

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. 08-162

ANNETTA HAMPTON NICHOLAS,

Claimant–Petitioner,

v.

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,

Self-Insured Employer-Respondent.

Appeal from a Compensation Order on Remand of
Administrative Law Judge David L. Boddie
AHD No. PBL 06-090, DCP/ODC No. 760002-2002-12

Annetta Hampton Nicholas, *pro se* Petitioner

Pamela Smith, Esq., for the Respondent

Before E. COOPER BROWN, *Chief Administrative Appeals Judge*, AMELIA G. GOVAN,¹ and MELISSA LIN KLEMENS,² *Administrative Appeals Judges*.

AMELIA G. GOVAN, *Administrative Appeals Judge*, on behalf of the Review Panel:

DECISION AND REMAND ORDER

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board (CRB) pursuant to D.C. Official Code § 1-623.28, § 32-1521.01, 7 DCMR § 118, and DOES Director's Directive Administrative Policy Issuance No. 05-01 (Feb. 5, 2005), by which 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 Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Official Code §1-623.1 *et seq.*, (the Act).

¹ Administrative Law Judge Govan is appointed by the Director of DOES as an Interim Board Member pursuant to DOES Administrative Issuance 09-03 (January 29, 2009) in accordance with 7 DCMR §252.2 and Administrative Policy Issuance No. 05-01 (February 5, 2005).

² Administrative Law Judge Klemens is appointed by the Director of DOES as an Interim Board Member pursuant to DOES Amended Administrative Issuance 09-02 (January 29, 2009) in accordance with 7 DCMR §252.2 and Administrative Policy Issuance No. 05-01 (February 5, 2005).

OVERVIEW

On March 9, 2007, the Administrative Hearings Division (AHD) of the Office of Hearings and Adjudication (OHA) in the District of Columbia Department of Employment Services (DOES) issued a Compensation Order granting Petitioner's claim for reinstatement of temporary total disability benefits from June 10, 2006 to the present and continuing. In response to Employer's Application for Review, the Compensation Review Board (CRB) issued a June 19, 2007 Amended Decision and Remand Order³ that (1) reversed the Compensation Order of March 9, 2007; (2) denied Ms. Nicholas' benefits in relation to a claimed psychiatric injury and disability; and (3) remanded the matter to AHD for further consideration of the question of whether Employer produced sufficient evidence of a change in Ms. Nicholas' physical condition "to warrant termination of benefits for those injuries and disability".

This appeal follows the issuance of the April 14, 2008 Compensation Order on Remand (the Remand Order), in which the Administrative Law Judge (ALJ) denied Petitioner's claim for relief. In the Petition for Review herein, Ms. Nicholas asserts that the Compensation Order on Remand is not supported by substantial evidence and is contrary to law.⁴ Respondent has submitted no filings to oppose this appeal.

ANALYSIS

As an initial matter, the scope of review by the Compensation Review Board (CRB) and this Compensation Review Panel, as established by the Act and as contained in the governing regulations, is 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. Comprehensive Merit Personnel Act of 1978, as amended, D.C. Official Code § 1-623.01, *et seq.*, at § 1-623.28 (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 Int'l. v. District of Columbia Department of Employment Services*, 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.

The medical opinions of record include those of treating psychiatrist Shamim A. Malik, M.D. (June 18, 2003 – July 28, 2006); of IME psychiatrist Daniel Freedenburg, M.D., CTD (March 13, 2006), and orthopedic IME Robert O. Gordon, M.D. (July 10, 2003). The Employer's June 6, 2006 Notice of Intent to Terminate Disability (Termination Notice) specifically relied upon the March 13, 2006

³ The original CRB Decision and Remand Order (issued on May 15, 2007) was defective, in that it did not include a notice advising the parties of their rights of appeal. In all other respects, the May and June Orders are identical.

⁴ While Petitioner has expressed disagreement with both the March 9, 2008 Compensation Order and the April 14, 2008 Compensation Order on Remand, our authority at this time is limited to review of the April 14, 2008 Compensation Order on Remand.

medical opinion of Dr. Daniel Freedenburg, a psychiatrist, to support termination of Ms. Nicholas' benefits. The Termination Notice reads as follows:

We intend to close your disability compensation claim and terminate your payments on the following date: May 31, 2006. Our claim examination process has led us to conclude that you no longer meet the requirements of the D.C. Disability Compensation Act for continued claim payments. This conclusion is based on Additional Medical Examination by Dr. Daniel J. Freedenburg completed on March 13, 2006. . . . Dr. Freedenburg further stated that your current symptoms are a result of a long standing pre-existing psychiatric disorder. Dr. Freedenburg concluded that the work injury was not sufficient to have either caused or worsened your pre-existing disorder.

In the initial March 9, 2007 Compensation Order, the ALJ decided that Ms. Nicholas had a psychiatric disorder which was medically causally related to her December 10, 2001 work injury. The CRB Amended Decision on Remand and Remand Order (ADRO) reversed the Compensation Order and "affirmed" the Notice of Termination denial of benefits "in relation to a claimed psychiatric injury and disability." ADRO, p. 7.⁵

The ADRO further states:

. . . .Nothing in the Notice of Intent to Terminate Disability Compensation Benefits refers to Petitioner's physical injuries for which benefits were commenced pursuant to the Form 5. Rather, the only basis given in the Notice for the termination of those benefits is the contents of Dr. Freedenburg's reports, which are silent on the physical aspects of the injury. While Petitioner did produce an IME report from Dr. Robert Gordon (EE 2, Report of July 10, 2003) in which he expresses the opinion that Respondent's physical injuries had resolved by the date of his examination, that report is not referred to in the Form 5 filed nearly three years later, nor is it discussed in the Compensation Order or the filings of the parties in this appeal.⁶ ADRO, page 5.

For the reasons asserted by Petitioner, and for additional reasons as will be discussed below, we reverse the ruling regarding the psychiatric condition contained in the Compensation Order, and enter an order affirming the denial of benefits for a psychiatric injury in this case. However, because the Compensation Order is silent with respect to the physical condition for which the Petitioner was initially awarded benefits, we remand for further consideration of the evidence in connection therewith. While we are hesitant to remand a matter for consideration of issues that neither the parties nor the ALJ appear to have thought relevant or significant, in light of Respondent's *pro se* status and the possibility that the ALJ might have proceeded

⁵ To cite the specific language of the ADRO: ". . . we reverse the award of disability benefits and, pursuant to 7 DCMR 267.1 (c), we modify and amend the Compensation Order so as to affirm the termination thereof by Petitioner".

⁶ Review of the March 9, 2007 Compensation Order indicates Dr. Gordon's IME opinion was, in fact, discussed and rejected by the ALJ because Dr. Gordon did not address Ms. Nicholas' psychiatric symptoms. CO, page 10.

to consider the issue had he resolved the psychiatric issues in a manner consistent with our ruling on this issue in this appeal, we have deemed it appropriate to remand the matter to AHD for further consideration of the claim as it relates to the purely physical impact of the work injury upon Respondent's entitlement to benefits. ADRO, pages 2 and 6.

The Conclusion section of the ADRO states, in part:

The Compensation Order fails to address whether there is substantial evidence of a change of condition relating to the physical injury that was the basis for the initial award of benefits, and is therefore not in accordance with the law. ADRO, page 6.

The Order section of the ADRO states, in part:

The matter is remanded for further consideration of the question of whether Petitioner has produced sufficient evidence of a change in Respondent's physical condition to warrant termination of benefits for those injuries and disability. ADRO, page 7.

We now turn to the Compensation Order on Remand (COR) which is under review. In the COR, the ALJ posited that only the alleged psychiatric condition, rather than the physical condition, was addressed in the employer's June 6, 2006 Notice of Intent to Terminate Disability (Termination Notice). Then, the ALJ responded to the CRB directive of the ADRO as follows:

CONCLUSION OF LAW

Based upon a review of the record evidence, and particularly the evidence relating to Claimant's physical injuries, I conclude that Employer has not produced sufficient evidence that the disability, for which the Claimant received compensation, has resolved. COR, page 6.

ORDER

It is ordered that Claimant's claim for relief be, and hereby is denied. COR, page 7

Petitioner cites the above discrepancy in the Petition for Review, and writes: "Still, he denied my claim. Something is wrong with this picture." She then asserts that, given Employer's initial acceptance of her claim for benefits, Employer has not met its burden of proof and has failed to present substantial evidence to support the termination of her benefits, in that Dr. Freedenberg's report does not address her physical condition. The Panel agrees.

As noted by the Panel in the ADRO, the issue of disability related to the physical injuries sustained by Ms. Nicholas in December of 2001 is central to the procedural requirements concerning termination of benefits under the public sector act.

The record reveals that Respondent's initial injury, described as "headaches, blurred vision, and ... pain in her neck and upper back" resulting from "a student swinging a purse" which struck Respondent's head (EE 1, Form 5, Compensation Acceptance Order, December 10, 2002), and that benefits for that injury were paid through and including May 31, 2006 (EE 4, Notice of Intent to Terminate Disability Compensation Payments, June 6, 2006). While Employer did produce an IME report from Dr. Robert Gordon (EE 2, Report of July 10, 2003) in which he expresses the opinion that Respondent's physical injuries had resolved by the date of his examination, that report is not referred to in the Form 5 filed nearly three years later.

The established law is that the burden of proof rests with the employer to present substantial medical evidence to justify the termination of benefits which have been commenced following acceptance of a claim. See *Toomer v. D.C. Dept. of Corrections*, CRB No. 05-202, OHA No. PBL No. 98-048A, DCP No. LT5-DOC001603 (May 2, 2005); *Jones v. D.C. Dept. of Corrections*, Dir. Dkt. No. 07-99, OHA No. PBL No. 97-14, ODC No. 312082 (December 19, 2000); *Robinson v. D.C. General Hospital*, ECAB No. 95-8, ODCVC No. 302585 (July 8, 1997); *Chase v. D.C. Dept. of Human Services*, ECAB No. 82-9 (July 9, 1992). Upon such a showing, the burden of production then shifts to the claimant to show that his/her condition has not changed such that a modification or termination of benefits is warranted. *Boyd v. D.C. Dept. of Corrections*, AHD PBL No. 06-068 (April 9, 2007).

The Panel discerns a discrepancy between the fact-finding adjudicator and the reviewing panel regarding both facts and law. Review of the evidentiary record reveals the following. On January 10, 2002, a DCP Claims Examiner accepted the claim for injuries (specifically, headaches, blurred vision, neck and upper back pain) related to a December 10, 2001 work incident.

In the COR, the ALJ rejected Dr. Gordon's opinion regarding the resolution of Petitioner's physical disability. There is no question that (1) the DCP Termination was not based upon claimant's physical condition and (2) Dr. Gordon's opinion was stale and could not have been used to support termination of the claim which was accepted for the physical condition by DCP. Both the Panel which issued the ADRO and the ALJ agree that the DCP Termination Notice relied solely on Dr. Freedenburg's opinion regarding the psychiatric claim. Claimant's Petition for Review is supported by the record. It is apparent to this Panel that the ALJ intended to reinstate benefits rather than to deny Ms. Nicholas' claim, and in his haste to comply with the ADRO, mistakenly set out the Order portion of the COR.

Clearly, the discord found between the Conclusion and Order sections render the COR internally inconsistent. The record evidence supports the Conclusion, as stated by the ALJ. It was improper for Petitioner to have had her benefits terminated by DCP on the basis of a psychiatric opinion (which termination was upheld by the CRB) when those benefits were initially awarded on the basis of a physical impairment. It is unfortunate that, on Remand, the intention of the ALJ was unclear due to the internal inconsistency of the COR.

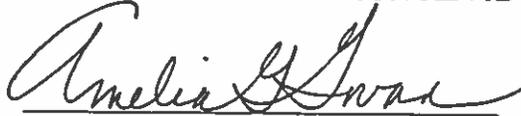
CONCLUSION

The finding that there is no substantial evidence of a change of condition relating to the physical injury that was the basis for the initial award of benefits contained in the April 14, 2008 Compensation Order on Remand is supported by substantial evidence and is in accordance with the law. The denial of the claim for relief set forth in the Compensation Order on Remand, which fails to address the impact of the determination that there was no substantial evidence of a change of condition relating to the physical injury that was the basis for the initial award of benefits is, therefore, not in accordance with the law. The conclusion of this Panel is that the Compensation Order on Remand must be construed as granting Petitioner's Claim for Relief, and the ALJ is directed to enter an appropriate Compensation Order on Remand correcting the inconsistency in the Order portion of the document.

ORDER

The April 14, 2008 Compensation Order on Remand is **VACATED**; the denial of Petitioner's benefits in relation to the physical injury that was the basis for the initial award of benefits is **REVERSED AND REMANDED** for disposal consistent with this Decision and Order.

FOR THE COMPENSATION REVIEW BOARD:



AMELIA G. GOVAN
Administrative Appeals Judge

March 26, 2009

DATE