

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA MARÍA MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 12-047

**CYNTHIA YVONNE BUSH,
Claimant-Respondent,**

v.

**UNITED HEALTHCARE SERVICES, INC. and SEDGWICK CMS,
Employer/Carrier-Petitioner.**

Appeal from a February 29, 2012 Compensation Order on Remand¹ By
Administrative Law Judge Belva D. Newsome
AHD No. 11-085, OWC No. 674768

David M. Schoenfeld, Esquire for the Petitioner
Michael J. Kitzman, Esquire for the Respondent

Before MELISSA LIN JONES, HEATHER C. LESLIE, and JEFFREY P. RUSSELL, *Administrative Appeals Judges*.

MELISSA LIN JONES for the Compensation Review Board.

DECISION AND REMAND ORDER

¹ Judge Newsome reissued the February 29, 2012 Compensation Order on Remand on April 11, 2012 due to an administrative error:

On February 29, 2012, the undersigned Administrative Law Judge issued a Compensation Order on Remand in the above-captioned matter. The Certificate did not correctly set forth the address for United Healthcare Services, Inc., and Sedgwick. By letter dated March 21, 2012, counsel for United Healthcare Services, Inc., and Sedgwick requested a new certified copy of the Compensation Order for the commencement of the appeal period. On March 30, 2012, by Request for Leave in Which to File the Employer's Brief in Support of Application for Review of Compensation Order on Remand, counsel for United Healthcare Services, Inc., and Sedgwick requested the Compensation Review Board for leave to allow the submission of its brief in support of its Application for Review. The Compensation Order issued on February 29, 2012 is hereby REISSUED.

Bush v. United Healthcare Services, Inc., AHD No. 11-085, OWC No. 674768 (April 11, 2012).

FACTS OF RECORD AND PROCEDURAL HISTORY

On April 19, 2010, Ms. Cynthia Yvonne Bush was on a lunch break at work when her supervisor and a medical director requested information from her. Ms. Bush attempted to obtain the information from a co-worker but was unsuccessful. Ms. Bush continued to have interactions with her supervisor and left a meeting in tears.

In August 2010, Ms. Bush stopped working. On August 26, 2010, Ms. Bush's supervisor advised her that she needed to explain in an email why she had been off work; Ms. Bush also was to describe the contents of a disability slip from her physician.

At some point, Ms. Bush was placed on short-term disability. Based upon her alleged stressors, however, Ms. Bush filed a mental-mental claim for workers' compensation benefits.

On August 11, 2011, an administrative law judge ("ALJ") awarded Ms. Bush ongoing temporary total disability benefits commencing August 20, 2010 for "an accidental injury without discreet [*sic*] event occurring at a particular date and time."² The ALJ ruled that as a result of repeated exposure to traumas, insults, and a harmful employment-related condition, Ms. Bush had sustained a compensable injury.

On appeal, the Compensation Review Board ("CRB") reversed the August 11, 2011 Compensation Order and remanded the matter for

1. [f]indings of fact concerning whether there existed specific work-related events or conditions--conditions or events occurring in the course of the employment and arising out of them--that caused the psychological injury that from which Ms. Bush suffers [because in] this case, there are no findings as to (1) what the workplace events or conditions were that Ms. Bush and her health care personnel allege caused the disabling psychological condition, (2) whether Ms. Bush, on the one hand, or UHS's witnesses, on the other, or both, were credible, or (3) whether the alleged workplace events or conditions were in fact the actual events or conditions of her workplace. In this context it is necessary to remember that the medical evidence in this case is to the effect that Ms. Bush suffered a psychological injury due to a "heavy work load" and a "hostile work environment", and not merely a "perception" of such conditions. That is, Ms. Bush's social worker and her psychiatrists all appear to have accepted as true Ms. Bush's assertions that she was subjected to hostility and was overworked. Thus, it is necessary that the ALJ make findings of fact on what the alleged conditions were, what the actual conditions were, and in so doing, make credibility findings and a determination as to whether the medical causal relationship evidence includes "competent medical evidence" that the actual workplace conditions had the potential to cause the disabling psychological condition. The failure to make specific findings on the actual work conditions or events renders the Compensation Order's conclusions unsupported by substantial evidence requiring a remand for further consideration.^[3]

² *Bush v. United Healthcare Services, Inc.*, AHD No. 11-085, OWC No. 674768 (August 11, 2011), p. 5.

³ *Bush v. United Healthcare Services*, CRB No. 11-092, AHD No. 11-085, OWC No. 674768 (November 22, 2011).

2. application of the *Ramey* test to the facts; and
3. additional consideration of the admissibility and the weight to be given to Employer's Exhibit 3 and Employer's Exhibit 4.

On remand, the ALJ, again, granted Ms. Bush's claim for relief. This appeal ensued.

United Healthcare Services, Inc. ("United") requests the Compensation Order on Remand be reversed because as a matter of law Ms. Bush's claim is not compensable. United takes issue with the ALJ's failure to address its witnesses' testimony that contradicts Ms. Bush's testimony. In addition, United asserts there is no credible medical evidence to support a causal relationship between Ms. Bush's alleged injury and her employment because Ms. Bush's perception of events is insufficient to form a basis for a compensable claim.⁴ United contends Ms. Bush is not entitled to workers' compensation benefits.

In response, Ms. Bush objects to United's characterization of the applicable law and asserts her credible testimony when coupled with her medical evidence proves the compensability of her claim. Ms. Bush requests the Compensation Order on Remand be affirmed because it is supported by substantial evidence in the record.

ISSUES ON APPEAL

1. Does the February 29, 2012 Compensation Order on Remand comply with the November 22, 2011 Decision and Remand Order's directives?
2. Is the February 29, 2012 Compensation Order on Remand supported by substantial evidence in the record and in accordance with applicable law?

⁴ In footnotes throughout Employer's Brief in Support of Application for Review of the Revised Compensation Order on Remand, United raises disputes regarding various other objections over evidentiary issues stemming from the formal hearing; however, "[i]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived." *Enders v. D. C.*, 4 A.3d 457, 471 n. 21 (D.C. 2010) quoting *McFarland v. George Washington University*, 935 A.2d 337, 351 (D.C. 2007); see also *Bardoff v. U.S.*, 628 A.2d 86, 90 n.8 (D.C. 1993) (arguments raised but not argued in briefing are treated as waived). Therefore, any arguments made in footnotes without supporting legal analysis will not be addressed. Furthermore, the admission of Claimant's Exhibit 5 was addressed in the CRB's previous Decision and Remand Order and will not be considered further in this Decision and Remand Order.

ANALYSIS⁵

In response to the directives in the November 22, 2011 Decision and Remand Order, the ALJ made the following additional findings of fact:

For the period from April 19, 2010 until August 19, 2010, Claimant and her new supervisor, Marcia Jones, had repeated conversations with respect to how Claimant had handled the request for information about a provider assigned to Ms. Strother. Claimant felt scolded, offended, embarrassed, ridiculed, and made light of in front of her coworkers on April 19, 2010. During this period, the conversations included:

An encounter when Ms. Jones came to Claimant's desk where Ms. Jones stated that she would not forget the events with respect to the events in the lunchroom on April 19, 2010.

On April 23, 2010, a meeting occurred between Ms. Jones and Claimant in Ms. Jones' office where the events of April 19, 2010, were discussed and, from which Claimant left in tears. When Claimant returned, Ms. Jones stated that Claimant was not ever to leave a meeting that she had called. Claimant felt humiliated, embarrassed, and threatened.

The atmosphere in Claimant's workplace became intense. Among other events, Ms. Jones informed Claimant not to contact Ms. Strother when Ms. Strother was on leave. Claimant found it impossible to perform her position without input from Ms. Strother who had years of experience in the duties and responsibilities of Claimant as a provider relations advocate.

A merger had occurred within Employer that required Claimant's job duties to include seeking providers that had been divided between Unison Health Plan and Charter Health Plan to participate in Employer's provider network. In performing this job duty, Claimant required information that Ms Strother had.

Based upon the email scheduling the staff meeting, a staff meeting occurred where Claimant's mock presentation was changed from a Gold Star presentation to a provider orientation. Claimant retrieved completed copies of sample folders that she gave to providers, and distributed them to the attendees. In the provider orientation, Claimant requests that questions be held to the end since the majority would be answered during her presentation. Questions were not held off, and Claimant was interrupted constantly by all the attendees in a manner that she found unprofessional.

⁵ The scope of review by the CRB is limited to making a determination as to whether the factual findings of the appealed Compensation Order on Remand are based upon substantial evidence in the record and whether the legal conclusions drawn from those facts are in accordance with applicable law. Section 32-1521.01(d)(2)(A) of the District of Columbia Workers' Compensation Act, as amended, D.C. Code §32-1501 to 32-1545, ("Act"). Consistent with this standard of review, the CRB is constrained to uphold a Compensation Order on Remand that is supported by substantial evidence, even if there also is contained within the record under review substantial evidence to support a contrary conclusion and even if the CRB might have reached a contrary conclusion. *Marriott International v. DOES*, 834 A.2d 882, 885 (D.C. 2003).

Claimant informed Patrick Lauer, Director of the Human Resources Department of Employer, of the events and the intense atmosphere in her workplace on several occasions. Mr. Lauer was sent from Employer's headquarters to investigate human resources issues after the merger. Among other things, Mr. Lauer requested from Claimant was to inform him of any retaliation for meeting with him.^[6]

By reaching these findings of fact, the ALJ deemed the listed events to have occurred, and the ALJ reiterated this point in the analysis:

In the August 11, 2011 Compensation Order, the undersigned ALJ found the Claimant to be credible, and, found the events described by Claimant had occurred in the workplace. Supplemented by the findings of fact above, the undersigned ALJ finds the Claimant to be credible, and the events described by Claimant occurred in the workplace.^[7]

Then, the ALJ ruled that Ms. Bush had invoked the presumption of compensability⁸ and that United had rebutted that Presumption through the opinion of Dr. Bruce Smoller.⁹ When weighing the evidence as a whole, the ALJ determined Ms. Bush had sustained a psychological injury as a result of repeated, cumulative, mental traumas, namely the events noted in the findings of fact listed above. Specifically, the ALJ afforded Ms. Bush's treating medical providers' opinions a preference and rejected Dr. Smoller's opinion to reach the conclusion that Ms. Bush had sustained a compensable injury:

The evidence of record establishes that Claimant suffers from depression. In weighing the competing medical opinions herein, more weight is accorded to the opinions of Claimant's treating physician. Claimant's treating psychiatrists, psychologist and licensed psychiatric social worker agree that Claimant's depression arose out of her work environment. Dr. Smoller's opinion of a biologic basis for Claimant's depression is rejected. Claimant's depression arose out of and in the course of her employment and medically causally related.^[10]

⁶ *Bush v. United Healthcare Services, Inc.*, AHD No. 11-085, OWC No. 674768 (February 29, 2012), p. 3-4.

⁷ *Id.*

⁸ Pursuant to §32-1521(1) of the Act, a claimant is entitled to a presumption of compensability ("Presumption"). In order to benefit from the Presumption, the claimant initially must show some evidence of a disability and the existence of a work-related event, activity, or requirement which has the potential to cause or to contribute to the disability. *Ferreira v. DOES*, 531 A.2d 651 (D.C. 1987). "[O]nce an employee offers evidence demonstrating that an injury was potentially caused or aggravated by work-related activity, a presumption arises that the injury is work-related and therefore compensable under the Act." *Washington Hospital Center v. DOES*, 744 A.2d 992, 996 (D.C. 2000).

⁹ Once the Presumption was invoked, it was Washington Home Hospice's burden to come forth with substantial evidence "specific and comprehensive enough to sever the potential connection between a particular injury and a job-related event." *Waugh v. DOES*, 786 A.2d 595, 600 (D.C. 2001) (citations omitted).

¹⁰ *Bush v. United Healthcare Services, Inc.*, AHD No. 11-085, OWC No. 674768 (February 29, 2012), p. 7.

Conspicuously absent from the ALJ's analysis is any consideration of United's witnesses. Although an ALJ is not required to "inventory the evidence and explain in detail why a particular part of it was accepted or rejected;"¹¹ "when evidence is contradictory, the contradiction must be addressed."¹² The ALJ's complete failure to so much as mention the testimony of any witness other than Ms. Bush requires we remand this matter for consideration of the record as a whole including resolution of the contradictions between Ms. Bush's testimony and the testimony of United's witnesses.¹³

Regarding a causal relationship between Ms. Bush's alleged injury and her employment, the *Ramey* test requires

[an] injured worker alleging a mental-mental claim invokes the statutory presumption of compensability by showing a psychological injury and actual workplace conditions or events which could have caused or aggravated the psychological injury. The injured worker's showing must be supported by competent medical evidence. The [administrative law judge], in determining whether the injured worker invoked the presumption, must make findings that the workplace conditions or events existed or occurred, and must make findings on credibility.^[14]

In other words, because of the complications inherent in proving a mental-mental injury, the *Ramey* test requires any testimony purporting to invoke the Presumption need not necessarily be corroborated by other lay testimony, but it must be supported by competent medical evidence. In this case, the ALJ failed to delineate any medical evidence which supports Ms. Bush's testimony that she has a psychological injury which potentially was caused or aggravated by actual workplace conditions or events. A review of the record does not lead to a singular conclusion as

¹¹ *Sturgis v. DOES*, 629 A.2d 547, 554 (D.C. 1993).

¹² *Braxton v. Marty's Restaurant*, CRB No. 09-032, AHD No. 06-092, OWC No. 6180296 (January 29, 2009).

¹³ In order to conform to the requirements of the D.C. Administrative Procedures Act ("APA"), (1) the agency's decision must state findings of fact on each material, contested factual issue; (2) those findings must be based on substantial evidence; and (3) the conclusions of law must follow rationally from the findings. Thus, when an ALJ fails to make factual findings on each materially contested issue, an appellate court is not permitted to make its own finding on the issue; it must remand the case for the proper factual finding. *King v. DOES*, 742 A.2d 460, 465 (D.C. 1999) (Basic findings of fact on all material issues are required; only then can the appellate court "determine upon review whether the agency's findings are supported by substantial evidence and whether those findings lead rationally to its conclusions of law.")

The CRB is no less constrained in its review of Compensation Orders. See *Washington Metropolitan Area Transit Authority v. DOES*, 926 A.2d 140 (D.C. 2007). Moreover, the determination of whether an ALJ's decision complies with the APA requirements is a determination that is limited in scope to the four corners of the Compensation Order under review. Thus, when, as here, an ALJ fails to make express findings on all contested issues of material fact, the CRB can no more "fill the gap" by making its own findings from the record than can the Court of Appeals but must remand the case to permit the ALJ to make the necessary findings. See *Mack v. DOES*, 651 A.2d 804, 806 (D.C. 1994).

¹⁴ *Ramey v. Potomac Electric Power Company*, CRB No. 06-38(R), AHD No. 05-318, OWC No. 576531 (July 24, 2008).

to the sufficiency of the medical evidence to support Ms. Bush's testimony; therefore, the law, once more, requires we remand this matter.¹⁵

Contrary to United's argument that something more than reprimand for poor work performance is needed to sustain a compensable mental-mental injury, there is no such restriction in the *Ramey* test; however, on remand, it is important to remember that any workplace conditions or events which could have caused or aggravated the psychological injury must exist in reality:

in mental-mental cases a test for the existence of actual workplace stressors must be one "*verifying the factual reality of stressors* in the workplace environment, rather than one requiring the claimant to prove that . . . a hypothetical average or healthy person would have suffered a similar psychological injury" *McCamey [v. DOES,]* 947 A.2d at 1214 (emphasis added).^[16]

Thus, here again, the importance of the ALJ's addressing Ms. Bush's testimony as well as the contradictory testimony of United's witnesses cannot be understated.

United also argues the ALJ misconstrued Dr. Smoller's opinion that "Claimant suffered from an involuntal depression since Claimant had not suffered from depression previously."¹⁷ Without a reference to the medical records, we are unable to assess the ALJ's use of the term "involuntal depression" in the context of a medical opinion that does not assert Ms. Bush suffered from depression previously but does state "she has not, to my knowledge, had a depression before, but it is quite impossible to get a full sense of this patient's course and history, as she refuses to tell me very much about herself in critical areas."¹⁸ This deficiency can be resolved on remand, but United's argument that the ALJ must provide an explanation and rationale for rejecting Dr. Smoller's opinion is not accurate because Dr. Smoller is an independent medical examination doctor; therefore, the ALJ is free to reject in whole or in part his opinion without explanation.¹⁹

Regarding the nature and extent of Ms. Bush's disability, the ALJ summarily determined

By a preponderance of the evidence, Claimant has demonstrated that she cannot return to her prior work environment by her medical records and has established a prima facie case of total disability. The employer may then seek to rebut Claimant's disability, Employer has not rebutted Claimant's disability by establishing the availability of other jobs which the Claimant could perform. Employer's IME states that Claimant could not return to work.^[20]

¹⁵ See note 13.

¹⁶ *Muhammad v. DOES*, 34 A.3d 488, 495 (D.C. 2012).

¹⁷ *Bush v. United Healthcare Services, Inc.*, AHD No. 11-085, OWC No. 674768 (February 29, 2012), p. 6.

¹⁸ Employer's Exhibit 1. (Emphasis in original.)

¹⁹ See *Canlas v. DOES*, 723 A.2d 1210, 1211-12 (D.C. 1999).

²⁰ *Bush v. United Healthcare Services*, CRB No. 11-092, AHD No. 11-085, OWC No. 674768 (November 22, 2011).

On remand, if the ALJ finds Ms. Bush has sustained a compensable, mental-mental injury the ALJ must make appropriate rulings regarding Ms. Bush's work capacity and must provide references to opinions in the record that support those rulings. Without a definitive ruling as to a claimant's work capacity, there can be no reasonable analysis of the nature and extent of disability.

Turning to the notice issue, §32-1513 of the Act states:

- (a) Notice of any injury or death in respect of which compensation is payable under this chapter shall be given within 30 days after the date of such injury or death, or 30 days after the employee or beneficiary is aware or in the exercise of reasonable diligence should have been aware of a relationship between the injury or death and the employment. Such notice shall be given to the Mayor and to the employer.
- (b) Such notice shall be in writing, shall contain the name and address of the employee and a statement of the time, place, nature, and cause of the injury or death, and shall be signed by the employee or by some person on his behalf, or, in case of death, by any person claiming to be entitled to compensation for such death or by a person on his behalf.
- (c) Notice shall be given to the Mayor by delivering it to him or sending it by mail to him, and to the employer by delivering to him or by sending it by mail addressed to him at his last known place of business. If the employer is a partnership, such notice may be given to any partner, or, if a corporation, such notice may be given to any agent or officer thereof upon whom legal process may be served or who is in charge of the business in the place where the injury occurred.
- (d) Failure to give such notice shall not bar any claim under this chapter:
 - (1) If the employer (or his agent in charge of the business in the place where the injury occurred) or the carrier had knowledge of the injury or death and its relationship to the employment and the Mayor determines that the employer or carrier has not been prejudiced by failure to give such notice; or
 - (2) If the Mayor excuses such failure on the ground that for some satisfactory reason such notice could not be given; or unless objection to such failure is raised before the Mayor at the 1st hearing of a claim for compensation in respect of such injury or death.

There is no dispute Ms. Bush did not provide written notice, but when considering the issue of actual notice, the ALJ determined "Claimant informed Patrick Lauer, Director of the Human Resources Department of Employer, of the events and the intense atmosphere in her workplace

on several occasions.”²¹ This finding alone is insufficient to reach the conclusion that Ms. Bush gave United timely notice because it lacks any determination as to whether Mr. Lauer qualifies as an “agent in charge of the business in the place where the injury occurred” or as to when Ms. Bush informed Mr. Lauer. These deficiencies require we remand this matter for further deliberation.

Finally, regarding Employer’s Exhibit 3 and Employer’s Exhibit 4, the ALJ admitted the exhibits into evidence. Because they were not relevant, they were given no weight. The ALJ correctly noted that these records do not pertain to any psychological injury but rather are evidence of physical injuries and testing unrelated to this claim. Consequently, the exhibits were handled appropriately by the ALJ.

CONCLUSION AND ORDER

The February 29, 2012 Compensation Order on Remand does not comply with the November 22, 2011 Decision and Remand Order’s directives, is not supported by substantial evidence in the record, and is not in accordance with applicable law. Employer’s Exhibit 3 and Employer’s Exhibit 4 were appropriately addressed by the ALJ, but the award of temporary total disability benefits and medical benefits is VACATED. This matter is REMANDED for further consideration consistent with this Decision and Remand Order as well as the November 22, 2010 Decision and Remand Order.

FOR THE COMPENSATION REVIEW BOARD:

MELISSA LIN JONES
Administrative Appeals Judge

May 29, 2013
DATE

²¹ *Bush v. United Healthcare Services, Inc.*, AHD No. 11-085, OWC No. 674768 (February 29, 2012), p. 4.