

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 15-153

**BRENDA JOHNSON,
Claimant-Petitioner,**

v.

**FEDERAL EXPRESS CORPORATION
and SEDGWICK CMS,
Employer/Third Party Administrator-Respondent.**

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2016 MAR 1 AM 11 21

Appeal from an August 21, 2015 Second Compensation Order on Remand by
Administrative Law Judge Donna J. Henderson
AHD No. 12-359, OWC No. 688463

(Decided March 1, 2016)

Krista N. DeSmyter for Claimant
Lisa A. Zelenak for Employer

Before LINDA F. JORY, HEATHER C. LESLIE, *Administrative Appeals Judges* and LAWRENCE D.
TARR, *Chief Administrative Appeals Judge*.

LINDA F. JORY for the Compensation Review Board.

DECISION AND REMAND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

The parties do not dispute the following facts of record as outlined in *Brenda Johnson v. Federal Express Corporation*, CRB No. 13-077 (February 5, 2014) (DRO 1) and *Brenda Johnson v. Federal Express Corporation*, CRB No. 15-058 (July 30, 2015) (DRO 2):

Brenda Johnson worked for Federal Express Corporation (“FedEx”) for more than 26 years. On January 27, 2012, she was called to a meeting with supervisors. At that meeting, Ms. Johnson was informed that due to company reorganization, the position she had held for more than 10 years was being eliminated; in return, Ms. Johnson was offered a part-time position at a different location.

Ms. Johnson completed her work day that Friday and returned to work the following Monday. The next day, January 31, 2012, Ms. Johnson sought treatment at Fort Washington Hospital for complaints of headaches, insomnia, and loss of appetite as a result of being “fired.” Ms. Johnson was diagnosed with anxiety and was instructed to contact a crisis response hotline for counseling services.

From February 6, 2012 through June 1, 2012, Ms. Johnson treated with a therapist who diagnosed Ms. Johnson as suffering from adjustment disorder with mixed depression and anxiety from the job “rearrangement and decrease in hours on the job.” Thereafter, Ms. Johnson began treating with a board certified psychiatrist.

On July 3, 2012 at FedEx’s request, Ms. Johnson was examined by Dr. Bruce Smoller, a neuropsychiatric specialist. Dr. Smoller concluded Ms. Johnson’s “reaction to the ‘job termination’ with anger was normal but he opined that her reaction was stronger and more exaggerated.”

Ms. Johnson filed a claim for temporary total disability benefits and medical treatment as a result of her mental-mental injury. Following a formal hearing, an administrative law judge (“ALJ”) denied Ms. Johnson’s request for benefits because her mental-mental injury is not compensable. *Johnson v. Federal Express Corporation*, AHD No. 12-359, OWC No. 688463 (May 23, 2013), p. 3.

The Compensation Review Board (CRB) vacated the Compensation Order (CO) issued by the Administrative Hearings Division (AHD) on May 23, 2013 and remanded it to the ALJ as the CRB concluded the ALJ did not properly apply the test in mental-mental cases which the CRB adopted from the Court of Appeals in physical-mental cases. *Ramey v. Potomac Electric Power Co.*, CRB No. 06-038(R) (July 24, 2008). *McCamey v. DOES*, 947 A.2d 1191, 1195 (D.C. 2008). *See* DRO 1.

According to the Compensation Order on Remand (COR 1) issued on March 16, 2015, the ALJ re-opened the record to admit evidence that was identified in the record before the presiding ALJ but not previously ruled upon. The COR denied in part and granted in part Claimant’s claim for relief.

In a Decision and Remand Order dated July 30, 2015, the CRB affirmed the COR on several grounds but vacated the denial of medical benefits for the diagnosis of major depression because the ALJ did not determine within the *Reynolds*¹ standard whether the employer met its burden to rebut the presumption of compensability of the major depression. *Johnson v. Federal Express and Sedgwick CMS*, CRB No. 15-058 (July 30, 2015) (DRO 2).

¹ It is well settled now that employer’s evidence is sufficient to rebut the presumption when it is rendered by a qualified independent medical expert who, having examined the employee and reviewed the medical records, and renders an unambiguous opinion that the work injury no longer contributes to the disability. *Washington Post v. DOES and Raymond Reynolds, Intervenor*, 852 A.2d 909 (D.C. 2004) (*Reynolds*).

On August 21, 2015, AHD issued a Second Compensation Order on Remand (COR 2) which concluded Employer rebutted the presumption of compensability that Claimant suffered from a work-related major depression and that Claimant was unable to establish by a preponderance of evidence that she suffers from a work-related major depression.

Claimant filed a timely Application for Review (AFR) asserting that the COR 2 is not supported by substantial evidence. Employer filed a timely response opposing Claimant's AFR.

ANALYSIS²

Did the ALJ fail to apply the presumption to the causal relationship of the diagnosis of major depression to the work injury?

Claimant alleges the COR 2 fails to apply the appropriate burden-shifting framework of the presumption of compensability to the diagnosis of Major Depressive Disorder. Specifically Claimant asserts:

Ms. Johnson demonstrated that her depression condition resulted from her work injury through the reports of Ms. Patricia Carter and through the medical reports and opinions expressed by her psychiatrist, Dr. Alan Brody. CE 2, 3. Her depression related disorders prompted both Ms. Carter and Dr. Brody to place restrictions on Ms. Johnson's ability to work. This evidence is sufficient to invoke the presumption that Ms. Johnson suffers from Major Depressive Disorder.

The Employer presents *no* evidence that Ms. Johnson does not suffer from major depression. The evaluation report of Dr. Smoller dated July 3, 2012 is silent as to whether Ms. Johnson suffers from major depression. Importantly, Dr. Smoller's addendum of October 2, 2012 where he reviewed Dr. Brody's narrative regarding the diagnosis of post-traumatic stress disorder *and* major depression is *silent* as to whether Ms. Johnson has the depression condition. Contrary to when the Compensation Order on Remand states, 'it is apparent that Dr. Smoller considered, and rejected, the diagnosis of major depression,' there is no rejection of the diagnosis apparent in Dr. Smoller's reports whatsoever and to conclude otherwise is purely speculative. See COR 2 at 8, *Brown v. DOES*, 700 A.2d 787, 792-93 (D.C. 1997). The rejection by that doctor is *solely* recorded as to the

² The scope of review by the Compensation Review Board (CRB) and this 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. D.C. Code § 32-1521.01(d)(2)(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. DOES*, 834 A.2d 882 (D.C. 2003). Consistent with This scope of review, the CRB and this Panel are bound 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.

PTSD diagnosis. Having reviewed Dr. Brody's September 22, 2012 narrative, Dr. Smoller had every opportunity to negate the separate diagnosis of depression, but he did not. Thus, one could just as easily draw the inference that he did not diagnose that Ms. Johnson suffers from depression. This only bolsters Ms. Johnson's argument that there is no evidence that meets the *Reynolds* standard of rebuttal of the compensability of her depression. The same infirmity detected by the CRB in the last Compensation Order on remand remains uncured.

Claimant's Brief at 4, 5 (emphasis in original)

Employer asserts:

Judge Henderson further finds that this case does not involve whether or not the Claimant's condition is related to the alleged injury, rather it is whether or not she has a specific diagnosis. Neither Ms. Carter nor Dr. Smoller diagnosed the Claimant with major depression. The fact that they do not specifically mention it does not discredit Judge Henderson's findings. Both professionals clearly would have considered such a diagnosis and did not find that the Claimant had major depression. Judge Henderson notes that negative evidence can be considered in this case because the issue again is not of causal relationship, but of whether or not the Claimant has a specific medical condition. As a result, Judge Henderson did apply the correct standard and her decision is correct.

Employer's Brief at 14, 15.

As has already been affirmed in the DRO 2:

In her analysis as to whether Employer rebutted the invoked presumption, the ALJ separated the diagnoses of Adjustment Disorder, Post-Traumatic Stress Disorder and Major Depressive Disorder into two sections entitled "The Diagnosis of an Adjustment Disorder" and "The Diagnosis of Post Traumatic Stress Disorder". The ALJ determined that Dr. Smoller's diagnosis of "adjustment reaction" was not specific or comprehensive enough to rebut the presumption and therefore Claimant's adjustment disorder is compensable. We find no error with the ALJ's approach and analysis with regard to the adjustment disorder and we accordingly affirm the ALJ's conclusion.

DRO 2 at 6.

The determination that Claimant's adjustment disorder is compensable and the conclusion that Claimant was disabled from January 30, 2012 through and including July 3, 2012, has been affirmed and is now the law of the case, as is the determination that the Claimant did not establish entitlement to temporary total disability after July 3, 2012.

The only element left for the ALJ to address was whether Dr. Smoller's independent medical examination (IME) report met the *Reynolds* rebuttal standard with regard to the major depression diagnosis alleged by Dr. Brody.

The ALJ acknowledged the CRB's reminder that in determining whether Employer's evidence is sufficient to rebut the presumption of compensability and that "negative evidence is generally not sufficient to constitute substantial evidence" as set forth in *Brown v. DOES*, 700 A.2d 787, 792 -793 (D.C. 1997) (*Brown*). The ALJ distinguished the facts of the instant matter from *Brown* stating:

In *Brown*, the employer's evidence consisted of the lack of a reference to prior work injuries in medical records of intervening doctor's visits. Mr. Brown had sustained multiple back injuries while with the employer. The employer cited the absence of references to the prior work injuries in his medical records as evidence that his condition had resolved. The Court held that the fact that the medical records did not refer to the earlier work-related accidents was insufficient to rebut the presumption. *Id.* Although referred to as 'negative evidence' in *Brown*, the employer was, in reality relying on the absence of evidence.

In *Shipman v. Fresenius Medical Care Holding*, CRB No. 06-13, AHD No 05-103A, OWC No. 603796, 2006 DC Wrk. Comp. LEXIS 66, (January 11, 2006), citing *Brown*, the CRB ruled that Employer's reliance on the absence of a reference to a work-related in Claimant's treating physician's records did not constitute sufficient evidence to rebut the presumption that a work-related accident occurred. *Shipman* at 8-9. As with the decision in *Brown*, the absence of evidence is referred to as 'negative evidence' *Id* at 9.

Unlike the cases cited above, the issue here is not whether Claimant's condition is causally related to the incident at work, but rather whether or not Claimant suffers from the specific medical condition of major depression. The evidence supports a finding that Claimant suffered from a condition other than major depression. The evidence establishes that Claimant suffers from a condition different than the ones Dr. Brody diagnosed her with. Dr. Smoller did not diagnose Claimant with major depression; Dr. Smoller diagnosed Claimant with 'adjustment disorder with anxious features versus normal reaction to job loss' and found that her symptoms were 'characterized mostly by anger.' EE 2, p. 14 and EE 6, p. 41.

CO at 4.

The ALJ concluded:

There is no 'undue speculation' in finding that Dr. Smoller did not diagnose Claimant with major depression. EE 2, p. 141 and *Brown* at 793. Employer's evidence is not an absence of evidence but rather a different diagnosis which fully considered Claimant's medical history and her symptoms, and then thoroughly explained by the medical expert. Thus, I find Dr. Smoller's opinion is 'specific

and comprehensive enough to sever the potential connection between a particular injury and a job-related event'. Therefore, I find that Employer has rebutted the presumption. *Ferreira v. DOES*, 531 A.2d 651, 655 (D.C. 1987).

CO at 5.

We are mindful that the instant matter involves a mental injury as opposed to a physical injury and the D.C. Court of Appeals in its significant decision involving a "mental-mental" injury did not mention the *Reynolds* standard followed in this jurisdiction since it issued *Reynolds* in 2004. See *Ramey, supra*. Nevertheless, the CRB has held employer to the *Reynolds* standard in a subsequent mental injury case and we see nothing about the facts of the instant case to distinguish it from the scenario presented to the CRB in that matter. See *Twyman v. IAP Worldwide Services*, CRB No. 14-146 (March 31, 2015) (*Twyman*) wherein the CRB reiterated:

The Presumption is rebutted when the record demonstrates a physician has performed a personal examination of the injured worker, has reviewed the relevant medical records, and has stated an unambiguous opinion contrary to the causal relationship presumption. *Washington Post v. DOES and Raymond Reynolds*, 852 A.2d 909 (D.C. 2004). Dr. Christiansen examined Ms. Twyman and her medical records, and based upon that examination, those records, and his medical expertise, he offered an unambiguous opinion that her symptoms and conditions are not work related. Dr. Christiansen's opinion suffices to rebut the Presumption.

Twyman at 4.

Claimant, Brenda Johnson, was diagnosed with several conditions; adjustment disorder, post-traumatic stress disorder, and major depression disorder. In our previous decision, we affirmed the ALJ's findings that the adjustment disorder was compensable and the post-traumatic stress disorder was not. This case was remanded for the ALJ to determine whether the employer submitted sufficient evidence to rebut the presumption with respect to Claimant's diagnosed major depression disorder.

Dr. Smoller's IME report shows that he knew Claimant had been diagnosed with a major depression disorder. His IME report is silent with respect to whether that diagnosis is correct. Instead, he diagnosed a different condition (adjustment disorder).

The ALJ held that this different diagnosis is sufficient to satisfy *Reynolds*. We disagree. We think *Reynolds* requires a specific statement by Dr. Smoller saying either that he disagrees with Dr. Brody's diagnosis of major depression disorder or that any major depression disorder is not medically causally related to the work accident. Dr. Smoller did not render any opinion regarding the diagnosis of major depression disorder. His opinion is neither unambiguous nor sufficiently substantial, specific nor comprehensive to rebut the presumption.

Recently, the CRB found that an IME's silence is insufficient to satisfy *Reynolds*. In *Fowler v. Children's National Medical Center*, CRB No. 15-096 (May 19, 2015), the claimant fell and sustained several injuries. Claimant's treating doctor recommended a neck MRI and a dispute

arose over whether Claimant's neck also was injured in the work accident. An IME doctor's report stated the claimant injured her back and hip but the report said nothing about a neck injury. The CRB held the IME report was insufficient to rebut the presumption

Consistent with *Twyman* and *Fowler*, we believe *Reynolds* is the standard to meet in mental injury cases and it requires more than mere silence. The ALJ's conclusion that Employer has rebutted the presumption is accordingly reversed.

CONCLUSION AND ORDER

The ALJ's conclusion that Employer has rebutted the presumption is reversed. This case is remanded to the ALJ to enter an Award consistent with our decision.

So ordered