GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services
Labor Standards Bureau

Office of Hearings and Adjudication
COMPENSATION REVIEW BOARD

(202) 671-1394-Voice
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CRB No. 06-07

GWENDOLYN GEDDIE,

Claimant–Petitioner,

v.

KAISER PERMANENTE AND CRAWFORD & COMPANY,

Employer/Carrier–Respondent.

Appeal from a Compensation Order of
Administrative Law Judge Anand K. Verma
AHD No. 05-205, OWC No. 604839

Alan S. Toppelberg, Esquire, for the Petitioner

Joseph C. Tarpine, III, Esquire, for the Respondent

Before E. COOPER BROWN, *Chief Administrative Appeals Judge*, JEFFREY P. RUSSELL, and LINDA F. JORY, *Administrative Appeals Judges*.

JEFFREY P. RUSSELL, *Administrative Appeals Judge*, for the Compensation Review Panel:

DECISION AND ORDER

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board pursuant to D.C. Official Code §§ 32-1521.01 and 32-1522 (2004), 7 DCMR § 230, and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005). [1]

[1]Pursuant to Administrative Policy Issuance No. 05-01, dated February 5, 2005, the Director of the Department of Employment Services realigned the Office of Hearings and Adjudication to include, *inter alia*, establishment of the Compensation Review Board (CRB) in implementation of the District of Columbia Fiscal Year 2005 Budget Support Act of 2004, Title J, the District of Columbia Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, *codified at* D.C. Official Code § 32-1521.01. In accordance with the Director's Directive, 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 Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §§ 32-1501 to 32-1545 (2005), and the District of Columbia Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Code Ann. §§ 1-623.1 to 1-643.7 (2005), including responsibility for administrative appeals filed prior to October 1, 2004, the effective date of the District of Columbia Workers'

BACKGROUND

This appeal follows the issuance of a Compensation Order from the Administrative Hearings Division (AHD) of the Office of Hearings and Adjudication (OHA) in the District of Columbia Department of Employment Services (DOES). In that Compensation Order, which was filed on September 30, 2005, the Administrative Law Judge (ALJ) granted Petitioner's request for temporary total disability from June 26, 2004 through July 3, 2004, and accrued interest thereon, and denied the remainder of the claim for relief of Petitioner, which remaining claims were for temporary total disability from July 4, 2004 through the date of the hearing and continuing thereafter, and for penalties under D.C. Code § 32-1515, for untimely controversion. Petitioner now seeks review of the claims that the ALJ denied in that Compensation Order.

As grounds for this appeal, Petitioner alleges six errors said to be committed by the ALJ: (1) the ALJ erred by finding that Petitioner had "voluntarily limited her income"; (2) the ALJ erred by "finding that [Petitioner's] treatment by Dr. (Alison) Henderson was unauthorized; (3) the ALJ erred by finding " a 'projection' to return to work was sufficient to terminated [sic] benefits"; (4) the ALJ erred by applying the test for compensability of psychological injury claims established under *Dailey v. 3M*, H&AS No. 85-259, OWC No. 066512 (May 19, 1988) to "this claim"; (5) the ALJ erred by "failing to recognize the disability authorized by Dr. [Rosita H.] Dee and Dr. [Benjamin] Andwale"; and (6) the ALJ erred by failing to address the claim for penalties for untimely controversion.

Respondent opposes the appeal, asserting that the ALJ's decision is based upon facts supported by substantial evidence in the record, and proper application of those facts to the law.

ANALYSIS

As an initial matter, 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. *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). "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. Dist. of Columbia Dep't. of Employment Servs.*, 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.

Regarding the first alleged error, there is a specific finding of a "voluntary limitation of income" in the Compensation Order.

Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004.

"Voluntary limitation of income" is a term of art in the workers' compensation jurisprudence of this jurisdiction, and generally describes a situation in which a job has allegedly been identified by an employer that is different from the pre-injury job to which the claimant is either allegedly or by agreement unable to return, due to the effects of the work injury, which job (which may be a modified version of the pre-injury job) was offered to (or identified during vocational rehabilitation) but declined by the claimant (or, not applied for by the claimant). "Voluntary limitation of income" defenses, while a subset of nature and extent of disability analysis, generally are concerned with whether the alternative job was "suitable", and involve concerns as to whether it is within a claimant's physical and vocational capacity, and whether the alternative job would have paid the same or less than the pre-injury job. See, D.C. Code § 32-1508 (3)(v)(iii).

In that this case has no such aspect, it is assumed that the ALJ's usage was meant only to summarize his general determination that Petitioner's physical injury had resolved by July 3, 2004, rendering her able to return to her pre-injury job without restriction. Since there is no evidence that such issues were raised in this case, technically it may be true that the ALJ was in error in referring to and finding a "voluntary limitation of income" in this matter, on this record. However, it is apparent that the ALJ's reference to such "limitation" was apparently merely a statement that in the ALJ's view, Petitioner could have returned to work in her pre-injury job, and that since she did not, she limited her income by that voluntary action. Therefore, this claim of error will not be addressed, except to the extent that it is subsumed within the allegations of error concerning the ALJ's findings that Petitioner either suffered from no disability whatever, or that some aspect of her disabling condition (the claimed psychological injuries) are nonetheless non-compensable for other reasons under the Act.

Regarding the allegation that the ALJ erred by "finding that [Petitioner's] treatment by Dr. (Alison) Henderson was unauthorized", reading the Compensation Order reveals that this "finding", found on page 3, is ambiguous, and does not appear to have been of any legal significance in connection with the outcome of the claim. Like "voluntary limitation of income", "unauthorized change of physician" cases are a special class of claims in which an employer seeks to avoid liability for payment of medical charges, because they were incurred from a second physician following selection by a claimant of an initial treating physician, and were incurred without authorization from the employer or approval of the Office of Workers' Compensation (OWC). See, D.C. Code § 32-1507 (b)(4).

However, we read the ALJ's usage of "unauthorized treatment" to mean that, despite Dr. Henderson, a chiropractor, making a recommendation that Petitioner receive a number of therapeutic treatments (spinal manipulation, ultrasound, exercise, electrical stimulation, ice and heat treatments, massage and acupressure), these recommendations were not approved by Respondent (e.g., they were not "authorized"), and presumably therefore, Petitioner did not obtain them (or, she may have obtained them but they were not paid for by Respondent). We do not read this Compensation Order as having denied payment for these treatments due to there having been an "unauthorized change of physicians" under the Act. Rather, we read the phrase as a mere statement by the ALJ of the fact that Respondent has not provided the recommended care. Thus, the specific issue of "unauthorized medical care", as it is generally understood in this jurisdiction, is not

presented in this case, and will not be addressed, except to the extent that Respondent's obligation for such care may be related to other issues that are before us and which will be addressed below.[2]

The next alleged error is that the ALJ erred by finding "a 'projection' to return to work was sufficient to terminated [sic] benefits". Review of the Compensation Order does not reveal any such finding or ruling by the ALJ. Rather, this complaint appears to be based upon the ALJ having referred in the Compensation Order, on page 3, to the fact, supported in the record, that Petitioner's initial treating physician, Dr. Hillary Woodson Reeves, expressed the opinion that, based upon his examination of Petitioner, that in the absence of an abnormal MRI scan, Petitioner could return to work. This is not a "projection" of a future change in Petitioner's condition, as suggested by the phraseology of Petitioner's counsel in the Application for Review. Rather, it is a statement that, assuming there are no abnormalities in the brain that would be revealed by an MRI, there is nothing to preclude a return to work. The fact that the MRI study itself was not carried out until after the expression by the physician of the effect of a negative MRI, does not make it a projection, except to the extent that it might be interpreted to be a "projection" of contingent future *incapacity*, should the test be positive (which it was not). Thus, in that the allegation of error mischaracterizes what the ALJ actually did in this case, it is rejected.

Regarding the complaint that the ALJ erred by applying the test for compensability of psychological injury claims established under *Dailey*, *supra*, to "this claim", the nature of the complaint is not easy to discern. Petitioner asserts in the argument supporting this claim as follows:

> Judge Verma found that an "average worker" in Dailey would not have suffered the psychological injury resulting from physical trauma which resolved on July 3, 2004. There are two major errors in this finding. One, there is nothing "average" about claimant and this major omission is the problem here. Second there was no evidence of any kind, from any of the treating providers that claimant's problems were resolved on July 3, 2004.

We do not know what to make of the argument following the word "one", and perceive no cognizable legal complaint. The *Dailey* test does not concern itself with whether a particular claimant is in any sense "average". Rather, it asks whether, in an objective sense, the psychological injury claimed to have been sustained by a specific claimant is one which an "average" worker of "normal" sensitivities would be expected to have sustained under the same or similar circumstances. Regarding the "second" assertion, Petitioner is incorrect as a matter of record: as previously discussed, Dr. Reeves made an assessment that, assuming the absence of an identifiable abnormality in a brain MRI, Petitioner could return to work. The MRI was not performed and interpreted until July 3, 2004, and it was normal. This is evidence that Petitioner was capable of returning to her pre-injury job upon confirmation of a negative MRI study, hence, it is evidence that her disability had "resolved" by that date.

Petitioner goes on to assert error in the application of the Dailey test to these facts, by arguing that "There is no evidence of any kind presented that the claimant was 'predisposed to psychic injury'". Petitioner then goes on to discuss the fact that there was, in fact, evidence that Petitioner had

[2] We hope that in future, the ALJ will exercise more care in avoiding usages that lead to such potential double meanings and confusion.

previously suffered from and been treated for emotional sequalae following the death of her husband, but argues that such is not evidence of a "predisposition".

This argument represents a misunderstanding of the Dailey test, which requires consideration of whether an "average" worker of "normal" sensitivities (meaning one who is not predisposed to suffer a psychological injury) would be expected to suffer the same psychological injury as that claimed to have been suffered by a specific claimant seeking compensation for a psychological injury. It is not a question of whether the specific claimant is shown to be predisposed; rather, such predisposition is irrelevant[3] in the application of the test, in that the test is one of "potentiality": that is, the test is an inquiry into whether a given set of circumstances or causes has the "potential" in an objective sense to cause the alleged psychological injury. See, *West v. Washington Hospital Center*, CRB (Dir. Dkt.) No. 99-97 (Decision and Order August 2005).

However, it does not appear that the ALJ differentiated with any specificity which of the symptoms of which Petitioner complained were covered by the rubric "psychological" injuries. We note, for example, that Dr. Rosita Dee, identified on her letterhead as a neurologist and a "neurophysiologist", has evaluated and treated Petitioner on at least five occasions, and that in the course of her treatment of Petitioner, she identified memory loss, confusion, concentration deficits, and speech difficulties as symptoms. CE 4, reports of October 6, 2004, December 1, 2004, January 5, 2005, and February 1, 2005. Similarly, we note that in his second narrative report, dated November 4, 2004, Dr. Reeves states that an unnamed neurologist at Kaiser Permanente had diagnosed "post traumatic syndrome", manifesting as headaches, confusion and dizziness, "superimposed" on "anxiety and insomnia". CE 1, Report of November 4, 2004. This follows his initial report of August 11, 2004, wherein he notes the presence of memory loss and confusion secondary to Petitioner's head injury. CE 2.

These conditions do not appear, at least on this record, to necessarily be "psychological" injuries; rather, they were diagnosed and treated by two neurologists (the Kaiser Permanente neurologist and Dr. Dee) as physical manifestations of a traumatic head injury, prior to Petitioner's being referred for psychiatric evaluation, which referral did not come until Dr. Dee's January 5, 2005 recommendation. Accordingly, application of *Dailey* to these particular symptoms may not be appropriate or in accordance with the law. To the extent that these complaints and conditions (1) are genuine, (2) are physical manifestations of a traumatic head injury, and (3) are contributory to Petitioner's ceasing to engage in her pre-injury work as a pharmacist with supervisory responsibility over 17 pharmacy technicians, it would be error to deny compensation based upon a failure of the Dailey test.

Thus, while Petitioner's psychiatrist noted the presence of depression and anxiety, and diagnosed an "acute stress disorder", all of which are psychological in nature and thus subject to *Dailey* analysis,

[3] Such a predisposition may become relevant if the given stressors or causes are found to be sufficient to pass the Dailey test, and the inquiry then becomes specific to the particular claimant's condition. That is, if a given set of claimed causes or stressors does indeed have the potential to cause a similar psychological reaction in a non-predisposed individual, the existence of such a predisposition in a particular case may aid in establishing that a particular claimant did, indeed, suffer from the claimed psychological injury. Conversely, even where a given set of circumstances passes the Dailey test for *potential* to cause a given psychological condition, a showing of a pre-existing psychological diagnosis or condition may be relevant in assessing whether the complained-of psychological condition was *in fact* caused (or aggravated) by the stressors.

the question remains whether the claimed memory loss, concentration difficulties, confusion and cognitive difficulties (i.e., math problem solving issues) have been demonstrated as a factual matter, are independent of the diagnosed stress disorder, and if so contribute to Petitioner's failure to continue in her employment as a pharmacist. In that the Compensation Order fails to address whether these conditions are genuine, whether they arose as physical manifestations of the head trauma without regard to any psychological issues, and whether they contribute to Petitioner's ceasing to be employed as a pharmacist, the denial of compensation must be reversed and the matter remanded for additional findings of fact and conclusions of law[4]. Further, because on remand the ALJ may determine that these conditions are non-psychological, are genuine and are contributory to Petitioner's failure to continue in her employment, and because the initial disallowance of this claim may have been based upon an improper application of *Dailey* to these non-psychological conditions, we vacate the original finding that *Dailey* operates as a bar to recovery of any or all of the claims in this case, and direct that the ALJ reconsider the application of the Dailey test in light of the new findings concerning Petitioner's complaints.

The question of whether the ALJ erred by "failing to recognize the disability authorized by Dr. [Rosita H.] Dee" will not now be addressed, in that the reconsideration of this claim as directed herein may require a re-assessment of Dr. Dee's opinions by the ALJ, should it be determined that the non-psychological complaints are indeed genuine and contributory to Petitioner's vocational status.

Lastly, review of the Compensation Order reveals that the ALJ never addressed the claim for penalties. Thus, Petitioner's assertion that the ALJ erred by failing to address the claim for penalties for untimely controversion is well founded. In that a party is entitled to have each material contested claim considered and ruled upon, this failure to address the question of penalties is not in accordance with the law. On remand, the ALJ shall address the claim based upon the record.

CONCLUSION

The Compensation Order of September 30, 2005, in which the ALJ failed to address the claim for penalties for untimely controversion, and in which the ALJ applied the test for compensability for psychological injuries under *Dailey* to non-psychological injury claims, is not in accordance with the law.

[4] We recognize that the ALJ has indicated a certain skepticism about whether Petitioner has an ongoing physical condition resulting from the head injury. See, for example, Compensation Order, page 12. While we express no view as to such skepticism, and the ALJ remains free to assess the conditions presented on remand with such skepticism, the ALJ's discussion of the subject reveals a failure to distinguish psychological from non-psychological symptoms, with the ALJ weaving together "closed head injury", "psychological malady", "headache, malaise, fatigue and possibly depression", "visual search and visual scanning tasks", a past history of depression and anxiety, and more, and makes understanding exactly what he determined to be Petitioner's condition, her job requirements, and her capacity very unclear.

ORDER

The denial of temporary total disability benefits and causally related medical care contained in the Compensation Order of September 30, 2005 is hereby VACATED; the matter is REMANDED for further findings of fact and conclusions of law consistent with the aforegoing Decision and Order.

FOR THE COMPENSATION REVIEW BOARD:

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JEFFREY P. RUSSELL
Administrative Appeals Judge

December 13, 2005
DATE