

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

**Office of Hearings and Adjudication**  
**COMPENSATION REVIEW BOARD**



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**CRB No. 06-084**

**MATILDA DAVIS,**

**Claimant–Petitioner,**

**v.**

**D. C. DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS,**

**Employer–Respondent.**

Appeal from a Compensation Order on Remand of  
Administrative Law Judge Fred D. Carney, Jr.  
OHA/AHD No. PBL 01-053, DCP No. 013064

Matilda S. Davis, *pro se* Claimant-Petitioner<sup>1</sup>

Kevin J. Turner, Esq., for Employer-Respondent

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

E. COOPER BROWN, *Chief Administrative Appeals Judge*, on behalf of the Review Panel:

## **DECISION AND ORDER**

### JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board pursuant to D.C. Official Code §1-623.28, § 32-1521.01, 7 DCMR §118, and DOES Director's Directive Administrative Policy Issuance No. 05-01 (Feb. 5, 2005).<sup>2</sup>

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<sup>1</sup> Petitioner was represented by Belva Newsome, Esquire at the formal hearing which led to the original Compensation Order and then to the Compensation Order on Remand under review herein, but is representing herself in connection with this appeal.

<sup>2</sup> 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 D.C. Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, 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

## BACKGROUND

This appeal follows the issuance on August 15, 2006 of a Compensation Order on Remand (hereinafter the Compensation Order) by the Administrative Hearings Division (AHD), Office of Hearings and Adjudication (OHA), that had rejected Claimant-Petitioner's (Petitioner's) claim for disability benefits under the D.C. Government Comprehensive Merits Personnel Act of 1978, as amended, D.C. Code § 1-623.1 *et seq.* The Compensation Order followed issuance by the Director of the Department of Employment Services of a Decision and Order dated April 30, 2004, which had reversed and remanded a prior compensation order that had initially rejected Petitioner's claim as untimely filed.

In support of her application for review to the Compensation Review Board (CRB), Petitioner filed a letter and an attached "Points and Authorities" seeking reversal of the Compensation Order and requesting that the CRB award Petitioner benefits under the Act for her claimed psychological condition.

In support of affirmation of the Compensation Order, Employer-Respondent (Respondent) asserts that the decision of the ALJ properly denied the claim pursuant to *Dailey v. 3M Co., et al.*, H&AS No. 85-259 (May 19, 1998).

## ANALYSIS

As an initial matter, the scope of review by the Compensation Review Board (CRB) and this Compensation 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. Comprehensive Merit Personnel Act of 1978, as amended, D.C. Official Code § 1-623.01, *et seq.*, at § 1-623.28(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. D.C. Department of Employment Services*, 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.

Turning to the case under review herein, the Compensation Order herein appealed denied Petitioner's claim for benefits in connection with a psychiatric injury or condition alleged by

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of workers' and disability compensation claims arising under the D.C. Workers' Compensation Act of 1979, as amended, D.C. Official Code § 32-1501 *et seq.*, and the D.C. Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Official Code § 1-623.1 *et seq.*, including responsibility for administrative appeals filed prior to October 1, 2004, the effective date of the D.C. Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004.

Petitioner to have been caused by her employment with Respondent. The presiding administrative law judge rejected Petitioner's claim on the grounds that she had failed to adduce sufficient evidence to conclude that her claimed injury met the special test for compensability of such claims as enunciated in *Dailey v. 3M Co., et al.*, H&AS No. 85-259 (May 19, 1998).<sup>3</sup> More specifically, the ALJ held that Petitioner had failed to objectively establish that the conditions of her employment would have caused similar emotional injury in an average worker not significantly predisposed to the psychological injury claimed, a necessary showing under the *Dailey* test.

Petitioner's application for review and supporting materials are lengthy, and it is difficult to summarize precisely the nature of her allegations of error. Nevertheless, Petitioner's allegations of error have been summarized, below, as best as can be ascertained. As demonstrated, they charge that the ALJ either failed in the Compensation Order to discuss evidence that Petitioner felt was significant, or which Petitioner contends the ALJ failed to adequately consider, or interpreted differently than does Petitioner. The allegations of error that we can discern are as follows:

1. Petitioner's supervisor, Chief Judge Savannah Little, and/or the Deputy Director of DCRA,Carolynn Fuller, required Petitioner to obtain a signature from a psychologist before granting annual leave;
2. Her supervisor would not permit a return to work from leave taken pursuant to the Family Medical Leave Act (FMLA) without a certification from her psychologist that she could so return;
3. The ALJ failed to accept into the record the evidence that the Agency's denial of advanced leave was premised upon the same medical report that the Agency used to grant FMLA leave;
4. The ALJ granted Respondent's counsel's request for an early adjournment on the first day of the two day formal hearing;
5. The ALJ considered the contents of EE 6, a document in which Petitioner's supervisor alleged certain "inexcusable neglect" and sought a 15 day suspension, while the Director of the Agency failed to find that Petitioner's neglect was "inexcusable", and ordered a five day suspension;
6. Respondent did not call Petitioner's supervisor to testify, despite the supervisor being listed as a witness;
7. The ALJ denied a request from Petitioner's counsel to introduce unspecified "rebuttal" evidence, and directed the attorney to file a Motion to Re-Open the record;<sup>4</sup>

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<sup>3</sup> Sometimes referred to as the "objective test" for psychological injuries, the *Dailey* test has been reviewed and approved as being reasonable interpretations of both the public and private sector acts by the D.C. Court of Appeals. See *Spartin v. D.C. Dep't of Employment Services*, 584 A.2d 564 (D.C. 1990) (for private sector cases under the D.C. Workers' Compensation Act); and *McCamey v. D.C. Dep't of Employment Services*, 886 A.2d 543 (D.C. 2005) (for public sector cases). While the Court's decision in *McCamey* was subsequently vacated in *McCamey v. Dist. of Columbia Dep't. of Employment Serv's*, 896 A.2d 191 (D.C. 2006), for the purpose of reconsidering the continuing vitality of the *Dailey* rule in all cases of psychiatric injury claims, there was no indication that the vacating of that order had anything to do with its application to public sector cases particularly.

<sup>4</sup> Petitioner does not state whether her counsel did in fact file such a motion.

8. In a pre-hearing procedure, Petitioner's proposed exhibit list was pared from 70 exhibits to 20;<sup>5</sup>
9. The ALJ did not accord her physicians the benefit of the "treating physician preference" rule;
10. The ALJ did not find that Petitioner lacked credibility, yet he accepted the supervisor's description of the facts surrounding the suspension rather than Petitioner's; also, Petitioner appears to assert that the ALJ erred by accepting other evidence to reach some factual conclusion that is contrary to her own testimony;
11. The ALJ failed to discuss her prior year personnel review in which she obtained an "Outstanding" performance rating;
12. The ALJ failed to address her claim that her job duties had been changed such that she was called upon to perform tasks that she deemed below her service grade (data entry) or outside her working obligations (supervising other staff);
13. The Agency where she worked was "out of control" and "always in a crunch", yet the ALJ never discussed these facts.

To the extent that Petitioner's various assertions of error challenge the ALJ's findings of fact, we note that the standard governing the CRB's review of the lower tribunal's findings are, as previously noted, well established and limited to a determination of whether the ALJ's factual findings are supported by substantial evidence in the record. As the Court of Appeals explained in *Washington Vista Hotel v. D. C. Department of Empl. Servs.*, 721 A.2d 574, 578 (D.C. 1998):

The standards governing the Director's review [now the CRB's review] of a hearing examiner's decision are well established. The Director may not consider the evidence *de novo* and make factual findings different from those of the examiner; rather, she may reverse the examiner's decision only when it is not supported by substantial evidence. *E.g.*, *King v. District of Columbia Department of Employment Services*, 560 A.2d 1067, 1072 (D.C. 1989); *Dell v. Department of Employment Services*, 499 A.2d 102, 107 (D.C. 1985). The Director is bound by the examiner's findings "even though the [Director] may have reached a contrary result based on an independent review of the record." *Id.* at 108.

As the Court further explained in *Gary v. D. C. Dep't of Empl. Servs.*, 723 A.2d 1205, 1209 (D.C. 1998):

[T]he relevant inquiry is whether the examiner's decision was supported by substantial evidence, not whether an alternative decision might also have been supported by substantial evidence. This court has frequently held that "where there is substantial evidence to support the Director's findings . . . then the mere existence of substantial evidence contrary to that finding does not allow this court to substitute its judgment for that of the Director." *McEvily, supra*, 500 A.2d at 1024

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<sup>5</sup> No specific description of the 50 exhibits removed from the list is given. Nor is there any indication in the record that Petitioner, or Petitioner's counsel interposed any objection to this procedure at the time.

n.3 (citations omitted); accord, e.g., *Upper Georgia Avenue Planning Committee v. Alcoholic Beverage Control Board*, 500 A.2d 987, 992 (D.C. 1985) ("we must uphold the Board's decision so long as it is supported by substantial evidence, even though there may also be substantial evidence to support a contrary decision").

In light of these principles, we can discern no factual findings of the ALJ that are not supported by substantial evidence of record. Of the foregoing, the assertions of error that seem to be most significant relate to the ALJ's acceptance of the supervisor's charges contained in EE 6, which were contradicted by Petitioner to varying degrees in her testimony. However, the Compensation Order contains no findings of fact to the effect that the supervisor's characterizations of Petitioner's actions at work were entirely accurate. Rather, the ALJ merely found that the supervisor wrote a memo containing certain characterizations of Petitioner's performance, and wrote a confidential letter to Petitioner essentially repeating those characterizations and advising that the supervisor sought a 15 day suspension for those actions. The findings included in the discussion portion of the Compensation Order concerning the working relationship between Petitioner and her supervisor come largely if not completely from the testimony of Petitioner. See Compensation Order and citations to HT, pages 5-6. The remaining matters appear to represent Petitioner's argument that the ALJ failed to accept her interpretation of the evidence, a complaint that is not a cognizable basis for reversal, so long as the ALJ's interpretations are reasonable, as they are in this case.

Nor do we find reversible error based on Petitioner's assertions concerning the treatment of Petitioner's medical evidence. Specifically, Petitioner asserts that the ALJ failed to accord her psychologists' opinions the deference and weight to which they are entitled under traditional rules governing treating physician opinion. However, this case does not involve competing medical opinion evidence. Moreover, the ALJ did not conclude that Petitioner does not suffer from the complained of conditions described by the physicians. Nor did the ALJ conclude that her psychological condition was not caused or contributed to by her employment and her relationship with her supervisor. Simply put, the ALJ did not base his decision upon the medical record's positive contents. Rather, it was the *lack* of evidence of meeting the *Dailey* test that the ALJ cites as the basis of the denial; specifically the lack of any evidence that the conditions of her employment of which Petitioner complained would have caused similar emotional injury in an average worker not significantly predisposed to the psychological injury claimed.

On appeal, Petitioner asserts that the evidence she presented before AHD clearly demonstrates that her psychological condition was caused by her employment conditions. However, what Petitioner fails to recognize is the fact that, unlike physical injuries sustained at work, psychological injuries have an additional legal and evidentiary requirement beyond simple causation. Where a work-related psychological injury is claimed, the claimant must also present evidence that the working conditions to which Petitioner claims that she was subjected and which caused her psychological distress also have the potential to cause the same or similar injury in an average individual of normal sensibilities not so pre-disposed, as required by the previously-mentioned *Dailey* test. This was the primary, if not exclusive reason the ALJ rejected Petitioner's claim. Based upon our review of the record before us, we find ALJ's determination consistent with *Dailey*, and otherwise free of legal error.

CONCLUSION

The Compensation Order on Remand of August 15, 2006 is supported by substantial evidence and is in accordance with the law.

**ORDER**

The Compensation Order on Remand of August 15, 2006 is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

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E. COOPER BROWN  
Chief Administrative Appeals Judge

May 24, 2007  
DATE