GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR

LISA MARÍA MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 12-147

VERONICA HOWARD,
Claimant–Petitioner,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
Self-Insured Employer-Respondent

Appeal from an August 27, 2012 Compensation Order by
Administrative Law Judge Karen R. Calmeise
AHD No. 12-109, OWC No. 683290

Justin M. Beall, Esquire, for the Claimant/Petitioner
Mark H. Dho, Esquire, for the Self-Insured Employer/Respondent

Before: HENRY W. MCCOY, MELISSA LIN JONES, *Administrative Appeals Judges*, and LAWRENCE D. TARR, *Chief Administrative Appeals Judge*.

HENRY W. MCCOY, *Administrative Appeals Judge*, for the Compensation Review Board.

DECISION AND REMAND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

Claimant worked for Employer as a train operator. After reporting for work on June 15, 2011, Claimant overheard a conversation between her supervisor and another person in which she was referenced by name and referred to as “crazy”. As a result, Claimant allegedly became upset, stressed, and depressed.

The following day, Claimant contacted Employer's Employee's Assistance Program (EAP) about this incident and was referred to Kaiser Permanente where she was seen by a licensed clinical social worker on June 20, 2011 and again on July 5, 2011. Claimant was kept off work until July 18, 2011 when she was seen that day by Dr. Charles Colao who executed a return to work certification for July 19, 2011.

Claimant requested a formal hearing where she sought temporary total disability (TTD) benefits for the period June 16, 2011 to July 19, 2011 during which time she claims she was disabled from working due to a psychological injury resulting from the June 15, 2011 work incident. Following a May 17, 2012 formal hearing, the presiding Administrative Law Judge (ALJ) issued an August 27, 2012 Compensation Order (CO) in which Claimant's request for benefits was denied, concluding that Claimant's psychological condition was not medically causally related to the work incident.[1] Claimant timely appealed with Employer filing in opposition.

On appeal, Claimant argues that the ALJ did not properly afford her the presumption of compensability in accordance with the applicable statute and case law. Employer argues to the contrary and that the CO is supported by substantial evidence and should be affirmed.

STANDARD OF REVIEW

The scope of review by the CRB, 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.[2] *See* D.C. Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §§ 32-1501 to 32-1545 (2005), at § 32-1521.01(d)(2)(A). 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.

Turning to the case under review, Claimant argues that the ALJ committed error by not properly affording her the presumption of compensability based on the evidence that her psychological injury was the result of a work-related event that occurred on June 15, 2011. Claimant argues that she presented medical evidence along with her testimony of a workplace event that had the potential to cause or aggravate her psychological injury which was more than enough to invoke the presumption. As we now determine that Claimant presented competent medical evidence sufficient to invoke the presumption of compensability in mental-mental cases, this matter must be returned for further consideration.

The ALJ found that prior to June 15, 2011 Claimant's working relationship with her supervisor was uneventful and that Claimant had reported no previous incidents of work-related

[1] *Howard v. WMATA*, AHD No. 12-109, OWC No. 683290 (August 27, 2012).

[2] "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 International v. D.C. Dept. of Employment Services*, 834 A.2d 882 (D.C. 2003).

conflicts. The ALJ further found that after reporting for work on June 15, 2011 Claimant overheard a conversation between her supervisor and the division clerk where her name was specifically mentioned. Claimant contacted the Employee's Assistance Program and was referred to Kaiser Permanente where she was seen twice by a licensed clinical social worker. The ALJ found that the two treatment reports from those sessions made no reference to a specific work incident on June 15, 2011 and the reports did not relate Claimant's adjustment disorder and depression to a work incident on that date.

The ALJ proceeded to note that the CRB has adopted a standard burden shifting test that is to be applied in mental-mental cases such that

> …an injured worker alleging a mental-mental claim invokes the statutory presumption of compensability by showing a psychological injury and actual workplace conditions or events which could have caused or aggravated the psychological injury. The injured worker's showing must be supported by competent medical evidence. The ALJ, in determining whether the injured worker invoked the presumption, must make findings that the workplace conditions or events existed or occurred, and must make findings on credibility. If the presumption is invoked, the burden shifts to the employer to show, through substantial evidence, the psychological injury was not caused or aggravated by workplace conditions or events. If the employer succeeds, the statutory presumption drops out of the case entirely and the burden reverts to the injured worker to prove by a preponderance of the evidence that the workplace conditions or events caused or aggravated the psychological injury.

Ramey v. PEPCO, CRB No. 06-38(R), AHD No. 03-035C (July 24, 2008).

Under the *Ramey* test, the initial determination to be made is whether the Claimant has shown a psychological injury and actual workplace conditions or events that could have caused or aggravated the psychological injury.[3] The ALJ here basically determined that Claimant did not make this showing by stating

> The record shows Claimant worked for Employer and was present, at work on the date of the alleged injury and that a conversation between the parties claimed could have occurred that referenced the Claimant by name. However, Claimant has presented insufficient evidence to make the initial showing of a medical causal relationship between the June 15th incident and the recommendation to remain off work to address her Adjustment Disorder and Depressed Mood. CO at 4.

In making the determination that Claimant "has presented insufficient evidence to make the initial showing of a medical causal relationship", the ALJ has weighed the evidence and found a lack of causal relationship before making the initial determination that the presumption has been invoked and subsequently rebutted or not.

[3] A claimant may make this showing by testimony or through medical evidence. *Ramey v. PEPCO*, CRB No. 08-217, AHD No. 05-318, OWC No. 608087 (October 29, 2008) (*Ramey II*).

To make the initial determination required under *Ramey* to invoke the presumption, the ALJ has to make supported findings of a psychological injury and actual workplace conditions or events that could have caused or aggravated the psychological injury. In the passage from the CO quoted above, the ALJ appears to acknowledge there was a workplace event and that Claimant has sustained an "Adjustment Disorder and Depressed Mood" that would indicate a psychological injury. It only remains for the showing by Claimant to be supported by "competent medical evidence" in order for the presumption to be invoked.

With regard to the medical evidence, we note that according to *Ramey* an injured worker in a mental-mental claim invokes the presumption of compensability by showing a psychological injury that must be supported by competent medical evidence. Here, the ALJ determined that Claimant's claim of psychological injury was not supported by competent medical evidence.

The ALJ reasoned:

> In the instant case, the claim for benefits is premised upon an alleged psychological injury that was caused by Claimant overhearing a conversation which allegedly included comments pertaining to her mental state. Claimant's claim must be supported by competent medical evidence. (*See Ramey supra*) First of all, although Ms. Ford may be qualified to counsel the Claimant, she is not a licensed medical practitioner. Furthermore, although the progress notes and history section of the counseling reports refer to the Claimant's "issues with her current supervisor" and her "feelings that her supervisor and coworkers are talking about her" the reports also make reference to the Claimant's family issues and difficulty managing emotions at home. (CE 2, pg 1 of 3) The reports, do not contain any statement, summary, or conclusion by the counselor that the Claimant's condition and need for treatment for Adjustment Disorder and Depressed Mood was caused or aggravated by a work conversation or incident or conditions which occurred on June 15th. I find that the counseling session reports fail to meet the requirement of "competent medical evidence" under the Act.

CO at 4-5, (Footnote omitted).

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The CRB has previously taken the position that the opinion of a licensed clinical social worker (LCSW) is not medical evidence and thus does not satisfy the requirement of competent medical evidence needed to support a claim of psychological injury.[4] However, upon further reflection, we note that Black's Law Dictionary defines "medical evidence" as "Evidence furnished by a doctor, nurse, or other qualified medical person testifying in a professional capacity as an expert,…." In addition, it is becoming more common for LCSWs to be found providing "a significant amount of mental health treatment."[5] Accordingly, we take this

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[4] *Jones v. D.C. Office of Unified Communications*, CRB No. 10-053, AHD No. PBL 08-062, DCP No. 2008-01339-846 (December 8, 2011).

[5] See *Jaffee v. Redmond*, 518 U.S. 1, 15-17 (U.S. 1996):

> All agree that a psychotherapist privilege covers confidential communications made to licensed psychiatrists and psychologists. We have no hesitation in concluding in this case that the federal privilege should also extend to confidential communications made to licensed social workers in the course of psychotherapy. The reasons for recognizing a privilege for treatment by psychiatrists and psychologists

opportunity to overrule that previous declaration and now ascribe to the position that the medical reports from a LCSW who has examined the claimant and expresses the findings of that examination in the traditional format of a psychological or psychiatric report constitutes competent medical evidence.

The only treatment reports in the instant matter were provided by a LCSW who saw Claimant on two occasions. In the assessment section of the LCSW's report, it states "Axis I: Adjustment disorder with mixed anxiety and depression" and "Axis IV: work stress, health concerns." In the "History of Present Illness" section of the LCSW's June 20, 2011 report, it is noted that

> Patient described issues encountered with current supervisor at work. Patient stated that she has been unable to focus as [sic] work, cries excessively, has difficulty managing emotions at home and has yelled at her children. Patient discussed feelings that her supervisor and coworkers are talking about her. CE 3.

The purpose of the "competent medical evidence" required by the *Ramey* test is to provide support that there was an event that could have caused the injury so as to invoke the presumption of compensability. However, as can be seen by reading the passage from the CO quoted above, the ALJ has basically weighed the "medical evidence" consisting of the reports of the LCSW and found them to constitute "insufficient evidence to make the initial showing of a medical causal relationship" between the work incident and her alleged psychological injury. We disagree.

The reports of the LCSW are now considered to be "competent medical evidence". The Axis diagnoses in those reports when read in conjunction with the "History of Present Illness" supports Claimant's testimony of a workplace incident that caused her to suffer a psychological injury. This is sufficient to invoke the presumption of compensability.[6] On remand, the ALJ shall proceed with the presumption analysis to determine whether the presumption has been rebutted and if rebutted, weigh the evidence with Claimant needing a preponderance of the evidence to prevail.

In addition, on remand, the ALJ shall review the record and survey Employer to determine whether Employer relied to its detriment on our ruling in *Jones*, now overturned, and did not seek rebuttal medical evidence. If detrimental reliance is found, the ALJ shall afford

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> apply with equal force to treatment by a clinical social worker such as Karen Beyer. Today, social workers provide a significant amount of mental health treatment. See, *e.g.*, U.S. Dept. of Health and Human Services, Center for Mental Health Services, Mental Health, United States, 1994 pp. 85-87, 107-114; Brief for National Association of Social Workers et al. as *Amici Curiae* 5-7 (citing authorities). Their clients often include the poor and those of modest means who could not afford the assistance of a psychiatrist or psychologist, *id.,* at 6-7 (citing authorities), but whose counseling sessions serve the same public goals. Perhaps in recognition of these circumstances, the vast majority of States explicitly extend a testimonial privilege to licensed social workers. We therefore agree with the Court of Appeals that "drawing a distinction between the counseling provided by costly psychotherapists and the counseling provided by more readily accessible social workers serves no discernible public purpose." 51 F.3d at 1358, n. 19.

[6] It is only necessary for the medical evidence to be sufficient initially to invoke the presumption, not ultimately prove the medical causal relationship. That would only come upon weighing the evidence after the presumption is rebutted and Claimant's evidence by a preponderance prevails.

Employer the opportunity to obtain rebuttal medical evidence and re-open the record to allow it to be admitted into evidence.

CONCLUSION AND ORDER

As we overrule our previous ruling to now declare that the medical reports of LCSW constitute competent medical evidence and in this case supports the Claimant's testimony of a psychological injury so as to met the initial test under *Ramey*, the shall ALJ proceed to determine whether the presumption has been rebutted. Due to our change in ruling, the Compensation Order of August 27, 2012 is not supported by substantial evidence in the record and is not in accordance with the law. Accordingly, the Compensation Order is VACATED AND REMAND for further consideration in accordance with this Decision and Remand Order.

FOR THE COMPENSATION REVIEW BOARD:

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HENRY W. MCCOY
Administrative Appeals Judge

March 5, 2013
DATE