CRB No. 05-216

SUSAN LERNER,

Claimant–Petitioner

v.

DISTRICT OF COLUMBIA DEPARTMENT OF HUMAN SERVICES,

Employer – Respondent.

Appeal from a Compensation Order of
Administrative Law Judge Fred D. Carney
OHA/AHD No. PBL 01-018, DCP Nos. 011122

Lynn Bernabei, Esquire, for Claimant – Petitioner

Kevin Turner, Esq., for Employer - Respondent

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

JEFFREY P. RUSSELL, *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).[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 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 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*

BACKGROUND

This appeal follows the issuance of a Final Compensation Order by the Assistant Director for Labor Standards of the District of Columbia Department of Employment Services, approving and adopting a Recommended Compensation Order from the former Office of Hearings and Adjudication, currently the Administrative Hearings Division (AHD) of the Office of Hearings and Adjudication (OHA). In that Recommended Compensation Order (the Compensation Order), which was filed on February 16, 2005, the Administrative Law Judge (ALJ) denied Petitioner's claim for benefits for permanent total disability and causally related medical expenses stemming from an alleged aggravation of Petitioner's pre-existent multiple sclerosis (MS), said alleged aggravation being claimed to have resulted from work-related stress.

Petitioner's Petition for Review (PFR) requests the following action be taken in connection with his appeal: (1) Disqualification of the ALJ on remand due to claims of bias, and (2) reversal of the Compensation Order and remand for rehearing and reconsideration.

In the Petition for Review, Petitioner identifies the grounds for this appeal as follows: (1) the ALJ did not afford Petitioner a presumption of compensability; (2) the ALJ's decision is "unreliable" because it contains certain findings of fact that are erroneous; (3) the ALJ's application of the psychological injury test established in *Dailey v. 3M*, H&AS No. 85-259, OWC No. 066512 (May 19, 1988), and ratified in *Spartin v. District of Columbia Department of Employment Services*, 584 A.2d 564 (D.C. 1990) was erroneous as a matter of law; (4) the decision rendered by the ALJ did not address the legal and factual issues presented by Petitioner, erroneously considering said issue to be one of psychological injury rather than physical injury; (5) the ALJ ignored substantial evidence concerning Petitioner's physical impairments, beyond fatigue and depression; and (6) the ALJ has demonstrated disqualifying bias by (a) applying an erroneous legal standard to the facts presented, and (b) previously dismissing this case on procedural grounds which were subsequently reversed by the Director of the Department of Employment Services (DOES) on appeal. Review if the PFR demonstrates that issues 3 and 4 present the same legal issue.

Attached to the PFR were 9 documents denominated Exhibits (PFRE) numbers 1 – 9. Petitioner requested that said documents be considered in connection with the appeal herein. AFR, page 10. In its "Agency's Opposition to Petition for Review" (AOP), Respondent objected to this request, indicating that said materials constitute new evidence, and that Petitioner has not demonstrated any reason why said exhibits could not have been presented at the formal hearing. There is no objection raised as to relevance or materiality.

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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.

Two of the proffered exhibits, the January 16, 2001 deposition of Dr. Carlo Tornatore (PFRE 1) and the January 12, 2001 deposition of Dr. Elaine Cotlove (PFRE 3) were in fact submitted to the ALJ at the formal hearing, as CE 32 and CE 33, respectively. At the formal hearing, Respondent objected to their introduction due to claimed irregularities in the scheduling of those depositions, which irregularities allegedly caused Respondent to be unable to attend the depositions, and thereby denied it the opportunity to cross examine the witnesses. The ALJ stated that he would receive the depositions "under advisement". HT 8 – 19. Although the ALJ never admitted the exhibits during the course of the formal hearing, and never discussed the objections raised by Respondent in the CO, they are referred to in the CO on page 10. This reference is taken by the Board as the ALJ's having overruled the objections raised at the formal hearing, and the depositions are accordingly considered as part of the record in this review proceeding. Respondent has raised no objection in its response to Petitioner's appeal to the ALJ's having made reference to these exhibits in the CO, and they are therefore deemed properly before the Board. Respondent's objections to the remaining exhibits attached to the PFR are sustained, there having been no motion to re-open the record, and no showing by Petitioner of the requisite unavailability of same at the time of the formal hearing. However, as this matter is being remanded for further consideration, Petitioner may request that the ALJ re-open the record for consideration of the additional materials, with the ALJ considering the motion on its merits if made, subject to any conditions or procedures that will ensure the due process rights of Respondent with respect to cross examination or rebuttal.

Respondent opposes the PFR, asserting that decision of the ALJ is supported by substantial evidence, that the ALJ's application of the *Dailey* test is in accordance with the law, and that the ALJ has not exhibited disqualifying bias.

ANALYSIS

Regarding the request by Petitioner that the ALJ be removed from further consideration of this case on remand, said request is premised upon an allegation that the ALJ is "biased", which alleged bias is claimed to be demonstrated by the ALJ's analyzing this case as one of psychological injury, and by having previously dismissed the case on procedural grounds, only to be reversed by the Director of DOES in a prior appeal.

Petitioner has identified no authority for the somewhat astonishing proposition that an adjudicator who is overturned for erroneously dismissing a claim, or otherwise deciding a procedural matter adversely to a party that ultimately prevails on appeal, has been shown to be "biased" by virtue of that circumstance, and that lack of authority is not surprising, in that such a rule would hopelessly hamstring any trial body, particularly one with only a very limited number of adjudicators, in short order. Further, the facts surrounding the prior dismissal and subsequent reversal, as outlined by Petitioner, contain no indicia of prejudgment, malice or ill will towards this claimant. The language cited by Petitioner, on page 23 of the PFR, in support of the claim that the ALJ appeared to "commiserate" with Respondent is not, to the Board, anything more than an indication of the ALJ's expression to a losing movant that, had the movant provided adequate justification, the ALJ would have granted the motion to dismiss, but that the movant had not done so. The fact that the

ALJ subsequently changed his mind, and then was ultimately reversed, does not change the nature of the exchange at the time that it occurred. Further, the ALJ's comment about having "a whole lot less to do" if he were to grant a motion to dismiss appears to be nothing more than an innocuous jest, which is obviously not meant to be taken seriously. If Petitioner labors under the impression that by dismissing a case, an ALJ in this agency would have less work to do, he misapprehends the size of the docket in line to take the place of any particular dismissed case.

Equally unavailing is Petitioner's suggestion that, because the ALJ failed to accept Petitioner's legal postulation that this claim does not involve a claim for psychological injury, that the ALJ is biased. The Board finds it unsupportable to posit that a disagreement over a legal proposition equates to disqualifying bias.

Turning to the merits of the substance of this appeal, 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. District of Columbia 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.

The first issue to be addressed is Petitioner's argument that the ALJ erred by not according him a "statutory presumption of compensability", citing "D.C. Code section 36-321 (1)", which was recodified two years ago as D.C. Official Code § 32-1521 (1), and *Spartin v. District of Columbia Department of Employment Services*, 584 A.2d 564 (D.C. 1990), and *Ferreira v. District of Columbia Department of Employment Services*, 531 A.2d 651 (D.C. 1985). PFR, page 35.

We disagree with this assignment of error, for the simple reason that, unlike the D.C. Workers' Compensation Act which governs "private sector" claims, there is no such presumption under the "public sector" statute governing disability compensation claims such as this one. The basis of the presumption under private sector claims is the existence of a statutory provision creating such a presumption, found at D.C. Official Code § 32-1521 (1) and it is that provision which the Court of Appeals discussed in *Spartin* and *Ferreira*. No such provision is found in the act governing this claim. We note that this is at least the second time in its short existence that this Board has been called upon to point out to a Petitioner that there is no such statutory presumption under the act governing public sector disability compensation claims. See, *Corley v. District of Columbia Office of*

Corporation Counsel, CRB. (Dir. Dkt.) No. 18-03, AHD/OHA No. PBL 02-029A, DCP No. LT4LC001748 (April 7, 2009).

Petitioner also contends that "the ALJ's decision is unreliable" because it contains certain findings of fact alleged by Petitioner to be erroneous (presumably meaning that the ALJ has committed manifest and prejudicial error in making these findings). Regarding the first three specific alleged errors cited by Petitioner, misidentifying a witness, giving the wrong year (1999 rather than 1998) that Petitioner was contacted by a magazine reporter, and stating that Respondent, rather than Petitioner, paid for training sessions that Petitioner received compensatory time for but did not attend, do not on their face appear to be of any significant import to the overall outcome of the case, and Petitioner has not explained how they, or the other two alleged errors (the ALJ allegedly misstating a treating physician's ascribing Petitioner's missing appointments to "fatigue" rather than "physical impairments" and the ALJ's alleged error in stating that another treating physician had testified that Petitioner was "functional" until April 2000), are such errors as, if corrected, could or would change the outcome of the case. Otherwise stated, Petitioner has not asserted how these errors, if errors they are, were harmful to her case.[2] We therefore decline to reverse the ALJ's decision on these grounds.

Petitioner asserts as additional error that the ALJ "ignored substantial evidence" concerning Petitioner's "physical impairments", limiting himself to addressing only "fatigue and depression". Although we do not accept the assertion that the ALJ "ignored" the physical aspects of Petitioner's condition (see, for example, CO, page 9, where the ALJ specifically comments upon Petitioner's difficulties with walking, vision, severe "neurological" impairment, and cognitive difficulties; also, see CO, footnote 1, defining multiple sclerosis as including symptoms of lack of coordination, weakness and speech difficulties; see also, page 6 wherein the ALJ writes "Claimant's symptoms did not remit and she experienced new symptoms of loss of strength, severe fatigue, memory loss and decline of cognitive abilities"), and we do not reverse the CO for that reason, the decision that follows concerning the reconsideration to be undertaken on remand will likely require further discussion and more specific consideration of the physical limitations secondary to Petitioner's MS, and its effects if any upon Petitioner's ability to perform her job.

The assignment of error with which we are in agreement is that, upon reviewing the CO, it is apparent that the ALJ viewed this case as being subject to the legal rules of causation that are set forth in *Dailey v. 3M*, H&AS No. 85-259, OWC No. 066512 (May 19, 1988), and ratified in *Spartin v. District of Columbia Department of Employment Services*, 584 A.2d 564 (D.C. 1990). Thus, the ALJ wrote in the CO, at page 11 that Petitioner "alleges her unfavorable evaluation caused her stress. This is a personnel matter which is common to the workplace …"; at page 2 – 3 that Petitioner " alleges her employer retaliated against her by taking adverse actions which claimant alleges aggravated her pre-existing multiple sclerosis *and depression* such that she could no longer perform" her pre-

[2] We also note that Petitioner has not provided the Board with reference to where, in the record, the Board could determine that the alleged errors are indeed errors. Merely pointing out where, in the CO, the alleged error appears does not assist the Board in determining whether the statements in the CO are supportable or not.

injury job (emphasis added); at page 9 that Petitioner "alleges that factors of her employment aggravated her pre-existing multiple sclerosis which caused her depression"; at page 10 "Therefore, the weight of the evidence of record indicates claimant's depression is not the direct result of her job duties but are symptoms of her MS which pre-existed the alleged date of her work injury and are not related to factors of her employment duties as a psychologist. Having found claimant's injuries are not work related I made no findings or conclusions on the remaining issues in this case". The ALJ also quoted from that portion of *Spartin* in which the Court of Appeals discussed the requirement that in order to be compensated for work related psychological injuries, a claimant is "required to show that the job conditions which caused the stress were uncommon and unusual when compared to employment conditions in general". CO, at page 10, quoting *Spartin*.

Review of the CO makes it apparent that the ALJ considered this to be solely a case controlled by the special rules of causation which govern claims for psychological injuries, as established in *Dailey* and *Spartin*, among other cases. This is erroneous. The causation tests established in those cases are applicable only where the *injury* for which compensation is sought is psychological in nature. Here, while the ALJ might properly decline to award benefits for the purely psychological aspects of Petitioner's medical state, Petitioner has undoubtedly alleged that her disability is at least in part attributable to the physical, non-psychological limitations imposed upon her by the debilitating nature of her MS, which she alleges, with evidentiary support, was aggravated by the stressful conditions which she alleges were endemic in her workplace. This is similar to an allegation that work place stress aggravated a condition such as Crohn's disease. In such a case, application of *Dailey* would be inappropriate, and would constitute an expansion of the restrictive *Dailey* standard to physical injuries, as opposed to psychological injuries, which we decline to do. See *Brown v. Lex Reprographics, et al.*, OHA No. 00-175, OWC No. 518623 (July 21, 200), footnote 3 for a more detailed discussion thereof.

Related to this, we note that the ALJ wrote, at page 10 – 11, as follows: "In the case at hand, I find claimant has not met her burden to present substantial evidence that her multiple sclerosis was aggravated in the performance of her duty", and in the next paragraph, after summarizing alleged work place stressors, stated "these are personnel and administrative matters common to the work place".

The ALJ's statement that Petitioner had not produced "substantial evidence" that "performance of her job" had aggravated her MS is clearly erroneous. Without making an exhaustive list of the evidence presented which tends to support the proposition that Petitioner's work related stress (described by the ALJ in the just-quoted sentence as being "common to the work place") aggravated her MS, suffice it to say that it includes: CE 28, the independent medical evaluation (IME) report from Dr. Bruce Smoller, dated August 22, 2000 ("I believe that the patient is, at this time, disabled by a combination of her depression and multiple sclerosis. The depression itself would not be disabling. However, the depression plus the multiple sclerosis is and the depression and stress worsened the multiple sclerosis. Therefore, in several ways, this patient's inability to work is based, in part, on occupational factors …"); CE 30, a report from Dr. Carlo Tornatore, her treating neurologist, dated September 21, 2000 ("Dr. Lerner has significant neurological deficits

from MS (including fatigue, cognitive impairment and motoric function) which are permanent, and severely impair her ability to function in her chosen profession. Clearly, she cannot return to work given the extent of her disability. Moreover it [sic] clear disease progression was precipitated by the stressful condition under which she worked"); CE 32, Dr. Tornatore's deposition, at pages 73 – 74, 77 -78, amplifying same; CE 26 , the April 30, 2000 "Declaration of Elaine W. Cotlove, M.D.", Petitioner's treating psychiatrist ("the circumstances of her work environment have undoubtedly contributed to her physical deterioration … It seems clear that she cannot return to her present job, now or in the predictable future. The stress of commuting and the psychological harassment she has sustained are too severe"; and CE 33, Dr. Cotlove's deposition, at pages 15 – 30, amplifying same. These items in the record are such evidence as a rational person might accept to support the proposition that Petitioner is disabled as a result of the aggravation of her pre-existing MS, and that that aggravation is the result of stress from her job. Thus, it is "substantial evidence" to support the proposition that the ALJ found to be unsupported by substantial evidence, which finding therefore reversed.

Further, it is notable that much of the evidence supporting the claim that the alleged work place stress aggravated Petitioner's MS is opinion evidence from treating physicians. As such, the ALJ is required to accord that evidence with "great weight", and if he chooses to reject it, he must give persuasive reasons for doing so. See, *Short v. District of Columbia Department of Employment Services*, 723 A.2d 845 (D.C. 1998); *Stewart v. District of Columbia Department of Employment Services*, 606 A.2d 1350 (D.C. 1992); and, *Butler v. Boatman & Magnani*, OWC No. 044699, H&AS No. 84-348 (December 31, 1986).

We note lastly that an aggravation of a pre-existing condition by work related events or conditions is a compensable injury under the workers' compensation jurisprudence of this jurisdiction. See, *Metropolitan Poultry v. District of Columbia Department of Employment Services*, 706 A.2d 33 (D.C. 1998), among other cases.

CONCLUSION

The Compensation Order of February 16, 2005 decision is not in accordance with the law, in that it applies the wrong test of causation with respect to the claimed aggravation of Petitioner's MS, and it does not address Petitioner's claim that her disability is the result of that aggravation, separate and apart from any psychiatric or psychological condition from which she suffers. Further, the determination by the ALJ that Petitioner had not met her burden of producing substantial evidence that her working conditions aggravated her pre-existing MS is clearly erroneous.

ORDER

The Compensation Order of February 16, 2005 is reversed and remanded to the Administrative Hearings Division of the Office of Hearings and Adjudication. Upon remand, the ALJ shall reconsider the record and may conduct such further proceedings as may be appropriate, to determine whether Petitioner's pre-existent MS was aggravated by her employment with Respondent, whether Petitioner is disabled as a result of said aggravation, and if so, to what extent is she so disabled, consistent with the application of the legal principles of causation, aggravation, and deference to the opinions of treating physicians, as discussed above.

FOR THE COMPENSATION REVIEW BOARD:

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JEFFREY P. RUSSELL
Acting Administrative Appeals Judge

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DATE