

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**  
**Department of Employment Services**

**VINCENT C. GRAY**  
**MAYOR**



**LISA MARÍA MALLORY**  
**DIRECTOR**

**CRB No. 12-167**

**GEORGE L. MARION,**  
**Claimant–Respondent,**

**v.**

**DISTRICT OF COLUMBIA DEPARTMENT OF HUMAN SERVICES,**  
**Employer–Petitioner.**

Appeal from a September 17, 2012 Compensation Order of  
Administrative Law Judge Fred D. Carney, Jr.  
AHD No. PBL 11-030, ORM/DCP No. 30100325151-0001

Shermineh Jones, Esquire, for the Petitioner  
George L. Marion, *pro se* Respondent

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

JEFFREY P. RUSSELL, for the Compensation Review Panel:

**DECISION AND REMAND ORDER**

**BACKGROUND**

George L. Marion is employed by the District of Columbia Department of Human Services (DHS or Petitioner). His position is sedentary and clerical in nature. In September 2009, Mr. Marion was exposed to mothball fumes stored near his work place to which he had an adverse reaction involving numerous symptoms, including facial numbness, a metallic taste in his mouth, and trembling in his lips and extremities. The following month the mothballs were removed, but Mr. Marion's symptoms persisted.

He underwent a number of diagnostic procedures, including a bone marrow biopsy, a flow cytometry test, trilineage hematopoiesis, and cytogenetic testing, all of which were normal.

Mr. Marion came under the care of Dr. Anne Marie Gordon, an internist, in March 2010. Mr. Marion's complaints included the metallic taste in his mouth, tightness in his chest, nasal irritation, headache, lightheadedness, and facial numbness. Dr. Gordon obtained chest x-rays, a Methacholine challenge test, and pulmonary function tests, all of which were normal.

Mr. Marion was evaluated by Dr. Denise Chevalier on March 29, 2010, who noted much the same complaints, and reviewed a CT scan of the head, which was normal. She diagnosed rhinitis and anxiety.

Mr. Marion was evaluated an allergist, Dr. Michael Kalimer, on April 14, 2010, who administered a pulmonary function test which he deemed normal. Dr. Kalimer also concluded that Mr. Marion suffers from allergies to dust, dog and cat hair, and cockroaches.

Mr. Marion was seen by an occupational health specialist, Dr. Virginia Weaver, on May 20, 2010, who believed the symptoms were due to a “hypervigilance or hyperawareness reaction to odors” after the initial exposure to mothballs. She recommended cognitive therapy and biofeedback.

Petitioner referred Mr. Marion to Dr. Ross Myerson for the purpose of an additional medical examination (AME) which was performed November 8, 2010. Dr. Myerson opined that Mr. Marion sustained no organic injury from the mothball exposure, instead developing “hypervigilance and hyperawareness” related to odors. He felt that Mr. Marion was capable of returning to work without restrictions.

On January 18, 2011, Dr. Gordon authored a report in which she opined that Mr. Marion developed a hypersensitivity reaction and associated hypervigilance due to the mothball exposure, that he continues to experience these problems, that he is desirous and capable of returning to work, but that he continues to require follow up care, including psychological care.

On April 29, 2011, the PSWCP issued a Notice of Denial, which read in pertinent part:

Your public sector workers’ compensation claim is hereby DENIED.

You reported that while working you noticed numbness of the face, a metallic taste in your mouth and trembling of your lip and extremities due to odor from moth balls. You were seen by Dr. Myerson, who reports your symptoms are related to anxiety and not a pulmonary, cardiac or neurological disorder.

Mr. Marion filed an Application for Formal Hearing (AFH) with the hearings division of the Department of Employment Services (DOES) to resolve the dispute. A formal hearing was held on September 13, 2011, following which a Compensation Order was issued September 17, 2012. In the Compensation Order, Mr. Marion was awarded “temporary total disability benefits from March 1, 2010 through September 30, 2010, and reimbursement of his leave and medical expenses related to his physical pulmonary symptoms from date of injury until January 18, 2011.”

Petitioner appealed the award to the Compensation Review Board (CRB), to which appeal Mr. Marion has filed an opposition.

#### STANDARD OF REVIEW

The scope of review by the CRB, as established by the Act and as contained in the governing regulations, is generally 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.*, (the Act), at § 1-623.28 (a), the “Public sector Workers’ Compensation Act” (the Act) and *Marriott International v. DOES*, 834 A.2d 882 (D.C. 2003). Consistent with this standard of review, the CRB and this review panel are constrained to affirm 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 this panel might have reached a contrary conclusion. *Id.*, at 885.

## DISCUSSION AND ANALYSIS

The phraseology of the award is such that, given the issues in this case and the lack of specific findings concerning (1) what dates or for how many days Mr. Marion used sick leave, (2) whether the ALJ concluded that all, or only some of those dates were for “purely physical pulmonary” conditions, (3) of what significance the September 30, 2010 date is *vis a vis* Mr. Marion’s disability status, it is impossible to assess precisely what medical bills are intended to have been ordered to be paid and what dates of medical leave is to be reimbursed. This problem alone requires a remand for clarification, additional fact finding and additional conclusions of identifying the specifics of the award and the bases therefore.

Further, we must address the substance of footnote 4. In it, the ALJ discusses the status of the compensability of “emotional conditions”, which include psychological and mental stress injuries. The phraseology chosen by the ALJ is somewhat ambiguous, and it is not clear precisely what he meant to convey about the chronology of the evolution of the status of the compensability of such claims under the Act. What is apparent, though, is that the ALJ assumed that if Mr. Marion’s claim had been for an emotional injury, it would not have been compensable, because the Act had been amended to disallow such claims. That is an erroneous application of the law as it pertains to this case.

The claimed date of injury in this case is September 1, 2009. The amendments to the Act which limited (or some would argue, eliminated) the compensability of such claimed injuries took effect October 1, 2010. *See*, D.C. Law 18-223, the “Fiscal Year 2011 Budget Support Act of 2010”. There is nothing in the amendment or the legislative history to suggest that the Council of the District of Columbia intended that the amendment be given retroactive effect. Accordingly, to the extent that Mr. Marion’s claim involved such an injury, the Act did not preclude such a claim.<sup>1</sup>

The Notice of Determination (NOD) in this case states that the reason the claim was being denied is that “You were seen by Dr. Myerson, who reports your symptoms are related to anxiety and not a pulmonary, cardiac or neurological disorder.” EE 1, Notice of Determination (NOD) dated April 29, 2011, referencing a “Date of Injury/Illness: 09/01/09”.

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<sup>1</sup> We note that the limiting amendments have been repealed, and such claims are presumably as compensable now as they were prior to the amendments. *See*, D.C. Law 19-168, the “Fiscal Year 2013 Budget Support Act of 2012” effective September 20, 2012. Thus, the limiting amendments were only in effect between October 1, 2010 and September 20, 2012.

This NOD is legally incorrect; it purports to deny a claim for a reason that is not a valid reason to deny the claim. As of the date of the NOD, it would appear that the PSWCP has accepted that Mr. Marion's work related injury is anxiety-related, and has declined to provide him with compensation for that injury, presumably on the erroneous grounds that such injuries are, in all cases, non-compensable.

Thereafter, the ALJ deemed the claim not compensable for the reason that the claimed injury is *not* psychological, but pulmonary.

Petitioner premises this appeal upon the argument that the ALJ's characterization of the injury as "pulmonary" is erroneous, because in its estimation there are no medical opinions which state that Mr. Marion's inhalation of the mothball fumes damaged his pulmonary function.

However, the ALJ cited the Dorland's Illustrated Medical Dictionary definition of the term "pulmonary", stating that it means "pertaining to the lungs". This meaning requires nothing more than that the inhalation of mothball fumes over a period of time had an adverse effect upon Mr. Marion's breathing processes. In that sense, the ALJ's characterization of the injury as being "pulmonary" is supported by substantial evidence. Mr. Marion's testimony (corroborated by the medical reports) that the inhalation of mothball fumes caused Mr. Marion breathing distress is, broadly speaking, a "pulmonary" matter. The fact that a physician might not ascribe to such an event any long lasting *pulmonary disability* does not render the ALJ's characterization of the initial injury as "pertaining to the lungs" reversibly erroneous.

Nonetheless, because the PSWCP and the ALJ were operating under the misapprehension that psychological injuries are non-compensable under the Act as a matter of law, the limitation in the award in the Compensation Order to pulmonary-related medical care and disability can not stand.

The problem is best evidenced by the irreconcilable contradiction between two critical passages in the Compensation Order. In the final paragraph of the "Discussion", the ALJ wrote:

I find the reports of Drs. Gordon and Myerson not in conflict. Dr. Gordon as did Dr. Myerson opined that Claimant suffered from a pre-existing emotional condition that was aggravated by his exposure to moth ball fumes. However, both physicians reported that changing Claimant's environment did little help. Claimant continued symptoms which [sic] appear to be psychological at this point. Dr. Gordon and Dr. Myerson both opined that Claimant can return to work full duty and continue to treat with his psychologist.

Then, in the very next paragraph, being the "Conclusions of Law", he wrote:

Therefore based on the evidence as presented, I find Claimant suffered a pulmonary reaction to moth balls at work in September 2009. That condition has completely resolved and Claimant continues with the residuals of an emotional condition that maybe [sic] pre-existing. I do not conclude of find that the pulmonary injury exacerbated Claimant's underlying emotional condition [footnote omitted]. Thus, Claimant has no remaining disability as a result of his Employment. Claimant is

entitled to leave restoration and medical expenses for his pulmonary symptoms up until his release to return to work by Dr. Gordon on January 18, 2011.

The omitted footnote in this passage is where the ALJ asserts that psychological injuries are not compensable under the Act. The conflict between the ALJ's accurate description of the opinions of the physicians and his conclusion that "I do not conclude or find that the pulmonary injury exacerbated Claimant's underlying emotional condition" are, at a minimum, in need of explanation.

We recognize that the conclusion as stated (a statement of what the ALJ does not conclude) is not necessarily at odds with the unanimous medical opinions in the record, because failing to reach a specific conclusion about a given condition's causal relationship to a work injury is not exactly the same as reaching a conclusion that the given condition is not causally related. There is no error in the award of medical and disability benefits for the period that pulmonary aspects alone were incapacitating and were being treated. The finding that Mr. Marion sustained an injury that "pertained" to his lungs is supported by substantial evidence.

However, the ALJ makes no findings concerning whether he viewed the "hypervigilance" and "hypersensitivity" as being part of the emotional or the "pulmonary" part of the case, and the award of benefits through the January 18, 2011 release to return to work appears inconsistent with the ALJ's (erroneous) determination that any emotional-injury based disability is non-compensable as a matter of law, since review of Dr. Gordon's report of that date certainly suggests strongly that her view of his disability status up to that time was for these non-pulmonary aspects of the case.

Because this case clearly has the potential for psychological injury-based claims both now and in the future, the errors of the PSWCP and the ALJ concerning the nature of the injury sustained and the disability and medical benefits to which Mr. Marion is entitled must be corrected. Accordingly, we must vacate the Compensation Order to the extent that it determined that Mr. Marion's psychological condition is not compensable under the Act, and remand the matter for further consideration.

In that regard, we set forth the following discussion of the current state of the law as it relates to psychological injury claims under the Public Sector Workers' Compensation Act. This quotation is taken from the CRB's remand to AHD of the public sector claim which had been remanded by the District of Columbia Court of Appeals (DCCA) to the CRB in *McCamey v. DOES*, 947 A.2d 1191 (D.C. 2008).

According to the DCCA in *McCamey*, [the] causal connection in a physical-mental claim has been established by establishing the existence of the physical injury and a medical opinion connecting the physical injury to the psychiatric condition: "Thus, in cases of physical injury, so long as the claimant proffers competent medical evidence connecting the mental disability to the physical accident (legal causation), the claimant has either established a prima facie case of aggravation or a new injury". *McCamey, supra*, at 34 -- 35. Upon producing such evidence, the test of causation, the court noted, is the same as that enunciated by the court in *Brown v. District of Columbia Department of Employment Services*, 700 A.2d 787 (D.C. 1997): "The rule is that a subsequent injury, whether an aggravation of the original injury or a new

and distinct injury, is compensable if it is a direct and natural result of a compensable primary injury." *McCamey, supra*, at 10 -- 11, quoting *Brown, supra*, at 791 -- 792.

The DCCA has therefore enunciated a 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. Although this case is a claim under the public sector act, the court did not limit its ruling or rationale to that act, but explicitly indicated that the ruling applies to the public and private sector acts.

Thus, under the new rule, unlike in *Dailey*, the injured worker, having established a causal link between the physical injury and the employment, bears the burden of proving by a preponderance of the evidence that the physical injury caused or contributed to the claimed psychological injury. The injured worker satisfies this burden by presenting evidence not only of the occurrence of the physical injury, but also competent medical evidence showing the physical injury caused or contributed to the psychological injury. The DCCA wrote that "Where the presumption is either inapplicable or has been rebutted, the burden falls on the claimant to prove by a preponderance of the evidence that the physical accident caused or contributed to the psychological injury". *McCamey, supra*, at 46, citing *Washington Post v. District of Columbia Department of Employment Services*, 852 A.2d 909, 911 (D.C. 2004). The court went on to state that "In determining whether a claimant has met his or her burden, a[n] [ALJ] must weigh and consider the evidence as well as make credibility determinations [and may] of course consider the reasonableness of the testimony and whether or not particular testimony has been contradicted or corroborated by other evidence." *McCamey, supra*, at 46.

This being a public sector case in which the presumption is "inapplicable", the quoted language suffices to explain the standard. That is, the physical injury satisfies the causal link to employment, and what remains is a consideration as to whether there is competent medical evidence connecting the physical injury to the claimed psychological injury, thereby establishing a *prima facie* case of compensability of the psychological injury, which can then only be defeated by employer presenting a preponderance of countervailing evidence. The court stressed that compensability may be shown where the claimant has a pre-existing psychological condition that is aggravated by the physical injury, if the aggravation is a direct and natural result of the physical injury.

*McCamey v. D.C. Public Schools*, CRB (Dir. Dkt.) No. 10-03R, AHD No. PBL 02-031, DCP No. LT2-DDT002166 (June 17, 2008) [internal page citations to the DCCA mandate are to the Slip Opinion].

On remand, the ALJ is to consider not only the physical injuries claimed, but also consider whether the psychological conditions discussed by Drs. Gordon and Myerson and referred to by the PSWCP in the NOD are compensable under the Act in light of *McCamey*, and if so, to further consider the

claim for relief in light of those findings. We note that the medical evidence appears to be uncontradicted in regard to the question as to whether the exposure to mothball fumes exacerbated or aggravated Mr. Marion's psychological state, and point out once again that the ALJ made apparently contradictory findings on this issue. Clarification of this matter should be a priority in the Compensation Order on Remand.

CONCLUSION AND ORDER

The Compensation Order lacks sufficient specificity such that the parties or the CRB can ascertain what benefits have been awarded and what benefits have been denied. Further, the Compensation Order evinces a misapprehension of the law relating to the compensability of claims for psychological injuries.

The language limiting the award to those related solely to physical pulmonary conditions is vacated. The matter is remanded for further consideration of the claims raised, including consideration of the claims that the ALJ and the PSWCP characterize as emotional or psychological claims, and for additional fact finding and legal conclusions, in a manner consistent with the foregoing, with sufficient factual analysis such that what is awarded and what is denied is capable of ascertainment, and in a manner consistent with the foregoing Decision and Remand Order.

FOR THE COMPENSATION REVIEW BOARD:

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JEFFREY P. RUSSELL  
*Administrative Appeals Judge*

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February 28, 2013  
DATE