

**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. 07-077**

**Anetta Hampton Nicholas,**

**Claimant–Respondent,**

**v.**

**District of Columbia Public Schools,**

**Self-Insured Employer-Petitioner**

Appeal from a Compensation Order of  
Administrative Law Judge David L. Boddie  
AHD No. PBL 06-090, DCP/ODC No. 760002-2002-12

Anetta Hampton Nicholas, *pro se* Respondent

Pamela Smith, Esq., for the Petitioner

Before E. COOPER BROWN, *Chief Administrative Appeals Judge*, JEFFREY P. RUSSELL, and FLOYD LEWIS, *Administrative Appeals Judges*.

JEFFREY P. RUSSELL, *Administrative Appeals Judge*, on behalf of the Review Panel:

**DECISION AND REMAND 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>1</sup>

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<sup>1</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 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.

## BACKGROUND

This appeal follows the issuance of a Compensation Order by the Administrative Hearings Division (AHD) of the Office of Hearings and Adjudication (OHA). In that Compensation Order (the Compensation Order), which was filed on March 9, 2007, the Administrative Law Judge (ALJ) reversed the termination of benefits being paid to Respondent in connection with a disability allegedly caused by a psychiatric condition, and ordered payment thereof.

Petitioner's Petition for Review requests the following action be taken in connection with his appeal: Reversal of the Compensation Order of March 9, 2007.

In his Petition for Review, Petitioner asserts that the Compensation Order is not supported by substantial evidence and is contrary to law, in that it asserts that (1) Respondent failed to adduce any evidence that the complained of condition is causally related to the work injury for which she had previously obtained benefits, and (2) Petitioner's own evidence contesting such a relationship was uncontradicted.

Respondent opposes this appeal, asserting that the decision of the ALJ is correct because Petitioner failed to adduce adequate evidence to terminate benefits that had been previously granted administratively.

For the reasons asserted by Petitioner, and for additional reasons as will be discussed below, we reverse the ruling regarding the psychiatric condition contained in the Compensation Order, and enter an order affirming the denial of benefits for a psychiatric injury in this case. However, because the Compensation Order is silent with respect to the physical condition for which the Petitioner initially awarded benefits, we remand for further consideration of the evidence in connection therewith.

## 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. District of Columbia Department of Employment Services*, 834 A.2d 882 (D.C. App. 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, Petitioner alleges that the ALJ's decision is not supported by substantial evidence, in that none of Respondent's medical evidence contains an opinion that

Respondent's allegedly disabling condition, which is psychiatric in nature, is causally related to the work injury that underlies this case, which is an incident occurring on December 10, 2001 when she was struck in the head with a purse by a student, and caused to fall to the floor, while Respondent was performing her duties as a Special Education teacher in the District of Columbia public schools. Thus, according to Petitioner, Respondent has failed to meet her burden of demonstrating such a causal relationship. Further, Petitioner asserts that it has presented an independent medical evaluation (IME) report from Dr. Daniel Freedenburg, who from the record is identified as a Board Certified psychiatrist and neurologist (EE 3), in which Dr. Freedenburg opines that Respondent's psychiatric condition is the result of long standing pre-existing mental disturbance, and was neither caused nor aggravated by the December 10, 2001 work injury. Thus, according to Petitioner, the medical evidence in this case is uncontroverted and is to the effect that the conditions for which benefits are sought herein are unrelated to the work injury, and therefore the award of benefits is contrary to law.

Respondent opposes the appeal, asserting that, given that Petitioner had initially accepted her claim for benefits, Petitioner is under an obligation to present evidence of a change of condition pursuant to D. C. Code § 1-623.24 (d). Respondent asserts that Petitioner failed to present substantial evidence to support the termination of her benefits.

Without recounting the record evidence in great detail, we have reviewed the medical records and reports submitted by Petitioner and Respondent at the formal hearing. In summary, those submitted by Respondent consist of a series of handwritten office notes and a typewritten narrative report from her treating psychiatrist, Dr. Shamin Malik, in Pine Bluff, Arkansas, (CE 2) where Respondent currently resides, and two IME reports from Dr. Freedenburg, dated June 18, 2003 and March 13, 2006 CE 3).

In none of these reports or records is there any expression of opinion that the work injury under consideration caused or contributed to Respondent's psychiatric condition; Dr. Malik's records are silent on the subject of causation, and Dr. Freedenburg's contain his opinion that Respondent's condition, diagnosed as "paranoid Delusional Disorder" and featuring symptoms described as "suspiciousness, paranoid ideation, decreased cognitive functioning, irritability, [and] poorly organized thoughts ... [which] are a result of a long standing pre-existing psychiatric disorder" (CE 3 and EE 3, Report of March 13, 2006, page 12). It is noteworthy that Dr. Freedenburg reviewed records from Dr. Liza Gold, a psychiatrist who evaluated Respondent on June 27, 2003 and who expressed an opinion that Respondent suffered at that time from depression which "may be causally related to the work place events of 2001, but neither of the assaults caused any long standing physical damage and it was highly unlikely that the physical consequences of these are responsible for her current state" (*id.*, page 9). The record does not contain Dr. Gold's report.

In concluding that Respondent's psychiatric condition (which is the only condition addressed in the Compensation Order as being the disabling condition) is causally related to the work injury, the ALJ cites no positive evidence in support of that conclusion, merely basing his decision upon what he perceived as shortcomings in the opinions of Dr. Freedenburg. These shortcomings include the

ALJ's assertion that Respondent had never been "diagnosed or treated or exhibited any of symptoms [described by Dr. Freedenburg and set forth above] described above", and because in his view the "basis for those opinions are not consistent with or supported by the evidence of record" for that same reason. Compensation Order, page 8. As an additional reason, the ALJ concluded that, because Dr. Freedenburg had not reviewed (or at least recited the contents of) Dr. Malik's records, his opinion was unreliable. He also questioned the validity of the opinions of Dr. Freedenburg because the ALJ deemed the history of the injury and subsequent medical treatment as contained in Dr. Freedenburg's report to be inconsistent with the history as related by Respondent in her testimony and as set forth in the prior medical records. Compensation Order, page 8.

Had this case involved the consideration of conflicting medical opinion, these considerations might<sup>2</sup> be relevant in deciding whether to accept one physician's opinion over that of another. However, in this case, Dr. Freedenburg's opinion is the only medical opinion of record, and it is uncontradicted.

In addition, because there is no citation or reference to the special nature of psychiatric claims in the Compensation Order, the application for review, the memorandum in support thereof, or the opposition thereto, neither the ALJ nor the parties appear to be aware that, as a claim for compensation for a disability allegedly caused by a psychiatric illness or condition, this jurisdiction has adopted a special set of analytical tests sometimes referred to as the "objective" test, in *Dailey v. 3M*, H&AS No. 85-259, OWC No. 066512 (May 19, 1988), which was sanctioned by the District of Columbia Court of Appeals in private sector cases in *Spartin v. Dist. of Columbia Dep't. of Employment Serv's*, 584 A.2d 564 (1990). The *Dailey* test has been adopted in public sector cases as well, in cases including *McCamey v. Dist. of Columbia Public Schools*, Dir. Dkt. No. 10-03, OHA PBL No. 02-031, OBA No. LT2-DDT002160 (February 10, 2004). The Court of Appeals considered and affirmed the application of *Dailey* and its progeny to public sector claims in *McCamey v. Dist. of Columbia Dep't. of Employment Serv's*, 886 A2d 543 (D.C. 2005); however, that decision was vacated in *McCamey v. Dist. of Columbia Dep't. of Employment Serv's*, 896 A2d 191 (D.C. 2006), for the purpose of reconsidering the continuing vitality of the *Dailey* rule in all cases of psychiatric injury claims. However, there was no indication that the vacating of that order had anything to do with its application to public sector cases particularly. We therefore deem the application of the standard to be required.

Normally, the failure to apply a required legal test to the facts of a case would require a remand for reconsideration in light of that test. However, because this case presents a situation in which there is no evidence of causal relationship at all, and given that unlike the private sector act, the public

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<sup>2</sup> We say "might", because we do not necessarily agree that the ALJ has accurately described either what Dr. Freedenburg reviewed, recounted in his reports, reviewed in preparation of his report, or asserted as the manner in which the incident occurred in 2001. Further, we explicitly reject the ALJ's assertion that Dr. Freedenburg's reports "fail[ed] to state the basis upon which he reached [his] conclusion" (Compensation Order, page 10). Those reports are detailed and contain the results of cognitive tests, record reviews, and histories of perceived persecution by superiors and familial mental illness, and in them Dr. Freedenburg discusses numerous matters concerning events preceding the work injury contributing to his assessment of Respondent's pre-injury mental state, as well as her mental state subsequent thereto.

sector act contains no presumptions relating to compensability or causal relationship, there is but one outcome possible given our ruling. Having determined that there is no evidence that the complained of condition is medically causally related to the work injury, and further that there is no evidence that a person of normal or average sensibilities not pre-disposed to psychiatric injury could have sustained the same or similar injury as the injury claimed herein (the *Dailey* requirement), we reverse the award of disability benefits and, pursuant to 7 DCMR 267.1 (c), we modify and amend the Compensation Order so as to affirm the termination thereof by Petitioner.<sup>3</sup>

However, this resolution of the psychiatric aspect of this case does not end the inquiry. While the Compensation Order and the appellate filings of the parties are completely silent on the subject of the physical injuries sustained by Respondent in December 2001, we feel compelled to address that issue, which seems to us to be central to the procedural requirements concerning termination of benefits under the public sector act.

The record reveals that Respondent's initial injury, described as "headaches, blurred vision, and ... pain in her neck and upper back" resulting from "a student swinging a purse" which struck Respondent's head (EE 1, Form 5, Compensation Acceptance Order, December 10, 2002), and that benefits for that injury were paid through and including May 31, 2006 (EE 4, Notice of Intent to Terminate Disability Compensation Payments, June 6, 2006).

Nothing in the Notice of Intent to Terminate Disability Compensation Benefits refers to Petitioner's physical injuries for which benefits were commenced pursuant to the Form 5. Rather, the only basis given in the Notice for the termination of those benefits is the contents of Dr. Freedenburg's reports, which are silent on the physical aspects of the injury. While Petitioner did produce an IME report from Dr. Robert Gordon (EE 2, Report of July 10, 2003) in which he expresses the opinion that Respondent's physical injuries had resolved by the date of his examination, that report is not referred to in the Form 5 filed nearly three years later, nor is it discussed in the Compensation Order or the filings of the parties in this appeal.

The failure of the ALJ or the parties to discuss this aspect of the case may be indicative of the fact that no one involved in this case believes or contends that the physical injuries are of any continuing significance. However, we note that Respondent is proceeding in this case *pro se*, and that, although there is no reference to any physical injury causing a disability in her documentary evidence or appellate filings, she did refer to a failure to establish a change of conditions as part her argument before us. See, Claimant-Respondent's Opposition to Employer-Petitioner's Petition for Review, page 4.

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<sup>3</sup> For reasons we can not discern from the record before us, the Compensation Order asserts that the parties stipulated that the sole issue before the ALJ was the nature and extent of disability. See, Compensation Order, page 2. This is an obvious error. Not only does the ALJ proceed to analyze this case solely in connection with the issue of causal relationship, it is evident from the transcript that causal relationship was the sole issue presented. See, HT 33 – 35.

The established law is that the burden of proof rests with the employer to present substantial medical evidence to justify the termination of benefits which have been commenced following acceptance of a claim. See *Toomer v. D.C. Dept. of Corrections*, CRB No. 05-202, OHA No. PBL No. 98-048A, DCP No. LT5-DOC001603 (May 2, 2005); *Jones v. D.C. Dept. of Corrections*, Dir. Dkt. No. 07-99, OHA No. PBL No. 97-14, ODC No. 312082 (December 19, 2000); *Robinson v. D.C. General Hospital*, ECAB No. 95-8, ODCVC No. 302585 (July 8, 1997); *Chase v. D.C. Dept. of Human Services*, ECAB No. 82-9 (July 9, 1992). Upon such a showing, the burden of production then shifts to the claimant to show that his/her condition has not changed such that a modification or termination of benefits is warranted. *Boyd v. D.C. Dept. of Corrections*, AHD PBL No. 06-068 (April 9, 2007).

While we are hesitant to remand a matter for consideration of issues that neither the parties nor the ALJ appear to have thought relevant or significant, in light of Respondent's *pro se* status and the possibility that the ALJ might have proceeded to consider the issue had he resolved the psychiatric issues in a manner consistent with our ruling on this issue in this appeal, we have deemed it appropriate to remand the matter to AHD for further consideration of the claim as it relates to the purely physical impact of the work injury upon Respondent's entitlement to benefits.

#### CONCLUSION

The finding that the psychiatric injury and attendant disability is causally related to the work injury of December 10, 2001 contained in the Compensation Order of March 9, 2007 is not supported by substantial evidence and is not in accordance with the law. The Compensation Order fails to address whether there is substantial evidence of a change of condition relating to the physical injury that was the basis for the initial award of benefits, and is therefore not in accordance with the law.

**ORDER**

The Compensation Order of March 9, 2007 is reversed; the denial of Respondent's benefits in relation to a claimed psychiatric injury and disability by Petitioner is affirmed. The matter is remanded for further consideration of the question of whether Petitioner has produced sufficient evidence of a change in Respondent's physical condition to warrant termination of benefits for those injuries and disability.

FOR THE COMPENSATION REVIEW BOARD:

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JEFFREY P. RUSSELL  
Administrative Appeals Judge

May 15, 2007  
DATE