

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR



F. THOMAS LUPARELLO
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 14-087

CYNTHIA THOMPSON,
Claimant-Petitioner,

v.

AVAYA COMMUNICATIONS, INC. and
GATES McDONALD,
Employer/Carrier-Respondent

Appeal from a July 3, 2014 Compensation Order on Remand
by Administrative Law Judge Gerald D. Roberson,
AHD No. 02-180, OWC No. 561690

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2014 DEC 12 PM 9 41

Cynthia Thompson, *pro se* Petitioner
Jonathan M. Marlin for Employer-Respondent

Before JEFFREY P. RUSSELL, HEATHER C. LESLIE, *Administrative Appeals Judges*, and LAWRENCE D. TARR, *Chief Administrative Appeals Judge*.

JEFFREY P. RUSSELL on behalf of the Compensation Review Board:

DECISION AND REMAND ORDER

BACKGROUND¹

Claimant was working for Employer as a sales service manager when she injured herself after falling on a concrete bathroom floor on September 29, 2000. Employer voluntarily paid two periods of temporary total disability ending on October 17, 2001. After a Memorandum of Informal conference recommended ongoing disability benefits, Employer filed for a formal hearing which resulted in an October 24, 2002 Compensation Order (CO 1) denying the claim. The Director

¹ The scope of review by the CRB is generally 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. Workers' Compensation Act of 1979, as amended, D.C. Code § 32-1501, *et seq.*, (the Act) at § 32-1521.01 (d)(2)(A), and *Marriott International v. DOES*, 834 A.2d 882 (D.C. 2003). Consistent with this standard of review, the CRB and this review panel must affirm 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 this panel might have reached a contrary conclusion. *Id.*, at 885.

remanded the matter on December 10, 2003 because the presumption of compensability was not properly applied.

On May 20, 2004, a Compensation Order on Remand (CO 2) was issued that again denied Claimant's request for disability benefits after concluding that Claimant's psychological injuries were not causally related to her fall on the floor. On appeal, the Compensation Review Board (CRB) issued a Decision and Remand Order on December 23, 2005 (DRO 1), instructing the Administrative Law Judge (ALJ) to reconsider whether the physical injury that Claimant sustained would have resulted in the same or similar psychological injury to an individual of normal sensibilities not predisposed to the depression suffered by Claimant, in light of the rule established by the CRB in *West v. Washington Hospital Center*, CRB (Dir. Dkt.) No. 99-97 (August 5, 2005).² The CRB noted that the ALJ's COR of May 20, 2004 was issued prior to the CRB's decision in *West*.

On February 28, 2006, a third Compensation Order (CO 2) was issued wherein the ALJ again denied Claimant's claim for relief after concluding she failed to prove that the physical injury she sustained and its after-effects could have produced similar emotional injury in a person of normal sensibilities not predisposed to such injury. On appeal, the CRB affirmed this decision on March 2, 2007. Claimant timely appealed to the D.C. Court of Appeals (DCCA).

During the pendency of Claimant's appeal, the DCCA decided *McCamey v. DOES*, 947 A.2d 1191 (D.C. 2008). In *McCamey*, the Court overturned the objective test as applied to physical-mental claims as being inconsistent with the statute. The DCCA remand Claimant's appeal with instructions that the psychological injury claim be reconsidered in light of the *McCamey* decision.

Accordingly on August 7, 2008, CO 2 was vacated by the CRB (DRO 2) and remanded for further proceedings, including further evidentiary proceedings if deemed necessary, in order to evaluate the claim consistent with the new standard for physical-mental disability claims. *Thompson v. Avaya Communications*, CRB No. 06-37R, OHA No. 02-180, OWC No. 561690 (August 7, 2008).

On January 13, 2009, an evidentiary hearing was convened to consider the claim under the new standard for physical-mental claims and with a new judge, Belva Newsome, presiding³ and no additional exhibits were introduced. On March 17, 2009, Judge Newsome issued Compensation Order (CO 3) finding Claimant's psychological injury to be medically causally related to her September 29, 2000 work injury and that she was entitled to temporary total disability from October 17, 2001 to the present and continuing. *Thompson v. Avaya Communications*, AHD No. 02-180, OWC No. 561690 (March 17, 2009). Employer timely appealed.

On July 23, 2009, the CRB issued a Decision and Remand Order (DRO 3). The March 17, 2009 (CO 3) was "reversed, vacated and remanded to AHD with specific instructions to convene a new

² The CRB basically instructed the ALJ that all claims for psychological injury under the Act must be evaluated under the objective test established in *Dailey v. 3M Company*, H&AS No. 85-259, OWC No. 066512 (Final Compensation Order, May 19, 1988).

³ This matter previously was presided over by ALJ Anand Verma. It was reassigned to ALJ Belva D. Newsome.

formal hearing” where the parties would be allowed to “present new evidence relevant and material” to Claimant’s claim for disability compensation benefits resulting from her alleged psychological injury. *Thompson v. Avaya Communications*, CRB No. 09-063, AHD No. 02-180, OWC No. 561690 (July 23, 2009).

On June 28, 2010, Judge Newsome convened another formal hearing. In a Compensation Order on Remand (CO 4) issued on September 8, 2010, it was noted that exhibits were admitted from both parties and the ALJ incorporated by reference all the findings of fact from the March 17, 2009 CO while making limited additional new findings and again granted Claimant’s claim for relief. Employer again timely appealed with Claimant filing in opposition.

In that appeal, Employer made the following assignments of error: that (1) the ALJ’s revisiting of Claimant’s physical injuries went beyond the scope of the remand instructions; (2) the ALJ used the wrong standard to determine whether the presumption had been rebutted with regard to Claimant’s alleged psychological injury; (3) the ALJ erred in incorporating the Findings of Fact from the March 17, 2009 CO; and, (4) the ALJ erred in citing testimony from a hearing held in 2002. In opposition, Claimant argued that none of these actions by the ALJ constitute error.

In a Decision and Remand Order issued May 9, 2013 (DRO 4), the CRB vacated CO 4, and remanded the matter to AHD with instructions as shall be described in the Analysis that follows.

Because ALJ Newsome had retired, the matter was assigned to a new ALJ, Gerald D. Roberson. On July 3, 2014, ALJ Roberson issued a Compensation Order on Remand (CO 5), finding that Claimant’s psychiatric injury was causally related to the work injury, and “granted in part” Petitioner’s claim for relief, awarding temporary total disability benefits from October 17, 2001 to December 31, 2009. No further specific claims for relief were mentioned or specifically denied.

On July 10, 2014, Claimant (Petitioner) filed a document with AHD and the CRB without title, but which voiced several objections to the content of CO 5, among them being that she did not understand what was meant by “granted in part”, and asserting claims for continuing disability and provision of medical care. We shall deem this document to be a timely Application for Review of CO 5.

On July 22, 2014, Employer (Respondent) filed an Opposition to Claimant’s Application for Review.

It is CO 5 that we now review. We affirm the Compensation Order on Remand of July 3, 2014, but remand for the ALJ to address the psychological medical benefits claim.

ANALYSIS

The specific instructions from the CRB were as follows:

...[I]t was improper for the ALJ to state that Employer did not rebut the presumption [that Petitioner’s psychological condition is causally related to the stipulated work injury] while at the same time acknowledging the Dr. Schulman [Respondent’s IME

psychiatrist] opined that his examination of Claimant did not support a psychiatric disability as related to her occupational injury. With the presumption rebutted, it fell to Claimant to prove the causal connection by a preponderance of the evidence. Finally, there is no error in citing to testimony from a prior hearing provided it is relevant and material to the contested issue.

CONCLUSION AND ORDER

The award of benefits in the Compensation Order on Remand of September 8, 2010 is not supported by substantial evidence and is not in accordance with the law. The CO is reversed, vacated and remanded with instructions to make new findings of fact without incorporating by reference findings from prior Compensation Orders and those findings shall be restricted to resolving the matter of the alleged psychological injury and disability.

Thompson v. Avaya, CRB No. 10-170, AHD No. 02-180, OWC No. 561690 (May 9, 2013), p. 7.

No one in this appeal contests that the ALJ did precisely as instructed: considered the evidence without reference to any presumptions, placed the burden upon the Petitioner, weighed the evidence and found that the psychological conditions were causally related to the injury. Respondent concedes that it does not contest this finding on appeal. *See, Employer and Insurer's Opposition to Claimant's Application for Review*, unnumbered p. 3, Argument 2.

Petitioner's AFR does not make explicitly clear with what she takes exception in the CO 5, or upon what legal basis such exception is taken. She does, in several places, indicate that she doesn't understand what the ALJ meant by granting her claim for relief "in part", and she re-iterates that she suffers from numerous psychological and physical maladies for which she has incurred medical bills and for which she seeks treatment, and that she continues to be unable to work due to continuing physical and psychological maladies.

We believe that it is clear that the ALJ intended to award benefits for the diagnosis, care and treatment of Petitioner's psychological claims, and that he also did not intend to (and in fact did not) contravene the additional mandate of the CRB to the following effect, quoting as we are from the remand order which ALJ Roberson addressed:

Turning to the first assignment of error, Employer argues that the [prior] ALJ exceeded the scope of the [prior] remand instructions of the August 7, 2008 Remand Order by revisiting Claimant's physical injury and work limitations. It is Employer's position that in returning the matter, the CRB gave a limited remand to consider the psychological claim only. We agree.

In the process of reversing and remanding the March 17, 2009 CO in a July 23, 2009 DRO [the CRB's prior Decision and Remand Order], the CRB stated

The only claims in contest that were before ALJ Verma when he issued the [February 28, 2006 Compensation Order on Remand], and which were affirmed by the CRB, which were appealed to the DCCA [District of Columbia Court of Appeals] were claims for disability benefits stemming from the alleged psychological injury. The remand order from the CRB to AHD was limited to instructions to further consider the psychological injury claims and to do so under the *McCamey*[v. *DOES*, 947 A.2d 1191 (D.C. 2008)] standard.

Otherwise put, the denial of the claims in connection with the purely physical aspects of the work injury became final, having been denied in the Compensation Order of May 20, 2004, and having been *expressly omitted from the matters appealed to the CRB*.⁴ From and after that point the only remaining issues in this case were those pertaining to psychological claims. Thus, and “finding” by the ALJ in the instant Compensation Order on Remand, that the “physical injuries” are disabling to Respondent, is erroneous as being in conflict with the previously determined law of the case and being beyond the scope of the remand to the Agency from the DCCA and from the CRB to AHD. They are accordingly reversed and stricken [footnote citation to *Thompson v. Avaya*, CRB No. 09-063 (July 23, 2009) omitted].

The ALJ in the instant CO under review has repeated her previous error. The ALJ has recited Claimant’s work duties and physical activities she can no longer perform [citation to CO omitted], recounted results of Dr. Ammerman’s physical examination of her lumbar spine and her ability to return to work [citation to CO omitted] and concluded that Claimant was entitled to disability benefits based on the “physical and mental injuries from the work related injury of September 29, 2000.” Accordingly, these findings are again reversed and stricken.

Thompson v. Avaya, CRB No. 10-170 (May 13, 2013), pp. 4 – 5.

⁴ Claimant’s Application for Review of the May 20, 2004 Compensation Order on Remand was filed June 21, 2004 on Petitioner’s behalf when she was represented by counsel, Sheldon Noel. In the “Claimant’s Application for Review” the first sentence reads “Comes now the claimant, by and through counsel, and requests that the Order on Remand issued on May 20, 2004 by Administrative Law Judge Anand K. Verma be reversed to the extent that it holds that Claimant’s psychological injuries were not medically causally related to her workplace fall of September 29, 2000.” In footnote 1 of the accompanying “Memorandum of Points and Authorities in Support of Claimant’s Application for Review”, Petitioner, through counsel, wrote “This appeal is limited to Claimant’s claim of psychological injury stemming from her fall”. Review of the May 20, 2004 Compensation Order on Remand demonstrates that the presiding ALJ considered and denied claims both for psychological and anatomical disability. Thus, absent a Compensation Order which is sought and issued in which it is determined that there has been some change in Petitioner’s physical condition warranting a modification of the dial of physically based disability claims, all that remains of this case are the psychological disability claims.

Thus, the only issues before the ALJ in the instant appeal were (1) whether Petitioner's evidence demonstrated that she had sustained a psychological injury as a result of the stipulated work injury, by a preponderance of the evidence of record, and if so, (2) what disability resulted from that psychological injury.

As noted before, the ALJ decided the first issue in Petitioner's favor, and Respondent does not contest that finding in this appeal. Thus, this issue is not before us.

As to the second issue, the ALJ noted properly that the burden was upon the Petitioner to establish to what degree the psychological injury was disabling. In so doing, the ALJ considered the reports from the treating psychologist, Marcella Marcey, Ph.D., the deposition of the treating psychiatrist, Dr. Kenneth Sommers, and the deposition of Respondent's IME psychiatrist, Dr. Brian Schulman. Regarding Dr. Sommers, the ALJ recited:

He stated that oftentimes depression and sometimes anxiety will be the result of chronic pain, and when the depression gets worse, it feeds back on the pain, and the perception of the pain gets worse when they are depressed . CE 8, Depo at 11. Dr. Smothers testified it was the physical pain that drove her depression, but now it is her inability, her limitations, and inability to function in a workplace environment. CE 8, Depo at 14. Dr. Smothers acknowledged he had treated Claimant since 2002, and when questioned about her ability to work, Dr. Smothers stated Claimant was severely depressed and had problems with concentration, focus and task completion. CE 8, Depo at 15. He recalled Claimant was admitted to the psychiatric hospital in 2004 due to an increase in suicidal ideation, adding she was not able to work much at that time. CE 8, Depo at 15. Dr. Smothers remarked "In the last three years or so, I said she could attempt to go back to the workplace. She would still need to be in therapy for depression, but I think she could go back based on the management of her depression." CE 8, Depo at 15. Dr. Smothers stated she could have attempted to go back approximately in 2007. CE 8, Depo at 16. Dr. Smothers further explained Claimant could have returned to work in 2009 from a psychiatric standpoint because the Duragesic patch had made such an impact that her mood had moderated some, and she did not have that constant preoccupation with pain. CE 8, Depo at 21. Dr. Smothers concluded his testimony stating "Psychiatrically I would not hold her from work anymore. I would not do that. CE 8, Depo at 23.

...

He [Dr. Smothers] stated it was the latter part of 2008 or 2009 that she could go back to work. CE 8, Depo at 17. ... Therefore, Claimant has established entitlement to temporary total disability benefits for the period October 17, 2001 to December 31, 2009 as a result of the September 29, 2000 work injury.

Thompson v. Avaya, AHD No. 02-180, Compensation Order on Remand (July 3, 2014), pp. 10–11.

We note that the commencement date of the disability finding is the date Petitioner claimed for the beginning of her claim for relief (*see Thompson, id*, p. 8), and that the concluding date thereof is the latest possible date for which Dr. Smothers's testimony could be read to support a claim for psychiatric disability from work. Since that was the only disability issue before the ALJ, the ALJ granted the maximum period of disability for which he had record evidence. Hence, the disability award is supported by substantial evidence and is in accordance with the law.

We note also that the ALJ made no reference to liability for provision of medical care for Petitioner's psychiatric treatment. In light of the clarity of his ruling in Petitioner's favor concerning causal relationship, we discern no reason why the ALJ would have intended to deny the provision of the psychological and psychiatric care sought by Petitioner, particularly in the absence of any dispute having been presented in Respondent's filings in this appeal or any reference to there being any dispute concerning the reasonableness and necessity of Petitioner's psychiatric medical care, and there being nothing in the record in the nature of a utilization review report concerning such reasonableness and necessity. We recognize that the failure to include reference to Respondent's liability therefor to most likely have been an oversight. Nonetheless, we feel it most appropriate that the matter be remanded to the ALJ to permit the entry of an order specifically addressing the provision of that care.

CONCLUSION AND ORDER

The finding that Petitioner's psychological disability is causally related the work injury is not challenged in this appeal and is affirmed. The beginning and ending dates relating to temporary total disability award are supported by substantial evidence, are not challenged in this appeal by Respondent, and are affirmed. The matter is remanded for entry of an order concerning the requested award of medical care for the psychiatric injury.

FOR THE COMPENSATION REVIEW BOARD:



JEFFREY P. RUSSELL
Administrative Appeals Judge

December 12, 2014
DATE