

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. 07-025

ROBERT MOORE,

Claimant–Petitioner,

v.

PROTEUS CONSTRUCTION AND DONEGAL COMPANIES,

Employer/Carrier–Respondent.

Appeal from an Order of
Administrative Law Judge Amelia G. Govan
AHD No. 01-291E, OWC No. 560052

David M. Schloss, Esquire, for the Petitioner

Cheryl D. Hale, Esquire, for the Respondent

Before JEFFREY P. RUSSELL, LINDA F. JORY, and SHARMAN J. MONROE, *Administrative Appeals Judges*.

JEFFREY P. RUSSELL, *Administrative Appeals Judge*, for the Compensation Review Panel:

DECISION AND ORDER

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board pursuant to D.C. Official Code §§ 32-1521.01 and 32-1522 (2004), 7 DCMR § 230, and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005).¹

¹Pursuant 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 District of Columbia Fiscal Year 2005 Budget Support Act of 2004, Title J, the District of Columbia Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, *codified at* 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 District of Columbia Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §§ 32-1501 to 32-1545 (2005), and the District of Columbia Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Code Ann. §§ 1-623.1 to 1-643.7 (2005), including responsibility for

BACKGROUND

This appeal follows the issuance of an Order from the Administrative Hearings Division (AHD) of the Office of Hearings and Adjudication (OHA) in the District of Columbia Department of Employment Services (DOES). In that Order, which was filed on December 28, 2006, the Administrative Law Judge (ALJ) denied a Motion for Reconsideration of December 5, 2006, dismissing Respondent's Application for Formal Hearing without prejudice.

As grounds for this appeal, Petitioner alleges as error that the ALJ lacked authority to dismiss an application for formal hearing without prejudice where the party filing the application voluntarily seeks its withdrawal. Petitioner seeks an order from the CRB in which the dismissal order is "revised such that the dismissal be with prejudice with instructions to the OWC that the informal conference recommendation be reduced to a final order".

In response to this appeal, Respondent filed an Opposition to Application for Review, wherein Respondent asserts that there was no voluntary withdrawal of the Application for Formal Hearing, and that the dismissal thereof by the ALJ was a unilateral decision by the ALJ in response to Respondent's request for continuance, to which Petitioner had consented. Respondent requests that the order of dismissal without prejudice be affirmed.

ANALYSIS

As an initial matter, the scope of review by the Compensation Review Board (CRB) and this Review Panel, as established by the Act and as contained in the governing regulations, is normally 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. Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §32-1501 to 32-1545 (2005), at §32-1521.01(d)(2)(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 International v. District of Columbia Dep't. of Employment Serv's.*, 834 A.2d 882 (D.C. 2003). Consistent with this standard of review, the CRB and this Review Panel are constrained 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.

However, in cases where agency action is appealed that does not involve the creation of a record, and where the actions of the agency must be considered without reference to evidence in the normal sense, the Board must affirm the order under review unless it is determined to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. *See*, 6 Stein, Mitchell & Mezines, ADMINISTRATIVE LAW, § 51.93 (2001). This case presents no record to review,

administrative appeals filed prior to October 1, 2004, the effective date of the District of Columbia Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004.

and does not involve the evaluation of evidence or the consideration of a claim for benefits. Rather, it concerns an administrative order issued by an ALJ that does attempt or purport to grant or deny a claim for benefits under the Act, which orders are ordinarily deemed interlocutory.

As stated above, the CRB has the authority to review Compensation Orders.² However, the CRB has recently issued a decision that held that the CRB does not have authority to review an interlocutory order from AHD. In that case, the CRB decision states as follows:

7 DCMR § 251.2 states:

The authority of the Board is quasi-judicial in nature, involving the review and determination of appeals from compensation orders (including *final decisions or orders granting or denying benefits*) by the Administrative Hearings Division and/or the Office of Workers' Compensation under the Public Sector and Private Sector Acts, consistent with statutory authority.

[emphasis added].

See also 7 DCMR § 258.1 (an appeal to CRB is from a compensation order or final decision of the AHD).

A final decision or judgment is a court's last action that settles the rights of the parties and disposes of all issues in controversy that are presented to the court for resolution at a given time. *See* Black's Law Dictionary (7th Ed.) at 847. On the other hand, a decision or order that is an interim or temporary action, not constituting a final resolution of the whole controversy presented to the court for resolution at a given time is considered an interlocutory order. An interlocutory order is, unless otherwise stated, not appealable. *See* BLACK'S LAW DICTIONARY at 819, 1123 (7th Ed.). These definitions embody the final judgment rule of D.C. Official Code § 11-721(a) which describes the jurisdiction of the D.C. Court of Appeals. [footnote omitted]. Under this provision, to be final and therefore reviewable, an order must dispose of the whole case on its merits so that the court has nothing remaining to do but to execute the judgment or decree already rendered. *Dyer v. William S. Bergman & Associates*, 635 A.2d 1285 (1993). As the CRB is not a court in the judicial system of the District of Columbia, it is not bound by the rules of procedure governing the D.C. Superior Court and the D.C. Court of Appeals, but may rely on them for procedural issues where appropriate. *See* 7 DCMR § 261.4. Given the quasi-judicial nature of the CRB, the Panel determines that the terms "final decisions or orders granting or denying benefits" in 7 DCMR § 251.2 as it relates to AHD refer to a decision or order from AHD which dispose of the whole case as presented to an ALJ on its merits.

² Such an Application for Review must be filed within 30 days of the Compensation Order, and that time period is not tolled by the filing of a Motion for Reconsideration. The Application for Review herein was filed January 4, 2007, and was therefore timely in relation to the December 5, 2006 Order.

Therefore, the question before the Panel is whether the Orders appealed are final orders from AHD. If they are not, they are interlocutory orders which are not appealable.

Hensley v. Cheechi & Company, CRB No. 07-068 April 23, 2007), pages 2 – 3 (CRB footnote omitted, additional CRB bracketed reference in original). Similarly, the question we must first address is whether the order of December 5, 2006 is an appealable order.

In the *Hensley* matter, the CRB determined that the two orders being appealed were interlocutory because they did not have implications effecting the final disposition of any potential claim, but rather they dismissed applications for formal hearings due, in connection with the first application, to the numerous outstanding and unresolved issues that were then pending on appeal, and as to the second, the repetitive nature of the claims sought to be adjudicated. In essence, the two orders denied a request for formal hearing because of the possibility or likelihood of there being an unneeded, or even worse, conflicting set of decisions, depending upon the outcome of the appeals. Further, the dismissals concerned applications without the existence of an underlying Recommendation from the Office of Workers' Compensation (OWC), and hence the possibility of there being a final order resulting from the disposition of the applications for formal hearings was not present.

In contrast, in this case there was an earlier Memorandum or Recommendation from OWC which was rejected by Respondent and following which rejection a formal hearing request was filed. There is, therefore, arguably a question as to whether there is in this case a Memorandum or Recommendation from OWC that could become a final compensation order; it is precisely that outcome that Petitioner asserts is called for in this case.

Because of this difference in procedural posture, we deem the order of dismissal in this case to be appealable, so as to avoid the possibility of the entry of an order by OWC under the theory expounded by Petitioner herein.

In the consolidated cases of *Gooden v. Nat'l Children's Cntr.*, CRB (Dir. Dkt.) No. 03-137 and *Stone v. Ogden Entertainment*, CRB (Dir. Dkt.) No. 03-142 (Decision and Order April 14, 2006), the CRB explicitly rejected the case and reasoning of the only authority cited by Petitioner in support the requested relief, *Sacko v. Radio Shack*, Dir. Dkt. No. 02-089 (August 25, 2003). Without going into great detail, the CRB rejected the concept of a "revival" of a properly rejected Memorandum or Recommendation from OWC. While recognizing that the ability of a party to abuse the adjudicatory process by repeatedly filing and then withdrawing an application for formal hearing poses a potential problem, the CRB determined that such abuses could be adequately addressed by the exercise by an ALJ of the power to dismiss an application for formal hearing with prejudice if an abuse of the process is apparent, but that non-prejudicial dismissals are nonetheless permissible.

In this case, Respondent neither requested a dismissal, withdrew its application for formal hearing, nor indicated that it would be unable or unprepared to proceed should the only thing it requested, a continuance, be denied. Converting a consensual request for a continuance into a prejudicial

dismissal is perhaps the least sensible result possible on these facts: no one asked for a dismissal of any variety. The clear and obvious intention of the ALJ was to grant the Respondent's request for a continuance in a fashion that would also remove the matter from AHD's pending case docket. It is central to understanding the nature of the dismissal in this case to recognize that it was the ALJ's action, *sua sponte*, and not the result of a request for said action by either party.

We discern no substantive difference between granting the consensual request for a continuance and entering a non-prejudicial dismissal, except to the extent that Petitioner has no control over when, or if at all, Respondent will file a new application for formal hearing. That problem is not insurmountable, given that Petitioner is free to file an application on his own on the same issues and seeking whatever relief to which he believes he is entitled but which has thus far been refused by Respondent.

CONCLUSION

The Orders of December 5, 2006 and December 28, 2006 are not arbitrary, capricious or otherwise prohibited by the Act. The non-prejudicial dismissal is affirmed, subject to either party being able to request a new hearing date be set on these same issues. The request that the dismissal order be revised and the OWC recommendation or memorandum be revived is denied.

ORDER

The Order of December 5, 2006 and December 28, 2006 are affirmed.

FOR THE COMPENSATION REVIEW BOARD:

JEFFREY P. RUSSELL
Administrative Appeals Judge

April 25, 2007

DATE