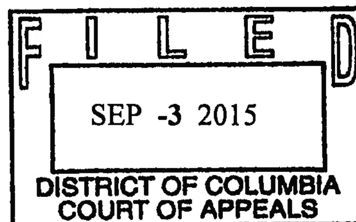
DISTRICT OF COLUMBIA COURT OF APPEALS

No. 13-AA-1421



MARYANNE TAGOE, PETITIONER,

v.

DISTRICT OF COLUMBIA
DEPARTMENT OF EMPLOYMENT SERVICES, RESPONDENT,

and

HOWARD UNIVERSITY HOSPITAL, ET AL., INTERVENORS.

Petition for Review of a Decision of the Compensation Review Board of the
District of Columbia Department of Employment Services
(AHD-287-03, CRB-187-08, -007-10, -110-12, -084-13)

(Submitted April 7, 2015 Decided September 3, 2015)

Before FISHER and BLACKBURNE-RIGSBY, *Associate Judges*, and KING, *Senior Judge*.

MEMORANDUM OPINION AND JUDGMENT

PER CURIAM: *Pro se* petitioner-employee Dr. Maryanne Tagoe seeks review of several decisions by the Compensation Review Board ("CRB") concerning her demands for medical expenses and travel reimbursements from intervenor-employer Howard University Hospital.[1] Review of these CRB decisions had been deferred pending resolution of the final issue relating to her reimbursement claim for travel costs incurred in 2009, which the Administrative Law Judge ("ALJ") denied on remand on November 8, 2013 ("final remand order"), following specific instructions to do so by the CRB. Seeking review directly from the ALJ's final remand order, Dr. Tagoe now makes several arguments relating to alleged errors made by the CRB throughout these administrative proceedings. On review, she

[1] Additionally, carrier Sedgwick CMS, Inc. is also an intervenor in this action.

primarily argues that: (1) the CRB erred in holding that her claim for reimbursement for the cost of her individual insurance premium was preempted by the Employee Retirement Income Security Act ("ERISA")[2]; (2) the CRB erred in applying a two-percent (2%) interest rate to her compensation awards; and (3) the CRB erred in upholding the ALJ's denial of compensation for certain medications.[3] We affirm.

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[2] *See* 29 U.S.C. §§ 1001–1461 (2013).

[3] In addition to Dr. Tagoe's three main arguments, she presents a few other arguments that we address summarily. (1) She challenges the CRB's decision not to impose default penalties on Howard University Hospital. However, an employer is subject to a penalty only if there is first a determination, by an evidentiary hearing, establishing the specific reimbursement amounts that the employer owes. Only after obtaining an order specifying what the employer owes, and if the amount remains unpaid, may Dr. Tagoe seek a default order, which did not occur in this case. *See* D.C. Code § 32-1515 (f) (2012 Repl.). (2) Dr. Tagoe makes a claim for $1,891.25 for "supplies, prescription and other non-prescription medical supplies." However, she does not explain why she is entitled to this amount or what supplies are included, and thus we decline to consider this argument. *Comford v. United States*, 947 A.2d 1181, 1188 (D.C. 2008) ("Issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived." (citation, internal quotation marks, and brackets omitted)). (3) Dr. Tagoe appeals the denial of her request for 2009 travel mileage reimbursement. However, as the CRB noted in its September 17, 2013, decision, Dr. Tagoe presented no evidence to substantiate a 2009 mileage award. Without evidence to the contrary, we affirm the CRB's decision, and the ALJ's final remand order vacating the award of $69.48.

Additionally, Howard University Hospital, as the intervenor, raises two claims of error by the CRB. It claims that (1) the CRB erred by denying its cross-application for review seeking to reverse the ALJ's September 21, 2009, Compensation Order on Remand on the basis that the employer had waived this argument by failing to raise an objection before the ALJ via a post-hearing motion and (2) the CRB incorrectly found that interest was applicable to Dr. Tagoe's medical expenses. However, we decline to consider these two arguments because intervenor Howard University Hospital never filed a cross-petition for review of any of the CRB's decisions pursuant to D.C. App. R. 15 (a)(6). *See also id.* (a)(1) ("*Review* of an agency order or decision is commenced by filing . . . a petition for

(continued . . .)

I.

On October 4, 2000, Dr. Tagoe suffered a stroke while working as a first-year resident physician at Howard University Hospital. Dr. Tagoe filed a petition for review with this court regarding her entitlement to disability compensation, vocational benefits, and medical expenses. In a published opinion, we held that Dr. Tagoe was not entitled to disability compensation because she failed to give timely notice of her injury to the employer, and that she was not entitled to vocational rehabilitation benefits based on the ALJ's findings that Dr. Tagoe suffered no wage loss and was not disabled as a result of her injury because her "migraines [following her seizure] did not prevent her from continuing to work full-time as a physician." *Howard Univ. Hosp. v. District of Columbia Dep't of Emp't Servs.*, 960 A.2d 603, 605, 612-13 (D.C. 2008). However, in the aftermath of our 2008 decision, the dispute over the proper amount of medical expense and travel mileage reimbursements owed to Dr. Tagoe continued.[4]

Concerning Dr. Tagoe's medical expenses, and relevant for our purposes, the CRB's July 30, 2010, order upheld the ALJ's decision granting Dr. Tagoe certain medical expenses and denying Dr. Tagoe's claims for an exercise bike, eyeglasses, an emergency pill container, and iron supplements. The CRB also held that Dr. Tagoe's claim for payment of her individual insurance premiums was preempted by ERISA. Further, the CRB's September 18, 2012, order affirmed the applicable interest rate for Dr. Tagoe's out-of-pocket medical expenses at two-percent (2%).

The last issue to be decided was Dr. Tagoe's claim that she was entitled to reimbursement for travel mileage expenses incurred in 2009. On June 5, 2013,

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(. . . continued)
review." (emphasis added)). The failure to file a cross-petition precludes review where a responding party seeks to "enlarge [its] rights or lessen those of an adversary[,]" such as what the intervenor sought to do here by making the above two arguments in its brief. *Freeman v. B&B Assocs.*, 790 F.2d 145, 151 (D.C. Cir. 1986).

[4] The ALJ and CRB decided Dr. Tagoe's medical expense and travel mileage reimbursement claims in a piece-meal fashion because the CRB had to remand several issues back to the ALJ for further findings of fact and additional clarification.

ALJ Amelia G. Govan issued a compensation order awarding Dr. Tagoe $69.48 for travel mileage expenses based on the "humanitarian purpose of the [Workers' Compensation] Act," even though she presented no documentation or testimonial evidence of such expenses. Dr. Tagoe appealed to the CRB, reiterating several previous claims that the CRB had already decided (such as the applicable interest rate and medical bills that she claims were unpaid), and arguing that the ALJ had erred in finding that evidence of her travel expenses was untimely submitted. On September 17, 2013, the CRB determined that the reimbursement award was "unsupported by substantial evidence and is contrary to law, and must be vacated." The CRB expressed its desire for this "matter to conclude administratively at this stage," and believed that it may have been authorized to "amend the order based on the panel's findings." However, uncertain if it could directly reverse the award and conclude the case, the CRB decided to remand back to the ALJ with instructions to issue an order denying the reimbursement.[5] On remand, ALJ Govan complied with the CRB's order and denied the $69.48 reimbursement award. Dr. Tagoe now directly seeks our review from the ALJ's final remand order, bypassing another round of review by the CRB.

II.

Before we consider Dr. Tagoe's substantive claims, we first address whether her petition for review is barred for failing to exhaust all of her administrative remedies. This is because Dr. Tagoe is petitioning for review directly from ALJ Govan's final remand order implementing the CRB's decision to vacate the $69.48 mileage award, instead of first appealing the ALJ's remand order back to the CRB. Howard University Hospital and respondent Department of Employment Services

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[5] Specifically, the CRB was unsure whether it had the authority to directly reverse the $69.48 award pursuant to this court's decision in *Washington Metropolitan Area Transit Authority v. District of Columbia Department of Employment Services*, 926 A.2d 140 (D.C. 2007) ("*WMATA*"). In *WMATA*, we held that, while the CRB may amend or reverse a compensation order, the CRB was not authorized by statute "to reverse an order of an ALJ denying compensation and in its place *issue an award of compensation*." *Id.* at 148 (emphasis added); *see* D.C. Code § 32-1521.01 (2012 Repl.). By contrast, the CRB here was merely reversing an award, based on the lack of evidence supporting the ALJ's decision. In this instance, the CRB could have directly reversed the award, and finalized the administrative proceedings at that time. D.C. Code § 32-1521.01 (d)(2)(B) (stating that the CRB may reverse or amend a compensation order).

("DOES") argue that Dr. Tagoe's failure to first appeal the remand order back to the CRB means that she has failed to exhaust all of her administrative remedies. We disagree.

A court in equity may waive the requirement that an individual first exhaust all of his or her administrative remedies "where the [individual] makes a 'strong showing' of 'compelling circumstances' to justify such a waiver." *Fisher v. District of Columbia*, 803 A.2d 962, 964 (D.C. 2002). One such circumstance is where a second administrative appeal "would have been altogether futile." *Tenants of 1255 New Hampshire Ave., N.W. v. District of Columbia Rental Hous. Comm'n*, 647 A.2d 70, 76 (D.C. 1994) ("*Tenants*"). In the CRB's final September 17, 2013, order, the CRB remanded to the ALJ with specific instructions to deny the 2009 mileage reimbursement. There was no discretion on the part of the ALJ because there was but one legally permissible action — vacating the award for lack of record evidence. *See* 7 DCMR § 267.5 (stating that the CRB may directly issue an amended compensation order and no remand is necessary "where there is but one action that the [CRB's] decision would permit, and thus remand would be superfluous") (parentheses omitted). Thus, it would have been "futile" and "superfluous" for Dr. Tagoe to again appeal to the CRB after the ALJ's remand order because the CRB already ruled on the issue. *See Tenants, supra*, 647 A.2d at 76. Consequently, because the 2009 mileage reimbursement claim was the last issue to be decided, the ALJ's remand order constituted the "final order" in this case, and Dr. Tagoe's petition for review is now properly before us after having exhausted all of her administrative remedies.

Turning to Dr. Tagoe's substantive claims, "[g]enerally speaking, our review of a CRB decision in a workers' compensation case is deferential and limited to assessing whether the decision was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Brown v. District of Columbia Dept. of Emp't Servs.*, 83 A.3d 739, 745 (D.C. 2014) (citation omitted). We review CRB decisions using the "substantial evidence standard." *WMATA, supra* note 5, 926 A.2d at 146. "We . . . determine first, whether the agency has made a finding of fact on each material contested issue of fact; second, whether the agency's findings are supported by substantial evidence on the record as a whole; and third, whether the Board's conclusions flow rationally from those findings and comport with the applicable law." *Id.* at 146-47 (citations and internal quotation marks omitted).

First, Dr. Tagoe challenges the CRB's decision that her claim for payment of individual insurance premiums is preempted by ERISA. Dr. Tagoe relies on D.C. Code § 32-1507 (2012 Repl.),[6] to argue that Howard University Hospital was required to provide health insurance to her, as an employee eligible for workers' compensation benefits. However, D.C. Code § 32-1507 (a-1)(1) became unenforceable after the Supreme Court explicitly ruled that the provision requiring employers to provide health insurance for employees who receive workers' compensation was preempted by ERISA. *District of Columbia v. Greater Wash. Bd. of Trade*, 506 U.S. 125, 129 (1992). Dr. Tagoe cites no other statutory authority explaining why she is entitled to compensation for insurance premiums, and we therefore affirm the CRB's decision denying compensation for health insurance premiums.

Second, Dr. Tagoe challenges the two-percent (2%) interest rate that the ALJ applied to her out-of-pocket medical expenses, which the CRB affirmed in its September 18, 2012, order. We discern no error in the CRB's calculation. "Interest on accrued benefits shall be calculated at the same rate as that utilized by the Superior Court of the District of Columbia for civil judgments." 7 DCMR § 209.11. Under D.C. Code § 28-3302 (c) (2012 Repl.), pertaining to Superior Court civil judgments:

> The rate of interest on judgments and decrees. . . shall be 70% of the rate of interest set by the Secretary of the Treasury pursuant to Section 6621 of the Internal Revenue Code of 1986, approved October 22, 1986 (100 Stat. 2744; 26 U.S.C. § 6621), for underpayments of tax to the Internal Revenue Service, rounded to the nearest full percent . . . provided, that a court of competent jurisdiction may lower the rate of interest under this subsection for good cause shown or upon a showing that the judgment debtor in good faith is unable to pay the judgment.

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[6] D.C. Code § 32-1507 (a-1)(1) states: "Any employer who provides health insurance coverage for an employee shall provide health insurance coverage equivalent to the existing health insurance coverage of the employee while the employee receives or is eligible to receive workers' compensation benefits under this chapter."

Here, the CRB noted, "[t]he tax underpayment rate is 3% and the 'Federal short term rate' was .51% in February 2011, therefore the applicable interest rate is 70% of 3.51% which is 2.457% and rounded to the nearest full percent is 2%." *See* D.C. Code § 28-3302 (c).[7] The CRB's direct calculation, based on the statutory instructions, supports the interest rate applied to Dr. Tagoe's compensation. In contrast, Dr. Tagoe argues that she is entitled to a six-percent (6%) interest rate and cites to D.C. Code § 28-3302 (a) as the provision that governs workers' compensation interest rates. However, D.C. Code § 28-3302 (a) only establishes a six-percent (6%) interest rate for "the loan or forbearance of money, goods or things in absence of expressed contract" which is inapplicable to workers' compensation judgments. *See* D.C. Code § 28-3302 (a), (c) (establishing different interest rate calculations for judgments versus loans).

Third, Dr. Tagoe argues that the CRB erred in upholding the denial of reimbursements for certain medical expenses.[8] Dr. Tagoe claims she is entitled to $445.82 in medication expenses for Motrin, Phenergan, Benadryl, Tylenol, Aspirin, and Gaviscon/Tums, and attaches some evidence of receipts for these medications.[9] However, as the ALJ's February 18, 2011, remand order makes clear, while "several receipts" were submitted, "there were no related medical prescriptions [or] reports" supporting the medical necessity of these medication expenses. Moreover, the ALJ essentially discredited Dr. Tagoe's treating neurologist Dr. Stuart J. Goodman's report, which gave "blanket approval of listed

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[7] *See* 26 U.S.C. § 6621 (a)(2) (setting the underpayment rate at (1) three-percent; plus (2) the federal short-term rate); Rev. Rul. 2011-4, 2011-6 I.R.B. 448-49, http://www.irs.gov/pub/irs-irbs/irb11-06.pdf (listing the short term federal rate for February 2011 at 0.51%).

[8] Dr. Tagoe further argues that the CRB denied her due process by refusing to hold a status conference to assess the proper reimbursements for medical expenses. However, as the CRB noted, "[t]he [Workers' Compensation] Act does not extend an entitlement to a status conference," and that a status conference is within the discretion of the ALJ. *See Galligan v. John F. Kennedy Center for Performing Arts*, CRB No. 04-28 (R) (Aug. 8, 2007). We agree.

[9] Dr. Tagoe also argues that there are email communications between her and Howard University Hospital indicating that the employer agreed to pay for her medications. However, the ALJ held that these email communications were not part of the record and the CRB affirmed on October 11, 2011.

items with no medical support or reasoning." We defer to the ALJ's credibility determination and findings of fact, and therefore affirm its determination of medication expenses owed to Dr. Tagoe.[10] *See Gross v. District of Columbia Dep't of Emp't Servs.*, 826 A.2d 393, 395 (D.C. 2003) ("[C]redibility determinations of an ALJ are accorded special deference by this court." (citation, internal quotation marks, and original brackets omitted)).

Accordingly, the orders on review are hereby affirmed.

ENTERED BY DIRECTION OF THE COURT:

JULIO A. CASTILLO
Clerk of the Court

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[10] The CRB affirmed the ALJ's order regarding the medication expenses on October 11, 2011.

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