GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR

F. THOMAS LUPARELLO
ACTING DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 14-081

VERONICA HOWARD,
Claimant–Petitioner,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY
Self-Insured Employer-Respondent.

Appeal from a June 4, 2014 Compensation Order on Remand
by Administrative Law Judge Karen R. Calmeise
AHD No. 03216E, OWC No. 571165

Justin M. Beall for Petitioner
Mark H. Dho for Respondent

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

JEFFREY P. RUSSELL on behalf of the Compensation Review Board:

DECISION AND REMAND ORDER

BACKGROUND[1]

Petitioner Veronica Howard's claim for workers' compensation benefits was denied by an Administrative Law Judge (ALJ) in the Administrative Hearings Division (AHD) of the Department of Employment Services (DOES) in a Compensation Order issued August 27, 2012 (CO 1). One of the reasons for the denial was that the ALJ, relying upon a prior CRB decision, determined that the reports and opinions of a Licensed Clinical Social Worker (LCSW) did not constitute "competent medical evidence." Ms. Howard appealed that denial to the Compensation Review Board (CRB),

[1] The scope of review by the CRB 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. Workers' Compensation Act of 1979, as amended, D.C. Code § 32-1501, *et seq.*, (the Act) at § 32-1521.01 (d)(2)(A), and *Marriott International v. DOES*, 834 A.2d 882 (D.C. 2003). Consistent with this standard of review, the CRB and this review panel must 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.

which reversed CO 1 in a Decision and Remand Order issued March 5, 2013 (DRO 1). The basis of the CRB's decision was that this second, different CRB panel deemed the medical reports of a LCSW to be "competent medical evidence" sufficient to carry a claimant's burden to invoking the presumption of compensability[2] in a psychological injury claim, a decision conflicting with the earlier CRB decision upon which the ALJ had initially relied.

Because this conflict between panel decisions became apparent, the CRB *sua sponte* issued an Order for Reconsideration *En Banc*, pursuant to 7 DCMR §§255.3 and 255.8.[3] The issue identified by the CRB to be decided upon reconsideration was described by the CRB as follows:

> Whether the opinion of a licensed clinical social worker (LCSW) is competent medical evidence to invoke the statutory presumption of compensability in an injured workers' mental-mental claim when that opinion relates a psychological injury to an actual workplace condition or events which could have caused the psychological injury in accordance with *Ramey v. PEPCO*, CRB No. 06-38, AHD No. 03-035C (July24, 2008).

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[2] D.C. Code § 32-1521 provides that "in any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of evidence to the contrary:

(1) That the claim comes within the provisions of this chapter;
(2) That sufficient notice of such claim has been given;
(3) That the injury was not occasioned solely by the intoxication of the injured employee; and
(4) That the injury was not occasioned by the willful intention of the injured employee to injure or kill himself or another."

In order to benefit from the presumption, a claimant needs to make some "initial demonstration" of the employment-connection of the disability. The initial demonstration consists in providing some evidence of the existence of two "basic facts": a death or disability and a work-related event, activity, or requirement which has the *potential* of resulting in or contributing to the death or disability. The presumption then operates to establish a causal connection between the disability and the work-related event, activity, or requirement. *Ferreira v. DOES*, 531 A.2d 651 (D.C. 1987).

Once raised, the presumption shifts to the employer the burden to produce evidence that is substantial, specific and comprehensive enough to sever the potential connection. "Substantial evidence" is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion". *Stewart v. DOES*,606 A.2d 1350 (D.C. 1992).

[3] 7 DCMR § 255.3 provides:

> The Chief Administrative Appeals Judge may also direct that an appeal on review be decided by the full membership of the Board as specified in section 255.8.

7 DCMR § 255.8 provides:

> Where two or more Review Panels disagree concerning the resolution of an issue, the Chief Administrative Appeals Judge may direct that the issue be reviewed and resolved by the full Board sitting en banc. In such instance, official action can be taken only on the concurring vote of at least three Board members.

The parties submitted memorandum to the *en banc* panel on the issue and on October 30, 2013, the CRB issued a Decision and Remand Order (DRO 2), in which the *en banc* panel unanimously agreed that the earlier position taken by the CRB was too restrictive, and held:

> [T]he statute must be interpreted in the context of the realities of how medical treatment is provided. Modern medical practice routinely includes treatment by LCSWs, nurse practitioners, physician's assistants and other professionals who, under the supervision of medical doctors, examine and treat patients. [Citation to and extended quote from *Jaffee v. Redmond*, 518 U.S. 1 (1996) omitted.]
>
> Therefore, we find that a treating LCSW's report is competent medical evidence that can support a claimant's initial burden to trigger the presumption of compensability in a mental-mental claim.
>
> Finally, because the employer reasonably could have relied upon the *Jones*[*v. D.C. Office of Unified Communications*, CRB No. 10-053, AHD No. PBL 08-062, DCP 2008-01339-846 (December 8, 2011)] decision, it may not have obtained or presented evidence to rebut the presumption. Therefore, on remand, the employer shall be afforded a reasonable time to obtain rebuttal evidence. After receipt of this evidence, or notification by employer that it will not obtain this evidence, the ALJ shall determine whether the presumption is rebutted, and if so, weight [sic] the evidence without benefits of the presumption.

DRO 2, pp. 5 – 6.

Upon remand, Respondent arranged to have Petitioner's medical records reviewed and to have Petitioner examined and evaluated by Dr. Brian Schulman. Respondent submitted the report, dated April 13, 2014, and the ALJ considered the matter further.

On June 14, 2014, the ALJ issued a Compensation Order on Remand (COR), finding that Petitioner's LCSW's report and records were sufficient to invoke the presumption of compensability, that Dr. Schulman's IME report was sufficient to overcome the presumption, and thereupon weighed the evidence, and denied the claim, choosing to credit Dr. Schulman's opinion over the reports and opinions of the LCSW.

Petitioner appealed the COR to the CRB, and it is that COR which we now consider.

Because the IME report of Dr. Schulman, when read as a whole, does not provide an unambiguous opinion that Petitioner's work did not cause *or contribute* to Petitioner's claimed period of disability, the determination that Respondent had adduced sufficient evidence to overcome the presumption is not supported by substantial evidence, and is reversed. The matter is remanded to AHD for further consideration as set forth in the Conclusion and Order hereof.

ANALYSIS

Although Petitioner's first argument is titled "The ALJ Did Not Properly Afford Claimant the Presumption of Compensability […]", this argument need not be addressed because the ALJ did in fact accord Petitioner the benefit of the presumption.

Petitioner's second two arguments are essentially the same: that the IME report was not sufficient to overcome the presumed relationship between Petitioner's employment and her claimed psychological disability because it merely states that her employment did not *directly* cause Petitioner's psychological injury, and did not address the possibility of a work related aggravation or exacerbation of her pre-existing psychological maladies.

Dr. Schuman's report contains the following statements on causation:

> Within a reasonable degree of medical probability, Ms. Howard was upset by a comment of a coworker in June, 2011. I found no evidence of a current mental disorder or historical evidence based upon my review of the records that she suffered an occupationally-generated mental and/or behavioral illness consequent to that comment.
>
> . . . .
>
> Veronica Howard did not demonstrate evidence of a mental or behavioral disorder during this evaluation. If she experienced an emotional reaction specifically to the occupational incident of June 15, 2011, she reached maximum medical improvement within two weeks.
>
> . . . .
>
> The psychiatric disorder(s), if any, that may have prompted Ms. Howard's extended leave from June 22 through July 20, 2011 cannot be attributed solely to her reaction to the subject event. Rather, the available records documented that she was being treated for a Depressive Disorder that was manifest for at least two months before the date of loss.

Employer's Post Hearing Exhibits on Remand (EPHE) 1, IME Report of Dr. Brian Schulman, April 13, 2014, pp. 9 -10.

The District of Columbia Court of Appeals has held that, where the record demonstrates that an IME physician has performed a personal examination of a claimant, has reviewed the relevant medical records, and has stated an unambiguous opinion contrary to the existence of a causal relationship between a claimed injury and a claimant's employment, there is substantial evidence in opposition to the presumption, sufficient to overcome it. *Washington Post v. DOES and Raymond Reynolds, Intervenor*, 852 A.2d 909 (D.C. 2004) (*Reynolds*). The court wrote:

> We hold that an employer has met its burden to rebut the presumption of causation when it has proffered a qualified independent medical expert who, having examined the employee and reviewed the employee's medical records, renders an unambiguous opinion that the work injury did not contribute to the disability.

Reynolds, supra, at 209.

Petitioner asserts that this opinion is insufficiently comprehensive, inasmuch as it merely addresses a part of the issue of causation, being direct causation or sole causation, and does not address "aggravation" or as the court put it in *Reynolds*, "contribution" to the condition. Respondent quotes the first part of the above quoted portion of the IME report, but does not address the remainder of Petitioner's argument. As Petitioner points out, the ALJ herself relied upon and quoted the portion of the report in which the doctor includes the qualification "solely" in his causation discussion.

We agree that the IME report is insufficiently comprehensive and is internally ambiguous to the extent that it fails to meet the *Reynolds*[4] standard. Accordingly, Respondent has failed to meet its burden of overcoming the established presumption of compensability. The ALJ's finding to the contrary is unsupported by substantial evidence, and must be reversed.

That being the case, the ALJ should not have proceeded to weigh the evidence. We therefore need not address Petitioner's argument concerning a treating physician preference.

Finally, because the nature and extent of Petitioner's disability was not reached, we must remand the matter for further consideration of that issue.

CONCLUSION AND ORDER

The determination that Respondent's evidence was sufficient to overcome the presumption that Petitioner's psychological condition is causally related to her employment, is unsupported by substantial evidence, and is reversed. The matter is remanded for further consideration of the remaining issue of nature and extent of disability.

FOR THE COMPENSATION REVIEW BOARD:

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JEFFREY P. RUSSELL
Administrative Appeals Judge

October 23, 2014
DATE

[4] *See also Boone v. PEPCO*, CRB No. 11-077 (October 21, 2011).