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**THE DISTRICT OF COLUMBIA**  
**BEFORE**  
**THE OFFICE OF EMPLOYEE APPEALS**

In the Matter of:	)	
	)	
SAMUEL MURRAY,	)	OEA Matter No. 1601-0032-14R17R18
Employee	)	
	)	
v.	)	Date of Issuance: October 23, 2019
	)	
DEPARTMENT OF YOUTH	)	
REHABILITATION SERVICES,	)	
Agency	)	

SECOND OPINION AND ORDER  
ON REMAND

This matter was previously before the Board. On December 17, 2013, Samuel Murray (“Employee”) filed a Petition for Appeal with the Office of Employee Appeals (“OEA”) contesting the Department of Youth Rehabilitation Services’ (“Agency”) act of removing him from his position as a Motor Vehicle Operator. Employee was charged with “any on-duty or employment related act or omission that interferes with the efficiency and integrity of government operations: incompetence” and “any other on-duty or employment-related reason for corrective or adverse action that is not arbitrary or capricious: inability to perform the essential functions of the job.”

The OEA Administrative Judge (“AJ”) issued his first Initial Decision on September 18, 2015. He held that Agency failed comply with D.C. Official Code § 1-623.45(b)(1), which provides that an agency must accord an employee with the right to resume his or her position

“...provided that the injury or disability has been overcome within two years after the date of commencement of compensation and provision of all necessary medical treatment needed to lessen [the] disability...” According to the AJ, Employee returned to work on November 5, 2012, without medical restriction, within two years of the commencement of Employee’s Worker’s Compensation benefits. He explained that Employee suffered a recurrence of his injury during his brief return to work and that under D.C. Official Code § 1-623.45(b)(1), a new two-year grace period began to run in November of 2012. Since Employee was terminated on December 29, 2013, the AJ concluded that Agency’s termination action violated the applicable statutory provisions and that it failed to meet its burden of proof in establishing the requisite cause to terminate Employee. Consequently, Agency was ordered to reinstate Employee to his position with back pay and benefits.<sup>1</sup>

Agency filed a Petition for Review with OEA’s Board on October 23, 2015. It contended that Employee could not produce evidence that he overcame his injury within two years after the date of commencement of compensation benefits. Therefore, Agency requested that this Board grant its Petition for Review.<sup>2</sup>

The OEA Board issued its Opinion and Order on Petition for Review on March 7, 2017. It noted that Employee returned to work from November 5, 2012 through December 17, 2012. However, the Board determined that there was no medical documentation from Employee’s physician stating that he overcame his injury in November of 2012, or that Employee was provided with medical treatment to lessen his disability. It held that the only documentation in the record from Employee’s physician was a note dated December 17, 2012 which provided that Employee could not return to work until the problems with his neck and shoulders were resolved.

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<sup>1</sup> *Initial Decision* (September 18, 2015).

<sup>2</sup> *Agency Petition for Review* (October 23, 2015).

Since there was insufficient evidence to determine whether Employee overcame his disability in November of 2012, the Board remanded the matter to the AJ to make further determinations.<sup>3</sup>

The AJ issued an Initial Decision on Remand on October 25, 2017. He held that under D.C. Official Code § 1-623.45(b)(1) and 7 DCMR § 139.2, the commencement of compensation began on November 18, 2010 because that is when Employee's first Worker's Compensation check was issued. Additionally, the AJ disagreed with Agency's position that the Disability Certificate produced by Employee failed to demonstrate that he recovered from his disability. The AJ noted that Employee presented a Disability Certificate to Agency on November 5, 2012 when he returned to work. The certificate placed no restrictions or limitations on Employee's ability to work as a Van Driver. While Employee was placed in a mail room position upon his return to work, the AJ nonetheless concluded that Agency accepted the Disability Certificate as proof that Employee was medically cleared to work, without restriction, on November 5, 2012. He further opined that Employee likely re-aggravated his injury after returning to work. Based on the foregoing, the AJ held that Employee overcame his medical disability within in the two-year statutory period and that Agency violated D.C. Official Code § 1-623.45(b)(1) by terminating him. Consequently, Agency's termination action remained reversed.<sup>4</sup>

Agency filed a second Petition for Review with the OEA Board on November 29, 2017. It reiterated its previous argument that Employee's Disability Certificate did not demonstrate that Employee overcame his injury as of November 5, 2012. Agency further posited that the AJ erred in relying on November 18, 2010 as the date from which to calculate the two-year "commencement of compensation" period. Additionally, Agency argued that the AJ erroneously relied on 7 DCMR § 139.2, and not D.C. Official Code § 1-623.45(b)(1), to reverse its

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<sup>3</sup> *Opinion and Order on Petition for Review* (March 7, 2017).

<sup>4</sup> *Initial Decision on Remand* (October 25, 2017).

termination action.<sup>5</sup>

In response, Employee asserted that the Initial Decision on Remand should be upheld because the Disability Certificate provided by Dr. Kothakota served as substantial evidence that he overcame his disability. Additionally, he stated that the AJ was correct in concluding that November 18, 2010, was the date on which to commence the two-year statutory period under D.C. Official Code §1-623.45(b)(1).<sup>6</sup>

The OEA Board issued an Opinion and Order on Remand on April 24, 2018. It concluded that there was substantial evidence in the record to support a finding that Employee overcame his injury as of November 5, 2012 because the documentary evidence showed that he was medically cleared to return to work, without restriction, by his treating physician. The Board further agreed with the AJ's finding that Employee received medical treatments to lessen his disability after being injured on July 30, 2010.

However, in reviewing the parties' submissions, the Board could not make a determination regarding whether the AJ applied D.C. Official Code § 1-623.45(b)(1) or 7 DCMR § 139.2 in determining the date when the two-year 'return to work' period began to run. It explained that the Initial Decision failed to provide legal basis for concluding that November 18, 2010, was the date that should be utilized for calculating the two-year period, and not the date on which Employee became entitled to Workers' Compensation benefits. It was also unclear whether the "commencement of payment of compensation" date under D.C. Official Code § 1-623.45(b)(1) is the same date as the "first date the employee received compensation or medical treatment" under 7 DCMR § 139.2. The Board noted that an analysis performed under each of the former could result in two different outcomes regarding the disposition of this matter.

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<sup>5</sup> *Agency's Petition for Review* (November 29, 2017).

<sup>6</sup> *Employee's Opposition to Petition for Review* (January 2, 2018).

Accordingly, the matter was remanded again for further consideration.<sup>7</sup>

The AJ subsequently held a status conference on June 26, 2018. The parties were ordered to submit briefs addressing the conflicting provisions in D.C. Official Code § 1-623.45(b)(1) and 7 DCMR § 139.2. The parties were also ordered to address whether the “commencement of compensation” date under D.C. Official Code § 1-623.45(b)(1) was the same date when Employee received Worker’s Compensation benefits.<sup>8</sup>

In its brief, Agency argued that the statutory language contained in D.C. Official Code § 1-623.45(b)(1) requires an employee to overcome a work-related injury, while the regulatory language of 7 DCMR § 139.2 does not. It provided that the regulation calculates the two-year period from the date the employee first received compensation benefits; whereas, the statutory provision utilizes the when an employee became entitled to benefits. Agency opined that the AJ was required to calculate the two-year period in accordance with D.C. Official Code § 1-623.45(b)(1) to determine whether Employee had the right to resume his former position. According to Agency, the AJ erred by instead relying on the regulatory language of 7 DCMR § 139.2 in determining that November 18, 2010 was the date from which to calculate the two-year period. In performing an analysis under D.C. Official Code § 1-623.45(b)(1), Agency contended that the calculation of the two-year period was “two years after the date of commencement of compensation.” Because Employee received two compensation checks: one for the period of August 26, 2010 to November 2, 2010, and one for the period of October 30, 2010 to November 2, 2010, Agency submitted that the commencement of compensation date could be either August 26, 2010 or October 30, 2010. Agency reasoned that Employee’s return to work on November 5, 2012, was not within two years of the date of commencement of compensation as required under

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<sup>7</sup> *Opinion and Order on Remand* (April 24, 2018).

<sup>8</sup> *Post-Status Conference Order on Second Remand* (June 26, 2018).

D.C. Official Code § 1-623.45(b)(1). Therefore, it believed that Employee did not have the right to return to his former position and that termination was proper.<sup>9</sup>

In response, Employee contended that he was entitled to return to his position under both D.C. Official Code § 1-623.45(b)(1) and 7 DCMR § 139.2. According to Employee, the D.C. Office of Risk Management approved his return to work on a regular, full-time basis and that the recurrence of his injury occurred after he resumed his full-time duties. Thus, Employee explained that although he returned to work pursuant to D.C. Official Code § 1-623.45(b)(1), he was also entitled to return to his position under 7 DCMR § 139.2, and that the regulation and the statute did not conflict.<sup>10</sup>

Agency submitted a reply brief on September 17, 2018. It stated that Employee failed to address the issues set forth in the AJ's June 26, 2018 order or any of the arguments presented in Agency's brief on remand. Agency explained that, contrary to Employee's position, OEA's Board did not agree that Employee overcame his injury within two years of the commencement of payment compensation. Rather, it clarified that the Board only concluded that Employee overcame his injury as of November 5, 2012. Agency stated that it never stipulated that Employee suffered a recurrence of his injury. Additionally, it contended that the language relied upon by Employee in his brief on remand includes language from 7 DCMR § 139.2 and § 139.3—the latter being a subsection of the regulation that neither the AJ nor the Board have previously relied upon in its rulings. Lastly, Agency argued that D.C. Official Code § 1-623.45(b)(1) must be used to determine when the two-year calculation period begins because 7 DCMR § 139.2 contains conflicting language, and where a statute and a regulation conflict, a statute must take precedence over the regulation. As a result, it requested that the AJ affirm its

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<sup>9</sup> *Agency's Brief on Remand* (August 3, 2018).

<sup>10</sup> *Employee's Brief on Remand* (September 7, 2018).

termination action.<sup>11</sup>

Employee also filed a reply brief on January 15, 2018. He reiterated his previous arguments regarding why Agency was required to place him in his previous position as required under D.C. Official Code § 1-623.45(b)(1) and 7 DCMR § 139.2. Consequently, he, again, requested that Agency's adverse action be reversed.<sup>12</sup>

The AJ issued a Second Initial Decision on Remand on October 31, 2018. First, he determined that the statutory language D.C. Official Code § 1-623.45(b)(1), instead of the regulatory language of 7 DCMR § 139.2 should govern this matter. Next, the AJ noted that this Board previously determined that the Disability Certificate, coupled with Agency's act of permitting Employee to return to work, constituted substantial evidence that Employee overcame his injury as of November 5, 2012. However, he stated that the issue presented on remand appeared to be one of first impression before OEA which largely hinged on the statutory interpretation of the meaning of "commencement of compensation" as it relates to D.C. Official Code § 1-623.45(b)(1). In concluding that November 10, 2010 was the date Agency should have used for calculating the two-year period, the AJ pointed to the plain language of the Code. He disagreed with Agency's contention that the calculation of the two-year period should be based on the dates of eligibility of coverage. Instead, the AJ held that using November 18, 2010 as the date that Employee's "commencement of compensation" began was consistent with the language of D.C. Official Code § 1-623.45(b)(1) because that is the date when Employee's Worker's Compensation benefits commenced (or began). Thus, the AJ held that Employee had two years from November 18, 2010 to overcome his injuries.<sup>13</sup>

In the alternative, the AJ suggested that even if he agreed with Agency's position that

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<sup>11</sup> *Agency's Reply Brief* (September 17, 2018).

<sup>12</sup> *Employee's Reply Brief* (January 15, 2019).

<sup>13</sup> *Second Initial Decision on Remand* (October 31, 2018).

October 30, 2010 should be the date utilized to calculate the two-year period, Employee suffered a recurrence of his injury after briefly returning to work from November 5, 2012 until December 17, 2012. According to the AJ, the documentary evidence supported a finding that Employee visited his treating physician, Dr. Sankara Kothakota, on December 17, 2012 because of neck and shoulder problems; Dr. Kothakota advised Employee not to return to his regular work schedule until his injuries were resolved; and that Employee's follow-up visit on December 17, 2012 was directly related to his Worker's Compensation claim for a compensable injury. Because Employee suffered a recurrence of his injury, the AJ reasoned that the two-year period under D.C. Official Code § 1-623.45(b)(1) was "reset" at some point during Employee's brief return to work.<sup>14</sup>

Based on the foregoing, the AJ held that Employee was entitled to resume full-time employment with Agency because he overcame his workplace injury within two years after the commencement of compensation under D.C. Official Code § 1-623.45(b)(1). The AJ also concluded that the two-year period was reset when Employee suffered a recurrence of his injury. As a result, he determined that Agency failed to comply with the applicable statutory provisions. Therefore, Agency was ordered to reinstate Employee to his previous position with backpay and benefits.<sup>15</sup>

Agency disagreed with the AJ and filed a third Petition for Review with OEA's Board on December 5, 2018. It argues that the Second Initial Decision on Remand failed to comply with the Board's remand instructions because the AJ did not specifically address the conflicting language between D.C. Official Code § 1-623.45 and 7 DCMR § 139.2. It states that the AJ also failed to provide a legal basis to support his determination that November 18, 2010, and not

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<sup>14</sup> *Id.*

<sup>15</sup> *Id.*



October 30, 2010, was the appropriate date for calculating the two-year time period under D.C. Official Code § 1-623.45. Additionally, Agency asserts that the AJ misquoted the language of § 1-623.45 in his decision, which resulted in him erroneously concluding that November 18, 2010 was the “commencement of compensation” date under the statute. It maintains that October 30, 2010, should have been used because that is when Employee first became entitled to benefits. As a result, Agency asks that Employee’s termination be affirmed.<sup>16</sup>

In response, Employee reiterates his previous contention that he is entitled to return to work under D.C. Official Code § 1-623.45 and that the preceding statute does not conflict with the regulatory language of 7 DCMR § 139.2. He also asserts that the AJ fully complied with the Board’s instructions on remand. Therefore, Employee asks this Board to uphold the AJ’s Second Initial Decision on Remand.<sup>17</sup>

#### Substantial Evidence

On Petition for Review, this Board must determine whether the AJ’s findings were based on substantial evidence in the record. The Court of Appeals in *Baumgartner v. Police and Firemen’s Retirement and Relief Board*, 527 A.2d 313 (D.C. 1987), held that if administrative findings are supported by substantial evidence, then it must be accepted even if there is substantial evidence in the record to support a contrary finding. Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion.<sup>18</sup>

#### D.C. Official Code § 1-623.45(b)(1)

Agency argues that the AJ erred by failing to address each of the issues as instructed by the Board. We disagree. On remand, the AJ was ordered to address the conflicting provisions

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<sup>16</sup> *Agency’s Petition for Review* (December 5, 2018).

<sup>17</sup> *Employee’s Memorandum in Response to Agency’s Petition to Review and Motion to Dismiss* (January 15, 2019).

<sup>18</sup> *Mills v. District of Columbia Department of Employment Services*, 838 A.2d 325 (D.C. 2003) and *Black v. District of Columbia Department of Employment Services*, 801 A.2d 983 (D.C. 2002).

between D.C. Official Code § 1-623.45 and 7 DCMR § 139. Because in his first Initial Decision on Remand, the AJ incorporated language from the regulatory provision while performing an analysis under D.C. Official Code § 1-623.45(b)(1), this Board could not reasonably conclude that his findings were based on substantial evidence. However, in his Second Initial Decision on Remand, the AJ agreed with Agency's argument that D.C. Official Code § 1-623.45 is the applicable provision in this matter because Agency's termination action was taken in accordance with the statute and because Employee returned to work without restriction on November 5, 2012.<sup>19</sup> We agree with the AJ's reasoning and find that he properly addressed the issue by incorporating, by reference, Agency's position that D.C. Official Code § 1-623.45 should govern the disposition of Employee's appeal. Therefore, we will utilize D.C. Official Code § 1-623.45 as the sole governing authority to determine whether the AJ's findings are supported by the evidence. D.C. Official Code 1-623.45(b)(1) provides the following in pertinent part:

(b) Under rules and regulations issued by the Mayor the department or agency which was the last employer shall:

(1) Immediately and unconditionally accord the employee the right to resume his or her former, or an equivalent, position as well as all other attendant rights which the employee would have had or acquired in his or her former position had he or she not been injured or had a disability, including the rights to tenure, promotion, and safeguards in reduction-in-force procedures, provided that the injury or disability has been overcome within two years after the date of **commencement of compensation** and provision of all necessary medical treatment needed to lessen disability or from the time compensable disability recurs if the recurrence begins after the injured employee resumes regular full-time employment with the District of Columbia government. (emphasis added).

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<sup>19</sup> Under D.C. Official Code § 1-623.45, an employee is required to overcome his or her work-related injury prior to invoking the protections afforded under the statute. Conversely, under 7 DCMR § 139.2, an employee is not required to overcome his or her work-related injury within the two-year period. This is commonly referred to as "limited duty status." D.C. Official Code § 1-623.45 and 7 DCMR § 139.2 refer to two different 'return-to-work' circumstances.

In its previous opinion, this Board held that Employee's Disability Certificate, coupled with Agency's act of permitting Employee to return to work, without restriction, constituted substantial evidence that Employee overcame his disability as of November 5, 2012. Thus, the remaining issue is whether the AJ correctly concluded that November 18, 2010 was the "commencement of compensation" date as it relates to D.C. Official Code § 1-623.45.

Agency argues that it has consistently maintained that the start date for calculating the two-year period under D.C. Official Code § 1-623.45(b)(1) should be October 30, 2010 because that was the date when Employee became entitled to Worker's Compensation benefits.<sup>20</sup> Thus, it suggests that the "commencement of compensation" date comports to the first date of eligibility of coverage, and not the date on an employee actually received a check for benefits. However, Agency's current position is incongruent with the language contained in its April 23, 2013 correspondence to Employee regarding the status of his work-related injury. The letter is signed by Agency's Director of Human Resources and states the following in pertinent part:

"Dear Mr. Murray[,] I am writing to ascertain your current status concerning the injury you sustained on or about July 30, 2010. Pursuant to D.C. Official Code § 1-623.45(b)(1), an employee who has demonstrated that he or she has overcome an injury or disability within a two-year period after **commencement of receipt of workers' compensation benefits and/or medical treatment** by the Disability Compensation Fund is entitled to resume his or her former or equivalent position."<sup>21</sup> (emphasis added).

Agency's own interpretation of D.C. Official Code § 1-623.45(b)(1) was that the two-year return-to-work period was based on the "commencement of receipt of worker's compensation benefits," and not the eligibility of coverage dates. Employee was permitted to

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<sup>20</sup> This contention is not wholly true, as Agency has previously proffered that "commencement of compensation" dates could be either October 30, 2010, or as early as August 26, 2010, in its previous filing with OEA. See *Agency's Brief on Remand* (August 3, 2018).

<sup>21</sup> *Agency's Answer to Employee's Petition for Appeal*, Tab 4 (February 14, 2014).

rely upon Agency's phraseology in defending against the instant adverse action. Likewise, the AJ's interpretation of the "commencement of compensation" date is consistent with Agency's correspondence to Employee. The AJ also provided a logical basis regarding why the plain meaning of "commence" should be used in determining that November 18, 2010, was the correct date for calculating the two-year period. Therefore, we find no reason to disturb his ruling.

It is undisputed that Employee received his first compensation check on November 18, 2010. As the AJ ruled, under D.C. Official Code § 1-623.45(b)(1), Employee was required to overcome his injury within two years of November 18, 2010, or by November 17, 2012. Employee returned to work, without medical restriction, on November 5, 2012. If Agency did not believe that Employee was entitled to return to work at that time, it should not have permitted him to resume the unrestricted duties of his position. Accordingly, this Board finds that Employee overcame his injury within two years after the date of commencement of compensation and the provision of all necessary medical treatment needed to lessen his disability in accordance with D.C. Official Code § 1-623.45(b)(1).

Additionally, there is substantial evidence in the record to support the AJ's conclusion that Employee suffered a recurrence of his work-related injury after returning to work from November 5, 2012 until December 17, 2012. Under D.C. Official Code § 1-623.45(b)(1), the two-year statutory period was reset during this time because Employee overcame his injury and resumed regular, full-time employment with the District. Agency failed to provide Employee with the full two-year period to overcome his injury by issuing its Written Notice of Proposed Removal on September 23, 2013.

Based on the foregoing, this Board finds that the AJ's conclusions are supported by substantial evidence. Under D.C. Official Code § 1-623.45, the commencement of compensation

of Employee's benefits began on November 18, 2010. Employee overcame his work-related injury as of November 5, 2012, within the two-year statutory period. Under D.C. Official Code § 1-623.45(b)(1), Employee had the right to immediately and unconditionally resume his former, or an equivalent, position had he not been injured. Additionally, the record supports a finding that Employee suffered a recurrence of his injury after resuming his full-time, unrestricted duties on November 5, 2012. The two-year period under D.C. Official Code § 1-623.45(b)(1) was; therefore, reset at the time of Employee's recurrence. Accordingly, Agency did not have cause to initiate its termination action. Consequently, its Petition for Review must be denied.

**ORDER**

Accordingly, it is hereby ordered that Agency's Petition for Review is **DENIED**.

**FOR THE BOARD:**

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Clarence Labor, Chair

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Patricia Hobson Wilson

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Jelani Freeman

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Peter Rosenstein

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Dionna Maria Lewis

Either party may appeal this decision on Petition for Review to the Superior Court of the District of Columbia. To file a Petition for Review with the Superior Court, the petitioning party should consult Superior Court Civil Procedure Rules, XV. Agency Review, Rule 1.