

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

Compensation Review Board

CRB No. 15-023

**TRINIDAD BLANCO,
Claimant-Petitioner,**

v.

**DARIO ZUCCHI and
TRAVELERS INDEMNITY COMPANY OF AMERICA,
Employer and Insurer-Respondent.**

Appeal from a January 20, 2015 Compensation Order on Remand by
Administrative Law Judge Donna Henderson
AHD No. 11-098A, OWC No. 655839

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2015 JUN 24 AM 11 56

Michael Kitzman for the Claimant
Amy L. Epstein for the Employer

Before HEATHER C. LESLIE, JEFFREY P. RUSSELL, *Administrative Appeals Judges*, and
LAWRENCE D. TARR, *Chief Administrative Appeals Judge*.

HEATHER C. LESLIE for the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

The background and facts as outlined by the Compensation Order on Remand (COR) under appeal are uncontested by the parties and are as follows:

Claimant seeks permanent partial disability (PPD) benefits in addition to the 33% PPD to her right arm she received as a result of an Office of Workers' Compensation Informal Conference Recommendation on April 9, 2010. The parties in their pleadings agree that the April 9, 2010 Recommendation became a Final Order as a matter of law. Claimant's Response to Remand (9/30/14), p. 2 and Employer and Insurer's Legal Memorandum (10/1/14), pp. 2-3.

The first claim for additional permanent partial disability was commenced when Claimant filed an Application for Informal Conference on December 27, 2010 for "permanent partial disability benefits of the upper extremity" based upon the

opinion of Dr. Jeffrey Phillips dated November 22, 2010. Dr. Phillips' rating had increased one percent, from 52% to 53%, from the rating he offered for the Informal Conference on April 9, 2010. An Informal Conference (IC) was held on February 7, 2011. OWC's Memorandum of Informal Conference, dated February 28, 2011, recommended denial of the claim for additional PPD was served on the parties on March 2, 2011.

Claimant rejected the IC Recommendation [sic] filed her Application for Formal Hearing on March 11, 2011. A scheduling order issued assigning the matter to Administrative Law Judge (ALJ) Meek and setting the Formal Hearing date for June 21, 2011. This Formal Hearing was continued to June 30, 2011 on Employer's Motion. On June 29, 2011, Claimant moved for a continuance of the June 30, 2011 Formal Hearing. The [sic] Judge Meek rescheduled the hearing to July 28, 2011. Voluntarily and without consent of employer, Claimant withdrew her Application for Formal Hearing on July 11, 2011. Judge Meek ordered the dismissal of the Application on July 20, 2011.

The second claim for additional PPD benefits was filed on October 20, 2011, when Claimant filed another AFH claiming the same additional PPD benefits. After timely notice, a hearing was held on March 6, 2012 before ALJ Belva Newsome. Trinidad Blanco, hereinafter Claimant, appeared in person and with counsel. Dario Zucchi and Travelers Indemnity Company appeared by counsel. Claimant testified on her own behalf. Claimant's Exhibits (hereinafter CE) 1 - 5 and Employer's Exhibits 1-4 described in the Hearing Transcript (HT) were admitted into evidence. The record closed upon receipt of the HT on March 27, 2012.

On May 10, 2012, ALJ Newsome issued a Compensation Order denying the claim for additional PPD on the merits. Claimant filed an Application for Review with the CRB and Employer filed an Opposition.

The CRB vacated the Compensation Order and remanded for a determination on whether the request for modification was timely and, if the request was timely, for findings of fact and conclusions of law sufficient to permit review.

Blanco v. Dario Zucchi, AHD No. 11-098A, OWC No. 655839 (January 20, 2015). (Footnotes omitted.)

After analyzing the dates above, the ALJ determined that Claimant was seeking a modification request under D.C. Code § 32-1524 but that the modification request was untimely pursuant to the CRB's decision in *Gooden v. National Children's Center*, CRB 03-137 and 03-142 (April 14, 2006)(hereinafter *Gooden*). Claimant's claim for relief was denied.

Claimant timely appealed. Relying on the District of Columbia Court of Appeals (DCCA) decision in *Blanken v. DOES*, 825 A.2d 894 (D.C. 2003), Claimant argues that the Application

for Formal Hearing was timely and the COR's denial was not supported by the substantial evidence in the record or in accordance with the law.

Employer opposes, arguing the COR's reliance on *Gooden* was correct and as such, the conclusion that the modification request was untimely is supported by the substantial evidence in the record and in accordance with the law.

STANDARD OF REVIEW

The scope of review by the CRB is generally 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 § 32-1501, *et seq.*, (the Act) at § 32-1521.01 (d)(2)(A), and *Marriott International v. DOES*, 834 A.2d 882 (D.C. 2003). Consistent with this standard of review, the CRB and this review panel must affirm 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 this panel might have reached a contrary conclusion. *Id.* at 885.

ANALYSIS

The COR notes:

The OWC Memorandum of Informal Conference recommendation became a Final Order on April 13, 2010 and Claimant was paid the award on or about May 11, 2010 (Claimant's Response on Remand, p. 2), thus commencing the statute of limitations set out in § 32-1524. Claimant was entitled to timely modification of the Final Order within one year after the date of last payment of compensation. Claimant makes no contention that Employer did not pay the entirety of the permanency benefit before the Memorandum became a Final Order. The Memorandum became a Final Order as a matter of law on April 13, 2010. The statute of limitations expired, at the latest, on May 12, 2011; one year after Claimant was paid her award.

Claimant's Application for Informal Conference seeking additional PPD, filed by mail on December 20, 2010, was timely under D.C. Code § 32-1524. Her subsequent rejection of the Memorandum of Informal Conference and Application for Formal Hearing was, therefore, also timely. However, Claimant withdrew her Application for Formal Hearing on July 15, 2011. Claimant's argues that the withdrawal of the Application was without prejudice and, therefore, tolled the statute of limitations provision of the Act. Claimant's argument is without merit.

Claimant's Withdrawal of the AFH states that she consents to voluntary dismissal of the AFH. No motion to dismiss to which she might be consenting appears in the OHA pleading file. Claimant requests that the matter be dismissed "**without**

prejudice to the right to either party to re-file an application for formal hearing on any issue". (emphasis in original) Claimant's request does not state that Employer consented to the dismissal. Claimant's request does not state any equitable grounds upon which the statute of limitations might be tolled.

COR at 5.

Claimant does not argue or contest any of the dates outlined above. Instead, Claimant argues:

The Court of Appeals addressed this very same issue in *Fred F. Blanken & Co. v. D.C. Dep't of Empl. Servs.*, 825 A.2d 894 (D.C. 2003). There, an application for Formal Hearing was dismissed, and shortly thereafter was refiled. The second application was after the 1 year time period. The Court of Appeals concluded, as would be the case here, that the second application was merely a re-institution of the first and therefore was not a new claim and therefore remanded timely. *Id.* at 900.

This means that similar to *Blanken*, the same issues and claim were raised in this matter with an application filed shortly after the dismissal of the first. This means that the applications remained tied and therefore were timely filed.

Additionally, the recommendation in this matter only became a Final Order after the issuance of payment by the carrier. That payment, while in the amount found by the recommendation, was not made pursuant to an Order. It was voluntary payment of compensation under the Act.

Claimant's argument unnumbered, at 4.

We disagree with Claimant. As the ALJ noted,

The procedural history in the case at bar is opposite of *Blanken*. In *Blaken* [sic], Examiner Davis dismissed the AFH filed by Claimant. Claimant Blanco filed and dismissed her first AFH without any explanation and without consent from Employer. In *Blanken*, after the ALJ dismissed the AFH, Blanken refiled the application "shortly thereafter." Claimant Blanco waited more than three months before refiling her second AFH. In *Blanken*, the Examiner dismissed the AFH without prejudice and remanded the case to OWC "until [Blanken] files a new Application for Formal Hearing." *Blanken*, fn. 5. In this case, Claimant withdrew her AFH and requested the "matter be remanded to the Office of Workers' Compensation for further action." In this case, neither the Claimant Blanco nor the ALJ noted that a new AFH was expected. Finally, *Blanken* filed a motion to reinstate the AFH which the Court of Appeals relied upon when it affirmed the agency decision to permit the matter to proceed. *Blanken* at 900. Claimant Blanco has filed no motion to reinstate the AFH.

In *Blanken*, the Court of Appeals was clearly uncomfortable with using equitable

estoppel to waive the statute of limitations expressed in D.C. Code § 32-1524. Instead, the Court found that the motion to reinstate was the proper pleading upon which Blanken could rely. As noted in *Gooden v. National Children's Center*, CRB 03-137 and 03-142 (April 14, 2006), "the Court of Appeals raised the prospect that a re-filed Application for Formal Hearing following dismissal of the original AFH could in certain circumstances be untimely." *Gooden*, fn. 13. These are those "certain circumstances." Claimant Blanco's second AFH was untimely.

The CRB in *Gooden* recognized that even a dismissal *without* prejudice did not waive the statute of limitations. "In the event of a dismissal without prejudice, either party is free, **absent a timeliness issue** to refile an Application for Formal Hearing with AHD." *Id.* at 19 (emphasis added).

COR at 6-7.

The CRB, *en banc*, in *Gooden* stated:

As the Court of Appeals noted in *National Geographic*, 7 DCMR § 219.23 dictates that "Once an application for a formal hearing is filed . . . all informal procedures [before OWC] must be terminated." 721 A.2d at 622. Consequently, as a result of the filing of the AFH and the assumption of jurisdiction over the claim by the Administrative Hearings Division, the previously issued Memorandum is effectively rendered null and void, and thus not subject to revival upon a subsequent dismissal of the AFH.

The DCCA in *Travelers Indemnity Company of Illinois v. DOES*, 975 A.2d 823, (D.C. 2009), agreed with the CRB's rationale enunciated in *Gooden*, stating:

In short, when it decided this case, the CRB panel had reasoned that it was a party's rejection of the Claims Examiner's Memorandum that rendered it null and void and incapable of being revived upon dismissal of an application for a formal hearing, *see Russell*, slip op. at 3, but sitting *en banc* in *Gooden*, the CRB reasoned that it is not only a party's rejection of the Memorandum but the application for a formal hearing that renders the Memorandum null and void. *See Gooden*, 2006 DC Wrk. Comp. LEXIS 485 at *13. The CRB explained its changed analysis by noting that under 7 DCMR § 219.22, a Claims Examiner's Memorandum

becomes final, and thus subject to conversion to a Final Order, upon lapse of 34 working days from the date of the Memorandum's issuance *if no AFH [application for a formal hearing] is within that period filed*. Thus, a party could reject a Memorandum pursuant to § 219.20 yet, if no AFH is timely filed, the Memorandum would nevertheless become final by operation of law upon lapse of the 34-day period.

Gooden, 2006 DC Wrk. Comp. LEXIS 485 at *13. The CRB's interpretation is

consistent with the language of the regulation, which states unequivocally that "All informal procedures *shall terminate* when the application for formal hearing is filed." 7 DCMR § 219.23 (emphasis added); see *Nat'l Geographic Soc'y*, 721 A.2d at 622; see also *Hansborough v. Wash. Metro. Area Transit Auth.*, H&AS No. 86-601A, 1988 D.C. Wrk. Comp. LEXIS 35 at *1 n.1 (June 2, 1988) (disallowing introduction into evidence at formal hearing of Memorandum of Informal Conference). Thus, regardless of whether a party later withdraws its application for a formal hearing before the OHA, the regulation reasonably can be interpreted as identifying the initial filing of an application for a formal hearing as the point when the informal procedures "terminate." 7 DCMR § 219.23. It follows logically, as the CRB held, that the OWC, which conducts the informal proceedings, loses jurisdiction over the matter once a party decides to have a claim adjudicated by an ALJ through a formal hearing by filing an application. Noting that proceedings before the OWC are "informal and non-adjudicatory in nature" -- without testimony under oath, cross-examination or a recorded transcript -- the CRB explained in *Gooden* that "[t]he Memorandum of Informal Conference . . . is, in effect, a recommendation for settlement -- which the parties can either accept or reject," and therefore, such Memorandum acquires the force of law only if it is "accepted by the parties." 2006 DC Wrk. Comp. LEXIS 485 at *12. This view is fully consonant with the regulations, which provide that "participation by interested parties in [informal] conferences shall be voluntary," 7 DCMR § 219.2, and gives either party the right, within fourteen days of the Memorandum of Informal Conference, to "agree or disagree with the terms of the memorandum," *id.* § 219.20, and to file, within thirty-four days, an application for a formal hearing. *Id.* § 219.22. Once those two conditions in the regulations are met, the CRB concluded, the Memorandum is "null and void." *Gooden*, 2006 DC Wrk. Comp. LEXIS 485 at *13.

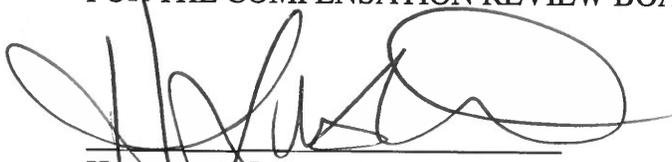
We perceive no unfairness in this approach that overcomes our deference to the agency's interpretation. The insurer argues that the prevailing party in an informal proceeding is prejudiced if by merely filing -- and then withdrawing -- an application for a formal hearing an opposing party can effectively nullify the Claims Examiner's Memorandum and divest the OWC of authority. But, as the CRB has explained, the Memorandum's legal force derives from its acceptance by the parties.

Thus, as the COR states, Claimant's application for an Informal Conference filed on December 20, 2010 was a timely application for purposes of modification as the underlying Order by OWC was dated April 13, 2010. However, when Claimant rejected the recommendation which issued as a result of the requested informal conference, and filed for a Formal Hearing, the underlying recommendation became null and void. Claimant then withdrew the Application for Formal Hearing in July of 2011. No request was made to toll the limitation period. When Claimant re-filed a second Application for Formal Hearing on October 20, 2011, this was well outside of the 1 year statute of limitations expressed in D.C. Code § 32-1524 to modify the April 13, 2010 Order. Thus, Claimant's second application was untimely and the COR's conclusion is in accordance with the law and is affirmed.

CONCLUSION AND ORDER

The January 20, 2015 Compensation Order on Remand is supported by the substantial evidence in the record and is in accordance with the law. It is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

A handwritten signature in black ink, appearing to read 'Heather C. Leslie', written over a horizontal line.

HEATHER C. LESLIE
Administrative Appeals Judge

June 24, 2015

DATE