

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA M. MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 11-099

EVELYN M. LYLES,
Claimant–Respondent,

v.

D.C. DEPARTMENT OF MENTAL HEALTH,
Employer–Petitioner.

Appeal from a Compensation Order on Remand by
The Honorable Heather C. Leslie
AHD No. PBL09-070A, DCP No. 30090343260-001

Pamela Smith, Esquire, for the Petitioner
Jason W. Shoemaker, Esquire, for the Respondent

Before MELISSA LIN JONES, LAWRENCE D. TARR, and JEFFREY P. RUSSELL,¹ *Administrative Appeals Judges*.

MELISSA LIN JONES for the Compensation Review Board; JEFFREY P. RUSSELL dissenting.

DECISION AND REMAND ORDER

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board pursuant to D.C. Code §1-623.28, 7 DCMR §118, and the Department of Employment Services Director's Administrative Policy Issuance No. 05-01 (February 5, 2005).

FACTS OF RECORD AND PROCEDURAL HISTORY

On April 16, 2009, Ms. Evelyn M. Lyles filed a claim for emotional injuries allegedly sustained as a result of work-related stress on January 22, 2009. The Disability Compensation Program² denied Ms. Lyles' claim for disability compensation benefits.

¹ Judge Russell has been appointed by the Director of the Department of Employment Services as a temporary Compensation Review Board ("CRB") member pursuant to Administrative Policy Issuance No. 11-01 (June 23, 2011).

² Effective October 1, 2010, the Disability Compensation Program's name was changed to the Public Sector Workers' Compensation Program.

Administrative Law Judge (“ALJ”) Belva D. Newsome presided over a formal hearing to adjudicate Ms. Lyles’ entitlement to wage loss and medical benefits. On October 21, 2010, ALJ Heather C. Leslie issued a Show Cause Order directing the parties to show cause why the case could not be assigned to another ALJ for resolution; neither party responded to the Show Cause Order, and on November 10, 2010, ALJ Leslie issued a Compensation Order denying Ms. Lyles’ claim for relief because the events alleged were based upon Ms. Lyles’ “distorted belief system.”³

On appeal, after acknowledging the “integral function of the fact finder” in assessing credibility, the CRB vacated the finding of no causal relationship, reversed the denial of disability compensation, and remanded the matter for application of the proper analytic framework to the issue of causation:

Thus, we agree with the claimant in this appeal that, in attributing the “current disabling condition” to a reaction to the events in a “distorted belief system”, the ALJ has impermissibly failed to adhere to the limited options available in the causal relationship inquiry: are the events or conditions alleged to be the cause of the injury real, on the one hand, or figments of the imagination on the other. If they are real, then the ALJ must determine whether they caused or contributed (by aggravation) to the current, and stipulated, psychological injury.^[4]

ALJ Leslie issued a Compensation Order on Remand on August 30, 2011. This time, Ms. Lyles’ claim for relief was granted, at least in part, because “[a]s with the first Compensation Order, the Undersigned will treat the Claimant’s testimony as if it was credible, meaning that the Claimant’s testimony was sincere and truthful.”⁵ Then, having found Ms. Lyles’ “testimony sincere and credible, [the ALJ found] that the psychological injury arose out of and in the course of her employment.”⁶ Finally, the ALJ applied the presumption of compensability to the issue of whether or not Ms. Lyles’ alleged injury “could have been caused or aggravated by the work injury.”⁷

Now, on appeal to the CRB for the second time, the Department of Mental Health (“DMH”) asserts reversible error in ALJ Leslie’s making the credibility determination without having observed Ms. Lyles’ live testimony. DMH also asserts the August 30, 2011 Compensation Order on Remand was issued prematurely because the time period for requesting reconsideration of the August 23, 2011 Decision and Remand Order had not expired before issuance of the Compensation Order on Remand. For these reasons, DMH requests we vacate the August 30, 2011 Compensation Order on Remand.

³ *Lyles v. D.C. Department of Employment Services*, AHD No. PBL09-070A, DCP No. 30090343260-0001 (November 10, 2010).

⁴ *Lyles v. D.C. Department of Employment Services*, CRB No. 10-200, AHD No. PBL09-070A, DCP No. 30090343260-0001 (August 23, 2011).

⁵ *Id.*

⁶ *Lyles v. D.C. Department of Employment Services*, AHD No. PBL09-070A, DCP No. 30090343260-0001 (August 30, 2011).

⁷ *Id.*

On the other hand, Ms. Lyles asserts ALJ Leslie's credibility determinations are based upon unchallenged testimony and are appropriate based upon the ALJ's knowledge of the record. Ms. Lyles also asserts the issuance of the Compensation Order on Remand was not premature, particularly given that DMH never filed any request for reconsideration with the CRB; even if issuance was premature, Ms. Lyles contends it is harmless error. Ms. Lyles requests we affirm the Compensation Order on Remand.

ISSUES ON APPEAL

1. Is ALJ Leslie's credibility determination supported by substantial evidence in the record and in accordance with the law?

2. Was issuance of the August 30, 2011 Compensation Order on Remand prior to the expiration of the time period afforded the parties for requesting reconsideration of a Decision and Remand Order reversible error?

ANALYSIS⁸

Ms. Lyles alleges that as a result of work-related stress on January 22, 2009, she sustained emotional injuries. In other words, Mr. Lyles alleges she sustained a mental-mental claim.⁹

DMH does not dispute that the test for assessing the compensability of mental-mental claims as set forth in *Ramey* applies to this matter. DMH contends ALJ Leslie erred in making a credibility determination in a case because she did not conduct the formal hearing.

The *Ramey* test states, in part:

[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 [administrative law judge], 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.^[10]

⁸ The scope of review by the CRB is limited to making a determination as to whether the factual findings of the appealed Compensation Order on Remand are based upon substantial evidence in the record and whether the legal conclusions drawn from those facts are in accordance with applicable law. Section 32-1521.01(d)(2)(A) of the Act. Consistent with this standard of review, the CRB is constrained to uphold a Compensation Order on Remand that is supported by substantial evidence, even if there also is contained within the record under review substantial evidence to support a contrary conclusion and even if the CRB might have reached a contrary conclusion. *Marriott International v. DOES*, 834 A.2d 882, 885 (D.C. 2003).

⁹ In a mental-mental claim, the injured worker alleges an emotionally-traumatic event or stressor at work caused a mental injury. See *Ramey v. DOES*, 997 A.2d 694, 696 (D.C. 2010) (workplace embarrassment allegedly led to post-traumatic stress disorder).

¹⁰ *Ramey v. Potomac Electric Power Company*, CRB No. 06-38(R), AHD No. 05-318, OWC No. 576531 (July 24, 2008) (Emphasis added.)

Clearly credibility is paramount in a mental-mental case; therefore, we turn our attention to the ALJ's credibility findings.

In the Compensation Order, the ALJ ruled

[f]irst, the CRB has mandated that in psychological injuries the Undersigned make a credibility determination. The Undersigned was not the hearing ALJ, as noted above, and did not directly observe the demeanor of the Claimant to aid in assessing credibility. That being said, for purposes of this Compensation Order as well as taking into [considering] the humanitarian purposes of the Act, the Undersigned will treat the Claimant's testimony as if it was credible, meaning that the Claimant's testimony was sincere and truthful.^[11]

Nonetheless, in that same Compensation Order, the ALJ went on to determine that "the workplace conditions that the Claimant complains of were not actual conditions that existed"¹² and reconciled these two rulings by finding Ms. Lyles believed her perception of persecution.¹³

In the Compensation Order on Remand, the ALJ ruled, "As with the first Compensation Order, the Undersigned will treat the Claimant's testimony as if it was credible, meaning that the Claimant's testimony was sincere and truthful."¹⁴ The Compensation Order on Remand is devoid of any justification for this treatment, and the ALJ's conditional treatment of Ms. Lyles' testimony is not actually a finding that the testimony is credible.

This failure is compounded by the use of the terms "sincere" and "truthful." Because the ALJ did not preside over the formal hearing, the ALJ lacked the information necessary to assess the sincerity of Ms. Lyles' testimony. Furthermore, as to truthfulness, the treatment of Ms. Lyles' testimony must be based upon a review of the record; however, there is no explanation as to how the record supports the determination that Ms. Lyles' testimony is truthful, and without any such analysis, a blanket statement of credibility is not supported by substantial evidence.¹⁵

Although in some circumstances an ALJ may be able to make a credibility determination without having presided over the hearing (especially when the parties do not object to the case being

¹¹ *Lyles v. D.C. Department of Mental Health*, AHD No. PBL09-070A, DCP No. 30090343260-0001 (November 10, 2010), p.6 (Emphasis added.)

¹² *Id.*

¹³ *Id.* at p. 7.

¹⁴ *Lyles v. D.C. Department of Mental Health*, AHD No. PBL09-070A, DCP No. 30090343260-0001 (August 30, 2011), p.4. (Emphasis added.)

¹⁵ Although an ALJ's credibility determinations often are entitled to deference, *Dell v. DOES*, 499 A.2d 102, 106 (D.C. 1985) credibility determinations, like all other findings of fact, must be supported by substantial evidence in the record when reviewed as a whole. See *Davis v. Western Union Telegraph*, Dir. Dkt. 88-84, H&AS No. 87-751, OWC No. 098216 (March 4, 1992).

reassigned after a Show Cause Order has issued),¹⁶ the ALJ's declaration that "[t]his testimony is unchallenged by the Employer. Having found her testimony sincere and credible, I find that the psychological injury arose out of and in the course of her employment"¹⁷ is insufficient. The mere fact that testimony is not contradicted does not make it credible:

[a]lthough generally, uncontradicted testimony "cannot be disregarded or ignored by judge or jury," that principle can be "trumped by any negative impression that the trier of fact may have on a witness' demeanor." *Belcon, Inc. v. D.C. Water & Sewer Auth.*, 826 A.2d 380, 386-87 (D.C. 2003). Further, we cautioned in *Belcon* that "even uncontradicted testimony need not and should not be credited if the witness comes across to the trier of fact as a liar or charlatan, or as having a deficient and unreliable memory." *Id.* at 387 n.9. "Where men [or women] of reason and fairness may entertain differing views as to the truth of the testimony, whether it be uncontradicted, uncontroverted or even undisputed, evidence of such a character is for the [trier of fact]." *Id.* (quoting *Ferdinand v. Agricultural Ins. Co.*, 22 N.J. 482, 126 A.2d 323, 329 (N.J. 1956)). In other contexts, we have said that the trier of fact "need not believe the testimony of a witness even though that witness' testimony is uncontradicted." *Ruffin v. United States*, 524 A.2d 685, 695 (D.C. 1987), cert. denied, 486 U.S. 1057, 100 L. Ed. 2d 927, 108 S. Ct. 2827 (1988). Other jurisdictions have announced a similar rule in the workers' compensation context. Thus, the trier of fact need not accept even undisputed evidence, if there is some reasonable justification for rejecting it.^{18]}

The ALJ never made a credibility determination; she merely assumed credibility. *Ramey* requires an actual credibility determination, not the assumption of one. Thus, in the context of this mental-mental case where credibility is crucial, the Compensation Order on Remand must be remanded for an appropriate credibility finding as required by *Ramey*.

Turning to DMH's argument that issuance of the Compensation Order on Remand was premature, although 7 DCMR §268 affords the parties ten calendar days to file a request for reconsideration of an order issued by the CRB, there is nothing that prohibits an ALJ from issuing a Compensation Order on Remand expeditiously. More importantly, DMH was never precluded from requesting reconsideration of the August 23, 2011 Decision and Remand Order.

CONCLUSION AND ORDER

Although issuance of the August 30, 2011 Compensation Order on Remand prior to the expiration of the time period allowed for requesting reconsideration of a Decision and Remand Order is not reversible error, the credibility finding in the Compensation Order on Remand is not supported by substantial evidence and is not in accordance with the law. The Compensation Order on Remand is

¹⁶ *Andrews v. D.C. Public Schools*, ECAB No. 94-23 (August 12, 1997).

¹⁷ *Lyles v. D.C. Department of Mental Health*, AHD No. PBL09-070A, DCP No. 30090343260-0001 (August 30, 2011), p. 4.

¹⁸ *Georgetown University v. DOES*, 862 A.2d 387, 392 (D.C. 2004).

VACATED, and this matter is remanded for further proceedings consistent with this Decision and Remand Order.

FOR THE COMPENSATION REVIEW BOARD:

MELISSA LIN JONES
Administrative Appeals Judge

June 20, 2012
Date

JEFFREY P. RUSSELL dissenting.

I concur with the rejection of DMH's argument concerning the issuance of a Compensation Order on Remand. Expeditious handling of remands is to be encouraged, and DMH has not shown how an expeditious handling of the matter prejudiced it in any way. Regarding the credibility issue, I must respectfully dissent.

DMH argues that the ALJ committed reversible error by rendering a credibility determination without having observed the witness-claimant. Citing *Santos v. DOES*, 536 A.2d 1085 (D.C. 1988), *Combs v. DOES*, 983 A.2d 1004 (D.C. 2009) and *Hartgrove v. Aramark*, CRB No. 09-133 (August 16, 2011) it asserts that it is not only error for a fact finder who has not observed the demeanor of a witness to deem that witness's testimony credible, but that the error compels reversal.

First, while some of the language in the cited cases is very broad and could if read absolutely literally be interpreted to support DMH's view, none of those cases stand for the proposition argued here by DMH. That is, in none of the cited cases did the Court or the CRB hold that it is error to make a credibility determination based upon review of the record. Indeed, each case made clear that other matters beyond demeanor can go into a credibility determination, including the testimony's rationality, internal consistency, and consistency with the other evidence. This is the full quote from *Hartgrove*:

In this jurisdiction, it is well-settled that the credibility findings of an ALJ are entitled to great weight. See *Murray v. D.C. Dept. of Employment Services*, 765 A.2d 980, 984-985 (D.C. 2001) citing *Dell v. D.C. Dept. of Employment Services*, 499 A.2d 102, 106 (D.C. 1985). The credibility findings must be predicated upon an ALJ's first hand observation of the witness's demeanor during the formal hearing, see *Santos v. D.C. Department of Employment Services*, 536 A.2d 1085, 1089 (D.C. 1988), as well as an evaluation of the witness's testimony in view of its rationality, internal consistency and the way it hangs together with other evidence of the record. See *Cohen v. A & A Hardware*, Dir. Dkt. No. 88-93, H&AS No. 86-272A, OWC No. 0075694 (July 2, 1990). In addition, the credibility finding, as with any other finding in a compensation order, must be supported by substantial evidence in the record and likewise must be set aside if not so supported. See *McDonnell v. Washington Gas*

Light Co., CRB No. 06-78, OHA No. 01-186B, OWC No. 283130 (December 11, 2006); *Washington Vista Hotel v. D.C. Dept. of Employment Services*, 721 A.2d 574, 578 (D.C. 1998).

These cases stand for the proposition that reviewing authorities should in proper circumstances give deference to the fact-finder's credibility determinations in part because of the assessment of demeanor is helpful in that exercise. None stand for the proposition that the ability to assess credibility is dependent upon the opportunity to assess demeanor, and they all include reference to the fact that credibility determinations involve more than assessment of demeanor. A credibility determination that is based in part upon assessment of demeanor may be entitled to greater weight on review than one that is not, but that does not mean that such a determination is not entitled to some level of deference, and it certainly does not mean that to make such a determination is error by the ALJ.

"Credibility" is "[T]he quality that makes something (as a witness or some evidence) worthy of belief". BLACK'S LAW DICTIONARY, 7TH EDITION, Bryan A. Garner, Editor in Chief, West Publishing Group 1999. Credibility determinations are sometimes made without there being any demeanor considerations at all, such as in the evaluation of medical opinions contained in reports. See, *Torres v. Westin Hotels*, CRB No. 09-072 (May 3, 2010); *McCormick v. Children's Nat'l Medical Center*, CRB No. 09-016 (January 2, 2009); *Whitesides v. Sonnenshein, Nath & Rosenthal*, CRB No. 07-144 (October 4, 2007).

I also note that, in the prior appeal, the CRB undertook an analysis of the ALJ's handling of the "credibility" of Ms. Lyles, and specifically found that her finding that the testimony was "credible" in the sense that it was accurate and supported by substantial evidence in the record, that none of the events about which she testified were subject to dispute or refutation by DMH, and that many were corroborated by documents elsewhere in the record. See, *Lyles v. D.C. D.M.H.*, CRB No. 10-200 (August 23, 2011), pages 8 – 9. The CRB noted then, and I note now, that DMH does not attack or challenge any finding of fact relating to the happening of the events underlying this claim.

Further, I note that despite DMH's contention that the ALJ's statements concerning Ms. Lyles's credibility constituted legal error, there is no claim of there having been any prejudice. Indeed, given that DMH failed to challenge the factual underpinnings of Ms. Lyles's testimony *at the formal hearing or in the prior appeal*, I hardly see how such a claim of prejudice could be taken seriously at this late date. Even if we were to find the ALJ to have been in error, it would nevertheless appear to be harmless.

In any event, I detect no error in the Compensation Order on Remand, which is in all respects supported by substantial evidence and is in accordance with the law. I would affirm.

JEFFREY P. RUSSELL
Administrative Law Judge