COMPENSATION REVIEW BOARD

CRB No. 10-170

CYNTHIA R. THOMPSON,
Claimant–Respondent,

v.

AVAYA COMMUNICATIONS, INC. and GATES MCDONALD,
Employer/Carrier - Petitioner

Appeal from a September 8, 2010 Compensation Order on Remand by
Administrative Law Judge Belva D. Newsome
AHD No. 02-180, OWC No. 561690

Michael D. Dobbs, Esquire, for the Claimant/Respondent
Michael S. Levin, Esquire, for the Employer-Carrier/Petitioner

Before: HENRY W. MCCOY, HEATHER C. LESLIE, and JEFFREY P. RUSSELL, *Administrative Appeals Judges*.

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

DECISION AND REMAND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

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 denying the claim. The Director remanded the matter on December 10, 2003 on the basis the presumption of compensability was not properly applied.

On May 20, 2004, a Compensation Order on Remand (COR) 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 remand order on December 23, 2005, 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 the case of *West v. Washington Hospital Center*, CRB (Dir. Dkt.) No. 99-97 (August 5, 2005).[1] 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 second COR was issued where 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.

During the pendency of Claimant's appeal, the DCCA decided *McCamey v. DOES*, 947 A.2d 1191 (D.C. 2008) where the Court overturned the objective test as applied to physical-mental claims as being inconsistent with the statute. The Court's May 15, 2008 *McCamey* decision reversed the Decision of the Director affirming the Final Decision and Order issued April 22, 2003. In keeping with that reversal, the Court, on June 3, 2008, vacated the CRB's March 2, 2007 Order and remanded the case for further consideration.

In response to the DCCA's May 15, 2008 remand, the CRB, on June 17, 2008, issued a Remand Order[2] sending McCamey's case back to the Administrative Hearings Division for further proceedings to consider the claim in accordance with the DCCA's newly announced standard for evaluating physical-mental disability claims.[3] Accordingly and with specific reference to the February 28, 2006 COR in the instant matter, it was vacated by the CRB on August 7, 2008 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.[4]

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 presiding[5] and no additional

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[1] 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).

[2] *McCamey v. DCPS*, CRB (Dir. Dkt.) No. 10-03R, AHD No. PBL 02-031, DCP No. LT2-DDT002160 (June 17, 2008).

[3] The CRB stated the DCCA's new rule in physical-mental cases: where a claimant in a physical-mental claim presents competent medical evidence connecting a work related physical injury to a claimed psychiatric injury the claimant has established a prima facie case of either a new injury or an aggravation of a pre-existing condition. *Id*. at 4.

[4] *Thompson v. Avaya Communications*, CRB No. 06-37R, OHA No. 02-180, OWC No. 561690 (August 7, 2008).

[5] Previously presided over by ALJ Anand Verma, this matter was reassigned to ALJ Belva D. Newsome.

exhibits[6] were introduced. On May 17, 2009, Judge Newsome issued Compensation Order (CO) 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.[7] Employer timely appealed.

On July 23, 2009, the CRB issued a Decision and Remand Order (DRO). The March 17, 2009 CO was "reversed, vacated and remanded to AHD with specific instructions to convene a new 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.[8]

On June 28, 2010, Judge Newsome convened another formal hearing. In a COR 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 and also filing a motion to dismiss the application for review (AFR).

On appeal, Employer has 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 argues that none of these actions by the ALJ constitute error.

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.[9] *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 (CO) 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.

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[6] Judge Newsome states at the hearing, first to the Claimant (HT 14) and later to Employer counsel (HT 18-19), that she will be relying on the exhibits from the May 7, 2002 initial hearing in this matter and would be eliciting no "additional [documentary] evidence; eliciting only [testimonial] evidence that concerns the new test." HT 19.

[7] *Thompson v. Avaya Communications*, AHD No. 02-180, OWC No. 561690 (March 17, 2009).

[8] *Thompson v. Avaya Communications*, CRB No. 09-063, AHD No. 02-180, OWC No. 561690 (July 23, 2009).

[9] "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. DOES*, 834 A.2d 882 (D.C. 2003).

We first address Claimant's motion to dismiss Employer's AFR, initially filed on October 13, 2010 and renewed on November 16, 2010 in her formal response in opposition to the AFR. In support of her motion, Claimant argues that because Employer has not made payment within 10 days pursuant to the September 8, 2010 CO awarding her benefits and Employer has not been granted a stay on the payment of those benefits during the pendency of any appeal, Employer should be precluded from filing an appeal. Claimant analogizes this to an appeal bond in a civil case where in order to appeal, the appellant must demonstrate the ability to satisfy the judgment. We disagree.

As Employer points out in opposition, we are aware of no provision in the Act or the implementing regulations that allow an AFR to be dismissed for the reasons stated by Claimant and Claimant has not cited to any. The failure to make payment within 10 days pursuant to a CO awarding benefits makes an employer subject to a penalty in an amount equal to 20% of the unpaid compensation.[10] To the extent Employer is delinquent in paying compensation pursuant to the CO under review, Claimant should file the appropriate motion, pursuant to that provision of the Act, for the assessment of a penalty. As Claimant has not asserted that the AFR was filed untimely, there is no basis to grant the motion and it is therefore denied.

Turning to the first assignment of error, Employer argues that the ALJ exceeded the scope of the 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 stated

> The only claims in contest that were before ALJ Verma when he issued the [February 28, 2006 COR], and which were affirmed by the CRB, which were appealed to the DCCA, 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* standard.
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> 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. From and after that point the only remaining issues in this case were those pertaining to the psychological claims. Thus, any "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.[11]

[10] See D.C. Code § 32-1515 (f), which states in pertinent part: "If any compensation, payable under the terms of an award, is not paid within 10 days after it becomes due, there shall be added to such unpaid compensation an amount equal to 20% thereof, …."

[11] *Thompson*, CRB No. 09-063, p. 7.

The ALJ in the instant CO under review has repeated her previous error. The ALJ has recited Claimant's work duties and the physical activities she can no longer perform (CO at 5), recounted results of Dr. Ammerman's physical examination of her cervical and lumbar spine and her ability to return to work (CO at 7), and concluded (CO at 10) with a determination that Claimant was entitled to disability benefits based on the "physical and mental injuries from the work related injury of September 29, 2000." All of these references go to issue of Claimant's physical injuries being disabling. Accordingly, these findings and conclusion are again reversed and stricken.

This allows us to transition to Employer's third assignment of error that the ALJ erred as a matter of law when she incorporated by reference the findings of fact from the March 17, 2009 CO. Employer argues that the findings in that CO were tainted because they were based upon a hearing that was determined to have denied Employer due process when Employer was prevented from introducing new evidence but allowed Claimant to do so. We agree and accordingly remand for new findings.

Not only did the ALJ incorporate and utilize findings that were reversed and stricken, she also relied upon findings based on a hearing record that was deemed wanting in affording Employer proper due process. The CRB appropriately noted:

> [Employer's] second and third bases for appeal deal with the process by which Judge Newsome conducted the formal hearing that preceded the issuance of the instant Compensation Order on Remand.
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> The ALJ announced that her consideration of the case would be limited to the evidence as it was presented in the May 2002 formal hearing, upon which all the prior Compensation Orders in this case were based. Because of this, [Employer] argues as the second error that the ALJ's refusal to permit [Employer] to offer additional evidence (i) relevant in light of the change in legal standards for compensability of psychological injury claims established by the DCCA in *McCamey*, and (ii) the refusal to permit [Employer] to submit evidence demonstrating that [Claimant] had settled a third party action under circumstances that, according to [Employer], extinguishes [Employer's] liability for ongoing workers' compensation benefits, were erroneous as a matter of law and violate [Employer's] due process rights.
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> The only reason why the matter is still before the AHD is that a prior, Agency-affirmed Compensation Order (CO 3) was appealed to the DCCA, which remanded it for further consideration in light of a significant and fundamental change in the law central to the only remaining claim n the case. Indeed, since the original formal hearing in May 2002, the law relating to psychological claims has been changed not once, but twice, through the intercession of the DCCA, first in *West*, and second in *McCamey*. Thus, this not an instance in which the matter has been returned to AHD to correct an error in the manner in which existing law has been applied to a given set of facts. This matter is before AHD again because the law has changed. While it may not be evident to us or to the ALJ in what fashion the newly conceived standards for assessing compensability of psychological claims would effect (sic) the nature of the

> evidence to be presented, we can not say that neither a claimant nor an employer might conceive of additional factual material that is relevant and material to their case that was not relevant or material under the prior standards.
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> Taking all these circumstances into account—the fact that more than seven year have passed since the formal hearing upon which this claim is based occurred, the fact that since that time the law governing the compensability of psychological injuries has changed twice, and at least once quite drastically, the fact that a significant event concerning [Employer's] obligation for and [Claimant's] entitlement to continued compensation benefits under the Act has be credibly alleged to have occurred, the fact that the ALJ determined that some new evidence, in the nature of [Claimant's] testimony, is to be allowed, the fact that not permitting a full airing of the current state of the medical and legal facts of the case has the high likelihood and potential for further compounding error or delays in a case that already has had too much of both—we feel that on remand, the only fair and most efficient procedure to be followed is the conduct of a new formal hearing, in which the parties are permitted to present fresh evidence of relevance to the issue of [Claimant's] entitlement to disability compensation benefits under the Act for her claimed psychological injuries.[12]

The CRB accordingly reversed, vacated, and remanded the March 17, 2009 CO to AHD to conduct a new formal hearing where both parties would be allowed to introduce new evidence relevant and material to Claimant's claimed psychological injury and disability. In response, the ALJ convened a hearing on June 28, 2010 where the parties were allowed to introduce new evidence, some of which postdated not only the May 2002 hearing but the May 2008 issuance of *McCamey*.

However, by stating in the findings of fact section of the September 8, 2010 CO that she was incorporating by reference the findings from the March 2009 CO, the ALJ has used and relied upon tainted findings to reach a similar conclusion, notwithstanding the admittance into evidence of documents generated after the issuance of *McCamey*. In the resulting CO, the ALJ made very limited new findings that might be interpreted as addressing Claimant's claim of psychological injury and disability. Rather, there is undue reliance on the previously discredited findings. This flies in the face of the intended purpose of the CRB's July 2009 DRO and we are compelled to return this matter for appropriated new findings of fact and conclusions of law on the claim for psychological injury and disability.

As this matter is being returned, we make only brief reference to Employer's other assignments of error in order to provide a measure of guidance so as to forestall possibly the assignment of further error on these issues. Regarding Employer's argument that the ALJ used the wrong standard in determining whether the presumption of compensability has been rebutted, we note that the ALJ appropriated cited the case law that an unambiguous medical opinion stating the work injury did not contribute to the disability would rebut.

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[12] *Id.* at 7-8.

Thus, it was improper for the ALJ to state that Employer did not rebut the presumption while at the same time acknowledging that Dr. Schulman 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.

FOR THE COMPENSATION REVIEW BOARD:

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HENRY W. MCCOY
Administrative Appeals Judge

May 9, 2013
DATE