

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 (Dir. Dkt.) No. 04-055

CYNTHIA R. THOMPSON,

Claimant – Petitioner,

v.

AVAYA COMMUNICATIONS AND GATES McDONALD,

Employer/Carrier – Respondent.

Appeal from a Compensation Order of
Administrative Law Judge Anand K. Verma
AHD No. 02-180, OWC No. 561690

Eric M. May, Esquire, for the Petitioner

Michael S. Levin, Esquire, for the Respondent

Before JEFFREY P. RUSSELL, LINDA F. JORY and FLOYD LEWIS, *Administrative Appeals Judges*.

JEFFREY P. RUSSELL, *Administrative Appeals Judge*, for the 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

¹Pursuant 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' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004.

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 on Remand, which was filed on May 20, 2004, the Administrative Law Judge (ALJ) denied temporary total disability benefits claimed by Petitioner, having found that Petitioner's claimed psychological injuries are not causally related to a stipulated work injury to Petitioner's lower back, neck and shoulder. Petitioner now seeks review of that Compensation Order.

As grounds for this appeal, Petitioner alleges as error that the ALJ, contrary to law, found that the presumption of compensability had been rebutted, in that Respondent had offered no independent psychological or psychiatric medical evaluation (IME) evidence of its own in opposition to Petitioner's psychiatric evidence which tended to establish a causal relationship between the work injury and the alleged psychological injuries.

Respondent opposes this appeal, asserting that Petitioner's own evidence sufficed to rebut the presumption of compensability, and that the ALJ's decision is supported by substantial evidence, and must therefore be affirmed.

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.

Turning to the matter under review, the sole issue on appeal relates to the compensability of the claimed psychological injuries. Petitioner makes this point expressly in two separate places in her appeal filings. *See*, Claimant's Application for Review, page 1, first sentence; and Memorandum of Points and Authorities in Support of Claimant's Application for Review, page 1, footnote 1.

Review of the Compensation Order on Remand reveals that it was issued prior to the decision issued by the CRB in *West v. Washington Hospital Center*, CRB (Dir. Dkt.) No. 99-97 (August 5, 2005). Prior to that decision, there was a split in opinion (and conflicting decisions from the Director of DOES) concerning the evidentiary requirements in connection with invocation of the presumption of compensability in claims for psychological or psychiatric injuries. In that decision,

the CRB established the rule that all claims for psychological injuries 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), regardless of the whether the claimed injury was related to workplace stress or was the claimed sequelae of a physical injury. The CRB also made clear that the analysis under *Dailey* is part of the “potentiality” prong of the quantum of evidence needed to be produced by a claimant to invoke the presumption of compensability. Specifically, the CRB ruled, in overturning a Compensation Order issued November 9, 1999, in which the ALJ declined to apply the *Dailey* test to a claim for psychological injury alleged to result from the aftereffects of a physical trauma, as follows:

Accordingly, we hold that in order to invoke the statutory presumption that an emotional or psychological condition, claimed to be the consequence or medical sequelae of an employment-related physical injury, arises out of and in the course of one’s employment, the claimant must present credible evidence demonstrating that his/her physical injury and its aftereffects (or sequelae) could have caused the same or similar emotional injury in a person of normal sensibilities not significantly predisposed to such injury.

West, supra. In the case presently before us, the ALJ made no such analysis, and neither party on appeal addresses the evidence in this case in light of that standard. Because of this, we must remand the matter to AHD to permit the ALJ consider this case in light of the rule in *West*. In that the rule was not announced at the time of the initial formal hearing in this case, the ALJ may re-open the record and take additional evidence in order to carry out the appropriate reconsideration.

CONCLUSION

The Compensation Order on Remand of May 20, 2004 is not in accordance with the law as established in *West, supra*, and the matter must be reconsidered in light of that decision.

ORDER

The Compensation Order on Remand of May 20, 2004 is VACATED, and the matter is REMANDED to AHD for reconsideration in light of the decision of CRB in *West v. Washington Hospital Center*, CRB (Dir. Dkt.) No. 99-97 (August 5, 2005).

FOR THE COMPENSATION REVIEW BOARD:

JEFFREY P. RUSSELL
Administrative Appeals Judge

December 13, 2005
DATE