claim for workers' compensation benefits filed pursuant to the provisions of the District of Columbia Workers' Compensation Act of 1979, as amended, D.C. Law 3-77, D.C. Code §36-301 et seq. (1981 Edition, as amended) (hereinafter, the "Act").

On September 18, 1987, the Director issued a Decision reversing and setting aside that portion of a March 25, 1987 Compensation Order awarding claimant temporary total disability benefits because that award relied on a post-hearing report submitted by Dr. Moscovitz.

Claimant appealed the Director's finding to the District of Columbia Court of Appeals contending that the Director committed error in concluding that the hearing examiner erroneously accepted and relied on the evidence submitted by claimant after the hearing.



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On January 31, 1989, the Court of Appeals reversed and remanded this case to the Director for further proceedings (No. 87-1129).

II. Background

After the conclusion of the hearing in this case, claimant filed a motion (in letter form) dated November 10, 1986 requesting that the record remain open for an additional period of time to allow claimant to submit the medical report of Dr. Peter Moscovitz, a doctor previously uninvolved with the case or claimant. Claimant also requested enough time for Dr. Moscovitz to perform the examination/evaluation and to review various medical records.

By letter dated November 21, 1986, employer opposed claimant's motion to leave the record open for purposes of receiving Dr. Moscovitz's report.

By Order issued November 26, 1986, Hearing Examiner Schaff granted at least part of claimant's motion, and he ordered that the record remain open until December 17, 1986 "to allow for the examination and report of Dr. Moscovitz".

In a Compensation Order, dated March 25, 1987, Hearing Examiner Schaff awarded claimant temporary total disability benefits from November 26, 1986 to the present, based solely on Dr. Moscovitz's post hearing examination and report. In its appeal of the March 25, 1987 Compensation Order, employer contested the Hearing Examiner's decision to allow Dr. Moscovitz to examine claimant and submit a report.

The Director concluded that the Hearing Examiner committed error in allowing the record to remain open for receipt of the report and in basing part of his decision on that report. Citing D.C. Code, §36-320 (c), the Director noted that claimant's November 10, 1986 motion to leave the record open for Dr. Moscovitz's report did not reveal unusual circumstances warranting the Hearing Examiner's conclusion; nor did the Hearing Examiner's November 26, 1986 order contain specific findings of fact justifying his acceptance of the report.

III. Discussion

In its remand, the Court noted that in construing D.C. Code, §36-320(c), the Director must consider agency regulation 7 DCMR §223.4 and, at minimum, the Director must explain her reasons for deciding that the Hearing Examiner erred in reopening the record to receive Dr. Moscovitz's report, in light of this regulatory provision.

D.C. Code, §36-320(c) provides in relevant part as follows:

If a hearing on such claim is ordered the Mayor shall give the claimant and other interested parties at least ten (10) days notice of such hearing . . . and no additional information may be submitted by the claimant or other interested parties after the date of the hearing except under unusual circumstances as determined by the Mayor (emphasis added).

The agency's regulation governing the reopening of evidentiary hearings for the receipt of additional evidence, 7 DCMR 223.4, provides:

If the Hearing or Attorney Examiner believes that there is relevant and material evidence available which has not been presented at the hearing, the hearing may be adjourned or, at any time prior to the filing of the compensation order, the hearing may be reopened for the receipt of the evidence.

The Director believes that the reliance on D.C. Code, §36-320(c) to conclude that the Hearing Examiner erred in allowing the receipt of the report, does not ignore 7 DCMR §223.4. Rather, this regulation should be read in light of the Act's "unusual circumstances" provision in D.C. Code, §36-320(c).

In administering workers' compensation claims in the District of Columbia, the Act is the controlling authority and the agency's regulatory construction of the statute should reasonably flow from that authority. In situations involving construction and interpretation, the Act must be the primary focus, as an administrative agency's regulations should not overrule a statute. See, Barbour v. Department of Employment Services, 499 A.2d 122 (D.C. App. 1985).

In this case, the Director believes that the regulatory provisions of 7 DCMR §223.4 governing the reopening of evidentiary hearings for the receipt of additional evidence, must be interpreted under the guidelines of the "unusual circumstances" requirement of the Act. The Act mandates that "no additional information may be submitted . . . after the date of the hearing, except under unusual circumstances . . ." Thus, there must be a threshold finding that there were "unusual circumstances" which prevented a party from submitting the evidence before the close of the hearing. This finding of "unusual circumstance" must be made before a

hearing examiner determines that since the evidence is material and relevant, the hearing should be reopened for the receipt of the evidence. This is a two step process. First, there must be the showing of unusual circumstances, and only then can the hearing be reopened for material and relevant evidence.

In the instant case, the Hearing Examiner apparently concluded that the report of Dr. Moscovitz was relevant and material, since he based his award of benefits on that report. However, there was no finding that there were "unusual circumstances" which prevented claimant from submitting this evidence at the hearing. Thus, the report should not have been admitted even though it may have been material and relevant. 1/ 2/

The Director emphasizes that the practice of limiting the administrative record only to that evidence which has been submitted and developed at the hearing, is critical for protecting a party's right to confrontation and cross examination. In addition, if a party is readily allowed to submit newly developed evidence after the hearing, an administrative hearing could conceivably linger on indefinitely, turning into prolonged discovery sessions.

In the Decision of September 18, 1987, the Director noted that the record "does not reveal any unusual circumstances cited by claimant warranting . . . what amounts to the development of completely new evidence. Nor does the Hearing Examiner's November 26, 1986 Order contain any specific findings of fact justifying the post hearing examination by Dr. Moscovitz and the submission of his report". On remand, the Director still concludes that since there was no finding of unusual circumstances, the Hearing Examiner committed error in allowing the receipt of the doctor's report and in basing a part of his decision on the improperly admitted report. In addition, the Director believes that agency regulation 7 DCMR §223.4, does not permit acceptance of this report in this case.

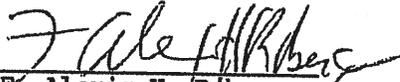
1/ Conversely, the Director notes that there could be a situation in which "unusual circumstances" prevents a party from submitting evidence before the close of the hearing, however, if the Hearing Examiner determines that the evidence is not material or relevant, then the Hearing Examiner could properly decline to reopen the hearing for receipt of such evidence.

2/ The Director would also point out that even if there were "unusual circumstances" which justified the admission of this post hearing report, the Hearing Examiner committed error by simply reopening the record for receipt of the report. 7 DCMR §223.4 provides that the "hearing may be reopened for the receipt of the evidence", but it does not allow the submission of ex parte evidence. If there were "unusual circumstances", the Hearing Examiner should have reopened the hearing to afford employer the opportunity for cross examination and rebuttal.

As a result, that portion of the March 25, 1987 Compensation Order which is based upon Dr. Moscovitz's post hearing examination and report must be reversed and set aside. 3/

IV. Disposition

Accordingly, for the reasons more fully set forth above, the Decision of the Director of September 18, 1987 is hereby affirmed, adopted and incorporated by reference herein.


F. Alexis H. Roberson
Director

Date OCT 03 1989

3/ The Director emphasizes that D.C. Code, §36-324 outlines the procedure for modification of awards in cases where there is reason to believe that a change of conditions has occurred concerning the fact or degree of disability. In the September 18, 1987 Decision, the Director alluded to the fact that previously filed motions for modification were unresolved and that the parties could request that the Hearings and Adjudication Section conduct a hearing on the pending motions (Decision of the Director, p. 9, n. 6). Since these motions are apparently still pending, the Director again would point out that claimant has the right to request a hearing if he feels there is evidence supporting a finding of changed conditions.