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

In the Matter of:	)	
	)	
SAMUEL MURRAY,	)	OEA Matter No. 1601-0032-14R17
Employee	)	
	)	
v.	)	Date of Issuance: April 24, 2018
	)	
DEPARTMENT OF YOUTH	)	
REHABILITATION SERVICES,	)	
Agency	)	
	)	

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 effective date of Employee’s termination was November 29, 2013.

In his appeal, Employee argued that Agency discriminated against him because of a disability. Employee further stated that his termination was a result of retaliation because he

previously filed a complaint with the Equal Employment Opportunity Commission (“EEOC”). As a result, he asked to be reinstated to his previous position and requested an award of attorney’s fees.<sup>1</sup>

In response, Agency provided that Employee received Workers’ Compensation benefits for an injury that he sustained on July 30, 2010. It stated that Employee failed to offer proof that he was medically cleared to perform the essential duties of his position in the more than three years since he sustained an injury. According to Agency, after August of 2012, Employee no longer retained the right to resume his position as a Motor Vehicle Operator. It also argued that removal was consistent with the District Personnel Regulations (“DPR”) and D.C. Official Code §1-623.45. Since Employee’s conduct was a considered a continuous offense that lasted more than two years, Agency opined that Employee’s removal should be upheld.<sup>2</sup>

The OEA Administrative Judge (“AJ”) issued an Initial Decision on September 18, 2015. First, he noted that Agency acknowledged that Employee temporarily returned to work on November 5, 2012. According to the AJ, when Employee returned to work within the two-year statutory period, and suffered a reoccurrence of his injury, a new accrual time period began to run. As a result, he concluded that the two-year period in which Employee was given to return to work was reset in December of 2012 when he received medical treatment for his neck and shoulder. Accordingly, the AJ concluded that Agency failed comply with D.C. Official Code § 1-623.45. He further held that Agency did not meet its burden of proof in establishing that Employee was terminated for cause. Consequently, Agency was ordered to reverse its termination action and reinstate Employee to the same or a comparable position.<sup>3</sup>

Agency filed a Petition for Review with OEA’s Board on October 23, 2015. It contended

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<sup>1</sup> *Petition for Appeal*, (December 17, 2013).

<sup>2</sup> *Agency Answer to Petition for Appeal* (February 14, 2014), Attachment 1.

<sup>3</sup> *Initial Decision* (September 18, 2015).

that the AJ erred in considering Chapter 7, Section 139 of the D.C. Municipal Regulations (“DCMR”) when he rendered his decision. Agency further asserted that Employee could not produce evidence that he overcame his injury within the two-year statutory period after the date of commencement of compensation benefits as required under D.C. Official Code § 1-623.45. Therefore, it requested that this Board grant its Petition for Review.<sup>4</sup>

The OEA Board issued its Opinion and Order on Petition for Review on March 7, 2017. First, the Board highlighted 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 disability....” Although the record reflected that Employee returned to work from November 5, 2012 through December 17, 2012, it could not be determined whether Employee actually overcame his disability, as is required by the Code. The Board also highlighted the holding in *Department of Youth Rehabilitation Services v. District of Columbia Office of Employee Appeals*, 2010 CA 1842 P(MPA)(D.C. Super. Ct. September 20, 2012), in which the District of Columbia Superior Court explained that the rights provided under § 1-623.45(b)(1) are conditional upon the employee overcoming his or her injury.

After reviewing the parties’ submissions, 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. According to the Board, the only documentation in the record from Employee’s physician was a noted dated December 17, 2012, which provided that “patient cannot go back to his regular work until problems with neck and shoulder are resolved....” Since there was insufficient evidence in the

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<sup>4</sup> *Agency Petition for Review* (October 23, 2015).

record to determine whether Employee overcame his disability in November of 2012, the Board remanded the matter to the AJ to make further determinations.<sup>5</sup>

The AJ subsequently ordered the parties to address the issues discussed in the Board's Order.<sup>6</sup> In his brief, Employee asserted that there was substantial evidence in the record to show that Agency permitted him to commence working on November 5, 2012, and paid him for the work performed. Employee further provided that he made frequent office visits and participated in certain medical treatments while under the care of his treating physician, Dr. Sankara Rao Kothakota ("Kothakota"). According to Employee, during his October 26, 2012 appointment, Dr. Kothakota determined that he was medically cleared to return to work. Included with his brief, was a newly-produced Disability Certificate from Dr. Kathokota, dated October 26, 2012. The certificate indicated that Employee could return to work as a Van Driver on November 5, 2012. As a result, Employee opined that he was medically cleared to return to work, without restriction, on November 5, 2012. Thus, he requested that the AJ reverse Agency's termination action.<sup>7</sup>

In its brief, Agency argued that Employee failed to demonstrate that he overcame his injury within the two-year statutory period under D.C. Official Code § 1-623.45. According to Agency, "commencement of payment of compensation for in Employee's case was no later than October 30, 2010, or as early as August 26, 2010." Thus, it claimed that in order to be entitled to rights under § 1-623.45(b)(1), Employee would have to present evidence that he overcame his injury no later than October 29, 2012. Agency also contended that the Disability Certificate from Dr. Kothakota did not establish that Employee had was medically cleared to return to work with no restrictions, noting that the document was not submitted to the AJ prior to the issuance of his Initial Decision. Therefore, Agency maintained that it did not violate D.C. Official Code § 1-

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<sup>5</sup> *Opinion and Order on Petition for Review* (March 7, 2017).

<sup>6</sup> *Post-Status Conference Order on Remand* (June 7, 2017).

<sup>7</sup> *Employee Brief on Remand* (July 10, 2017).

623.45 and requested that the AJ uphold Employee's termination.<sup>8</sup>

The AJ issued an Initial Decision on Remand on October 25, 2017. First, the AJ dismissed Agency's argument that the commencement of payment of compensation occurred on August 26, 2010, and again on October 30, 2012. Citing to the September 18, 2015 Initial Decision, the AJ reiterated that the "two[-]year grace period began to run once commencement of compensation payments began: November 18, 2010." Thus, he concluded that the Disability Certificate issued by Employee's physician on October 26, 2012, in addition to Employee returning to work on November 5, 2012, clearly demonstrated that Employee had overcome his disability within the two-year statutory time limit as required under § 1-623.45(b)(1).

Next, the AJ held that the Disability Certificate, included in Employee's July 10, 2017 brief, could be considered part of the record on remand. In support thereof, the AJ stated that the Board's Opinion and Order on Petition for Review clearly remanded this matter for the purpose of determining whether documentation existed to prove that Employee overcame his disability in November of 2012. Therefore, he found Agency's argument to be without merit.

The AJ further disagreed with Agency's position that the Disability Certificate failed to demonstrate that Employee actually recovered from his disability. He acknowledged that the record contains a December 12, 2012 letter from Dr. Kothakota which stated that Employee could not return to work until the problems with his neck and shoulder were reversed. However, the AJ noted that Employee presented the 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 on November 5, 2012. Moreover, he stated that the

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<sup>8</sup> *Agency's Brief on Remand* (August 3, 2017).

December 17, 2012 medical report from Dr. Kothakota did not negate the fact that Employee was medically cleared to return to work on November 5, 2012. He further opined that Employee likely re-aggravated his disability after returning to work. Thus, it was reasonable that Employee was only able to work for six weeks until his physician issued the December 17, 2012 medical report. Based on the foregoing, the AJ held that Employee overcame his medical disability within in a two-year period. Consequently, Agency's termination action remained reversed, and Employee was ordered to be reinstated with back pay and benefits.<sup>9</sup>

Agency disagreed and filed a second Petition for Review with the OEA Board on November 29, 2017. It reiterates its previous argument that the Disability Certificate issued by Dr. Kathakota does not demonstrate that Employee overcame his injury as of November 5, 2012. Agency further posits that the AJ erred, as a matter of law, in relying on November 18, 2010 as the date from which to calculate the two-year "commencement of payment of compensation" period. Additionally, Agency states that the AJ erroneously relied on 7 DCMR § 139.2, and not D.C. Official Code § 1-623.45(b)(1), to reverse Agency's termination action. Thus, it requests that the Board grant its Petition for Review.<sup>10</sup>

In response, Employee asserts that the Initial Decision on Remand should be upheld because the Disability Certificate provided by Dr. Kothakota serves as substantial evidence that he overcame his disability. Employee further echoes his previous contention that Agency accepted Dr. Kothakota's medical documentation as proof that he was medically cleared to return to work, without restriction, on November 5, 2012. Therefore, Employee reasons that Agency cannot currently argue that the same Disability Certificate only gave him the "opportunity to perform full duty." Additionally, he states that the AJ was correct in concluding

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<sup>9</sup> *Initial Decision on Remand* (October 25, 2017).

<sup>10</sup> *Agency's Petition for Review* (November 29, 2017).

that November 18, 2010 was the date on which to commence the two-year statutory period. As a result, Employee argues that Agency's Petition for Review should be denied.<sup>11</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>12</sup>

### OEA Board's Instructions on Remand

In its Opinion and Order on Petition for Review, this Board remanded the matter for the purpose of determining whether Employee was medically cleared or deemed to have overcome his disability under D.C. Official Code §1-623.45(b)(1) as of November 5, 2012. The matter was also remanded to determine whether medical treatments were performed to lessen Employee's disability. Employee argues that he has presented substantial evidence demonstrating that he was medically cleared to return to work, citing to the Disability Certificate from his treating physician. Conversely, Agency maintains that Initial Decision on Remand should be reversed because the AJ erroneously relied on 7 DCMR § 139 in his analysis; the Disability Certificate did not constitute a medical clearance to return to work; and the AJ incorrectly utilized November 18, 2010 as the date to calculate the "date of commencement of compensation."

First, we find that the AJ correctly utilized D.C. Official Code §1-623.45 in his analysis

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<sup>11</sup> *Employee's Opposition to Petition for Review* (January 2, 2018).

<sup>12</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).

on remand to determine whether Employee overcame his disability as of November 5, 2012. Section 1-623.45(b)(1) provides the following with respect to Career and Educational status employees:

(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; or

Accordingly, if an employee overcomes his or her disability under the aforementioned statute, certain protections apply. However, the rights provided are conditional upon the employee overcoming his or her injury within a two-year period.<sup>13</sup>

In this case, there is substantial evidence in the record to support a finding that Employee was medically cleared to return to work, without restriction, on November 5, 2012. Included with Employee's Brief on Remand is a Disability Certificate from Dr. Kothakota. The document is signed by Dr. Kothakota, and states that Employee was seen in his medical office on October 26, 2012. The Disability Certificate also contains an "X" mark in the area stating "May return to regular duty: Van Driver." The "Other" area on the document provides a return to work date of November 5, 2012. Finally, there are no marks or writings in the area entitled "restrictions." Employee subsequently returned to work on November 5, 2012. On this date, Employee

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<sup>13</sup> See *D.C. Department of Youth Rehabilitation Services v. Office of Employee Appeals*, 2010 CA 1842 P(MPA) (D.C. Super. Ct. September 20, 2012).



presented the Disability Certificate to Agency, and he was subsequently placed in the mail room where he was permitted to work for approximately six weeks.

Agency submits that the Disability Certificate does not purport to show that Employee overcame his disability. Rather, it argues that the document was an “opportunity to determine whether he could perform full duty with the problems he was experiencing with his shoulder....”<sup>14</sup> We disagree. The AJ was permitted to rely upon the newly-produced Disability Certificate as evidence in reaching his conclusion that Employee was medically cleared to return to work in November of 2012. There is no indication that Dr. Kothakota issued the Disability Certificate in error, or that he meant to send Employee back to work in a limited duty or capacity status. The document, on its face, reflects that Employee was cleared to return to work without limitation. Therefore, this Board finds that the Disability Certificate, coupled with Agency’s act of permitting Employee to return to work, constitutes substantial evidence that Employee overcame his disability as of November 5, 2012.

Next, this Board does not believe that the December 17, 2012 medical document from Dr. Kothakota proves that Employee had not overcome his injury when he returned to work in November of 2012. This document was completed after Employee returned to work for six weeks and started experiencing shoulder discomfort. During the December 17, 2012 visit, Dr. Kothakota administered Depomedrol and Xylocaine medications to lessen Employee’s pain. Dr. Kothakota also determined that Employee needed arthroscopy subacromial decompression of the shoulder, and that he should remain out of work until the medical problems were resolved. However, the document makes no mention of Employee’s previous clearance to return to full duty on November 5, 2012. There is also no evidence in the record to prove that Dr. Kothakota should not have cleared Employee to return to work, knowing that he was not medically

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<sup>14</sup> *Petition for Review* at 5.

competent to perform the essential functions of his job.

Agency's arguments are further undermined by its own admission that on April 23, 2013, Employee was sent a letter via FedEx, stating that pursuant to "D.C. Official Code § 1-623.45, [Employee] was "entitled to return to work in his former position or an equivalent position..."<sup>15</sup> The letter further stated that Employee needed to provide a notice of intent to return to his position by May 2, 2013. While Employee failed to respond to the letter, this Board cannot ignore that as of April 23, 2013, Agency believed that Employee was entitled to resume his position pursuant to D.C. Official Code § 1-623.45 if he provided the appropriate medical documentation.

Additionally, it is clear that Employee received medical treatments over the years to lessen his disability. According to his June 13, 2013 Compensation Order from the Department of Employment Services ("DOES"), Employee received "a blend of treatments to various parts of [his] body, not limited to left shoulder hyperextension injury."<sup>16</sup> Employee also received three injections in the shoulder at Washington Hospital, and attended six physical therapy sessions to rehabilitate his injury.<sup>17</sup>

Based on the foregoing, this Board finds that Employee was medically cleared to return to work without restriction on November 5, 2012. We further find that Employee received medical treatments to lessen his disability after being injured on July 30, 2010.

While this Board finds that Employee was medically cleared to return to work on November 5, 2012, it is unclear whether the AJ applied D.C. Official Code § 1-623.45(b)(1) or 7 DCMR § 139 in determining the date on which the two-year period began to run. Agency argues

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<sup>15</sup> *Agency's Answer to Employee's Petition for Appeal*, Tab 7.

<sup>16</sup> *Agency's Petition for Review*, Attachment 1, Compensation Order at 11.

<sup>17</sup> *Id.* In his decision, the DOES Administrative Law Judge also concluded that "[a]fter November 2012...Claimant was not disabled from performing his full duties of driving vehicles as part of regular duties."

that the AJ erred in utilizing November 18, 2010 to calculate the two-year grace period because the “commencement of payment of compensation” date was October 30, 2010, or the date on which Employee became entitled to Workers’ Compensation Benefits.<sup>18</sup> It further states that by using a date of November 18, 2010—the date on which actually Employee received his first benefits check—the AJ erroneously analyzed its actions under the DCMR. As previously stated, § 1-623.45(b)(1) affords certain protections to employees who are deemed to have overcome their disability within two years after the date of commencement of compensation. However, 7 DCMR § 139 states the following with respect to the two-year return to work period:

139.2 If the employee resumes employment with the District government within two (2) years of the first date the employee *received* compensation or medical treatment, the employee’s pre-injury employment agency shall 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, including the rights to tenure, promotion, and safeguards in reduction-in-force procedures. (emphasis added).

The AJ in this case 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 is also unclear whether the “commencement of payment of compensation” date under § 1-623.45(b)(1) is the same date as the “first date the employee received compensation or medical treatment” under DCMR § 139. An analysis performed under each of the former could result in two different outcomes regarding the disposition of this matter. Because this Board cannot ascertain the basis for the AJ’s conclusion, we must remand the matter for further consideration to address the conflicting

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<sup>18</sup> *Agency’s Brief on Remand*, Attachment 5. Employee received a check for Temporary Total Disability on November 18, 2010 in the amount of \$355.66. This check covered the period beginning August 26, 2010 through November 2, 2010. He received a second check on July 18, 2013 in the amount of \$5,766.89. This check covered the period of October 30, 2010 through November 2, 2010.

language between the Code and the DCMR.

Conclusion

Based on the foregoing, this Board finds that there is substantial evidence in the record to support a finding that Employee overcame his disability on November 5, 2012. Likewise, the AJ correctly concluded that Employee received medical treatments to lessen his disability. However, this matter must be remanded to the AJ to address the conflicting provisions in § 1-623.45(b)(1) and 7 DCMR § 139.

**ORDER**

Accordingly, it is hereby **ORDERED** that this matter is **REMANDED** to the Administrative Judge for further consideration.

FOR THE BOARD:

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Sheree L. Price, Chair

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Vera M. Abbott

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Patricia Hobson Wilson

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Jelani Freeman

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.