

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



ODIE DONALD II
ACTING DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 16-114

**QUEEN GLYMPH,
Claimant–Petitioner,**

v.

**DISTRICT OF COLUMBIA DEPARTMENT OF HEALTH,
Employer-Respondent.**

Appeal from a July 27, 2016 Compensation Order
by Administrative Law Judge Fred D. Carney, Jr.
AHD No. PBL 13-016A, DCP No. 761012-0001-1999-0009

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2017 FEB 17 PM 1 15

(Decided February 17, 2017)

Justin M. Beall for Claimant
Rahsaan Dickerson 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 REMAND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

Claimant worked for the Employer as a Program Analyst. Claimant sustained a work-related injury on May 17, 1995, injuring her head, neck, shoulders, arms, hand, chest, back, ribs, hips, legs, knees, ankles and feet. Dr. Moskowitz diagnosed Claimant with soft tissue injuries. The then Office of Risk Management Disability Compensation Program (“DCP”), now Public Sector Workers’ Compensation Program, (“PSWCP”) accepted the claim and awarded wage loss and medical benefits.

Claimant continued to be symptomatic. Subsequently, Dr. John L. Lawson diagnosed Claimant with post-traumatic fibromyalgia secondary to the work injury in 1997. Claimant treated with Dr. Lawson for a number of years for fibromyalgia, which was paid for by Employer.

Based on an independent medical exam (“IME”) performed by Dr. Kathleen Fink, Claimant’s disability benefits were terminated on August 8, 2012. Claimant was informed by a Notice of Determination (“NOD”) of this termination of benefits.

Claimant requested reconsideration of the NOD. On October 5, 2012, Claimant’s request for reconsideration was denied, in part, because her “current complaints of pain and restrictions are related to fibromyalgia, osteoarthritis, and obesity which are not related to your original injury of May 17, 1995.” Employer’s exhibit 4 at 9. Claimant filed for a Formal Hearing seeking a restoration of benefits.

A full evidentiary hearing occurred on March 25, 2015. Claimant sought restoration of temporary total disability benefits from August 8, 2012 to the present and continuing as well as past and future medical benefits. The issues presented were whether the Administrative Hearings Division (“AHD”) had jurisdiction to consider the medical causal relationship of Claimant’s diagnosed fibromyalgia, and whether the termination of Claimant’s benefits was warranted. A Compensation Order (“CO”) issued on July 27, 2016. The ALJ first concluded that AHD did not have jurisdiction over Claimant’s fibromyalgia claim as a NOD had not been issued regarding the compensability of the fibromyalgia. Second, the CO determined that Employer had met its burden of proving that a change of condition had occurred in Claimant’s condition warranting a termination of benefits.

Claimant appealed. Claimant argues the ALJ erred in determining AHD lacks jurisdiction to address the compensability of Claimant’s fibromyalgia. Employer opposes Claimant’s appeal, arguing the CO is supported by the substantial evidence in the record and in accordance with the law.

ANALYSIS¹

In determining that AHD did not have jurisdiction to address Claimant’s diagnosis, the ALJ stated:

Having considered the arguments of both parties on the foregoing it is determined this tribunal lacks jurisdiction over Claimant's claim for fibromyalgia. The record contains no evidence that Claimant filed a claim alleging that her May 17, 1995 work injury aggravated her fibromyalgia. Consequently, Employer has not made a final administrative determination on the compensability of Claimant's fibromyalgia. As for Claimant’s argument that Employer accepted her claim by paying for the treatment, I found that argument contrary to the ruling of the CRB

¹ The scope of review by the Compensation Review Board (“CRB”) and this Review Panel as established by the District of Columbia Comprehensive Merit Personnel Act of 1978, as amended D.C. Code § 1-623.01 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. D.C. Code § 1-623.28(a). “Substantial evidence”, as defined by the District of Columbia Court of Appeals (“DCCA”), is such evidence as a reasonable person might accept to support a particular conclusion. *Marriott Int’l. v. DOES*, 834 A.2d 882 (D.C. 2003) (“*Marriott*”). Consistent with this scope of review, the CRB and this 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, supra*, 834 A.2d at 885.

in the cases of *Tomlin v. DCPS*, AND [sic] No. PBL 12-013A, DCP No. 30080945683-0001 (April 11, 2016) citing *Powell v. DC Office the State Superintendent*, CRB No. 15-165, AHD No. 09-047B, DCP No. 0468-WC-13-0501-084 (March 21, 2016).

In *Powell*, the CRB rejected a similar argument of an employee who asserted that because Employer paid for medical care including two surgeries that Employer "implicitly accepted" her claim and in the alternative, argued that AHD had jurisdiction to adjudicate the non-accepted claim because it had terminated all of Claimant's benefits. Therein the CRB stated:

We do not agree with Claimant's assertion that Employer "implicitly accepted the claim for the shoulder insofar as it paid for medical care including two surgeries", nor do we agree with Claimant that "by issuing a Notice of Determination that terminated all of Ms. Powell's temporary total disability benefits and medical care and treatment for all injuries, the Employer "opened the door to a determination as to causal relationship of Claimant's left shoulder injuries".

AHD only has jurisdiction over what PSWCP denied, not all that was claimed as injured. While neither party has presented the claim completed by Claimant, we take guidance from an unpublished DCCA memorandum opinion. The DCCA held that AHD could not exercise jurisdiction over a claim for an injury for which a claimant has not filed a specific claim, and for which a specific denial has not been issued by the PSWCP. Despite being an unpublished Memorandum Opinion and Order, it is instructive of the court's views, and we adopt those views on this subject. *D. C. Housing Authority v. DOES*, No. 12-AA-1824, Mem. Op. & J. (D.C. March 31, 2014) [(“Jackson”)]. See also *Reyes v. D.C. Dept. of Mental Health*, CRB No. 14-158, and [sic] (May 13, 2015). Thus we must conclude the ALJ lacked jurisdiction to address Claimant's left shoulder claim.

The lack of a final determination of the compensability of Claimant's fibromyalgia is a bar to an administrative decision on that matter. *Tomlin, supra*,

CO at 5-6.

Since the issuance of the CO, the CRB has had occasion to address the District of Columbia's Court of Appeals' ("DCCA") recent opinion in *Reyes v. DOES*, No. 15-AA-648 (December 29, 2016)(*Reyes*). In *Reyes*, the DCCA stated:

The CRB understood this court to have held in *Jackson* that a DOES ALJ only has jurisdiction to hear claims for which the claimant had given timely notice and

for which the Program had issued a final decision. Although the CRB acknowledged that *Jackson*, as an unpublished decision, "is not to be viewed as having precedential authority," it felt "obligated to adopt" what it understood to be the court's reasoning therein. Accordingly, the CRB concluded that the ALJ lacked jurisdiction to adjudicate Dr. Reyes's claim, and vacated the ALJ's compensation order. Dr. Reyes then filed the petition for review now before us.

* * *

The procedural history of *Jackson* is distinguishable and the CRB misunderstood the nature of our decision in that case. See *Nunnally v. District of Columbia Metro. Police Dep't*, 80 A.3d 1004, 1012 (D.C. 2013) ("An agency's interpretation of our case law does not trigger an obligation of deference on our part."). In *Jackson*, the CRB upheld an ALJ's review of a request for benefits never presented to or decided by the Program, reasoning that the Program had failed to challenge the ALJ's jurisdiction and had thus waived any such argument. This court reversed the CRB, pointing out that *Jackson*'s back claim was never asserted to DCHA. *Jackson* had no occasion to address, and thus did not decide, the question of whether an initial failure to allege an injury to a specific part of the body creates a jurisdictional bar even if the agency thereafter considers that alleged injury and decides on the merits that the alleged injury does not provide a basis for an award. This case presents that question, because Dr. Reyes did ask the Program to consider her right knee claim (in a motion for reconsideration), and the Program in fact did consider and reject that claim in its Final Decision on Reconsideration. *Jackson* is thus inapposite.

In *Cunningham v. D.C. Office of the Chief Financial Officer*, CRB No. 15-037(R) (February 15, 2017), the CRB, relying on *Reyes*, reasoned,

[A] claimant would not be barred from having a formal hearing for a claim relating to an injury that was not identified on the first report or claim, so long as PSWCP considered the alleged later-identified injury and issued a final determination on the merits of the later-identified injury.

To require a claimant to ask PSWCP to consider a claim for which PSWCP already had all the information it needed to investigate and issue a final determination would require a claimant to do a useless act. If PSWCP did not have sufficient notice of the later-identified injury and could not have fully investigated (including ordering an AME) the claim related to that injury, it would not have issued a final decision on the merits of the claim.

Cunningham at 10.

Stated another way, even if an injury or condition was not identified in the first report or in a subsequent claim, as long as Employer has had a chance to consider an injury and decide that the

injury or subsequent condition does not qualify for an award, either monetary or medical, then jurisdiction to adjudicate the denied injury or condition confers upon AHD.

Such is the case before us. Employer, in reviewing medical reports, including the AME of Dr. Fink, concluded definitely in its October 5, 2012 Final Decision on Reconsideration that Claimant's fibromyalgia was not related to the work injury. By this decision, pursuant to *Cunningham*, jurisdiction vested in AHD to adjudicate the fibromyalgia claim.

Thus, we must remand the case with instructions to consider Claimant's fibromyalgia claim and what impact, if any, the fibromyalgia condition (if found to be medically casually related) has on Claimant's claim for relief.

CONCLUSION AND ORDER

The July 27, 2016 Compensation Order is VACATED and REMANDED for further consideration consistent with the above discussion.

So ordered.