CRB 12-147(1)

VERONICA HOWARD,
Claimant-Petitioner,

v.

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

***En Banc* Reconsideration of a Decision and Order on an Appeal from an August 27, 2012, Compensation Order by Administrative Law Judge Karen R. Calmeise AHD No. 12-109, OWC No. 683290**

Before: Lawrence D. Tarr, *Chief Administrative Appeals Judge* with *Administrative Appeals Judges* Melissa Lin Jones, Henry W. McCoy, Jeffrey P. Russell, and Heather C. Leslie.

Lawrence D. Tarr, *Chief Administrative Appeals Judge* for the Compensation Review Board.

Justin M. Beall, Esquire, for the Claimant
Mark H. Dho, Esquire, for the Self-Insured Employer

DECISION AND REMAND ORDER

PROCEDURAL HISTORY AND BACKGROUND FACTS OF RECORD

Veronica Howard worked as a train operator for the Washington Metropolitan Area Transit Authority (WMATA). Ms. Howard alleges that she sustained psychological injuries on June 15, 2011 when she overheard a conversation between her supervisor and another employee in which they mentioned her by name and apparently referred to her as "crazy."

The next day, Claimant, who said she was upset, depressed and stressed after hearing the remark, contacted her employer's in-house assistance program and was referred for treatment to Kaiser Permanente, which in turn, referred her to a licensed clinical social worker (LCSW), Ms. Lori Ford, who treated the claimant on June 20, 2011 and July 5, 2011.

Ms. Ford diagnosed Claimant as having an "adjustment disorder with mixed anxiety and depression" and advised her not to work. On July 19, 2011, internist Dr. Charles Colao determined Claimant could return to employment without restrictions.

Claimant applied for temporary total disability benefits for June 16 to July 19, 2011 and for causally related medical treatment. An Administrative Law Judge (ALJ) denied the claim in a Compensation Order (CO) issued on August 27, 2012. One of the reasons the ALJ denied the claim was because the ALJ held the reports of a LCSW did not qualify as "competent medical evidence" and therefore could not be used to invoke the statutory presumption of compensability.

On March 5, 2013, the Compensation Review Board (CRB) issued a Decision and Remand Order that reversed the ALJ's determination and held the medical reports of an LCSW are "competent medical evidence." *Howard v. WMATA*, CRB 12-147 (March 5, 2013). However, because the CRB's March 5, 2013 panel decision on this issue is contrary to an earlier CRB panel decision, *Jones v. D.C. Office of Unified Communications*, CRB No. 10-053, AHD No. PBL 08-062, DCP No. 2008-01339-846 (December 8, 2011), the CRB, *sua sponte*, issued an Order for Reconsideration *En Banc*, pursuant to 7 DCMR §§ 255.3 and 255.8.[1]

The specific issue designated for *en banc* review is:

> 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 conditions or events which could have caused or aggravated the psychological injury in accordance with *Ramey v. PEPCO,* CRB No. 06-38(R), AHD No. 03-035C (July 24, 2008).

Each party was granted the opportunity to submit a memorandum on this issue and has done so.

DISCUSSION AND ANALYSIS

In the present claim, Ms. Howard has alleged a mental-mental claim; that as a result of a nonphysical occurrence at work (overhearing the June 15, 2011 conversation) she developed a psychological disability (adjustment disorder and depression) that disabled her from June 16, 2011 to July 19, 2011.

In *Ramey v. District of Columbia Dep't of Emp't Servs., (DOES)*, 997 A.2d 694 (D.C. 2010), the District of Columbia Court of Appeals (DCCA) upheld the CRB's test for invoking the statutory presumption of compensability in mental-mental claims.

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[1] 7 DCMR § 255.3 provides:

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

7 DCMR § 255.8 states:

> 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 of the full Board can be taken only on the concurring vote of at least three Board members.

The CRB's test is a burden shifting one, in which:

> [A]n 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 ALJ, 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. If the presumption is invoked, the burden shifts to the employer to show, through substantial evidence, the psychological injury was not caused or aggravated by workplace conditions or events. If the employer succeeds, the statutory presumption drops out of the case entirely and the burden reverts to the injured worker to prove by a preponderance of the evidence that the workplace conditions or events caused or aggravated the psychological injury.

Ramey v. PEPCO, CRB No. 06-38(R), AHD No. 03-035C (July 24, 2008). (Emphasis added).

Therefore, under *Ramey*, the claimant's initial showing of a psychological injury and a workplace condition or event that could cause or aggravate the psychological injury, must be supported by "competent medical evidence." The issue before the CRB, *en banc*, is whether the report of a LCSW qualifies as competent medical evidence that is admissible to support a claimant's initial showing.

In the *Jones* case, the CRB, without discussion, concluded that the LSCW's report was not competent medical evidence because it was not "medical evidence."

> In addition, the opinion of a LCSW is not medical evidence, and thus does not satisfy the requirement that a causal relationship showing include "competent medical evidence."

Jones, supra, at 5.

In the CRB's March 5, 2013 *Howard* decision, the CRB panel held that a LCSW's report qualified as competent medical evidence and stated why it disagreed with the *Jones* decision:

> The CRB has previously taken the position that the opinion of a licensed clinical social worker (LCSW) is not medical evidence and thus does not satisfy the requirement of competent medical evidence needed to support a claim of psychological injury. However, upon further reflection, we note that Black's Law Dictionary defines "medical evidence" as "Evidence furnished by a doctor, nurse, or other qualified medical person testifying in a professional capacity as an expert,. . . ." In addition, it is becoming more common for LCSWs to be found providing "a significant amount of mental health treatment."

The CRB's *Howard* decision further stated:

> Accordingly, we take this opportunity to overrule that previous declaration and now ascribe to the position that the medical reports from a LCSW who has examined the claimant and expresses the findings of that examination in the traditional format of a psychological or psychiatric report constitutes competent medical evidence.

Howard, supra, at 4-5.

We find that the CRB's *Howard* panel decision is consistent with the statute and reaffirm that decision's holding that the report of a LCSW qualifies as competent medical evidence that is admissible to support a Claimant's initial burden.

Neither of the two laws that govern workers' compensation matters in our jurisdiction, the District of Columbia Workers' Compensation Act of 1979, D.C. Code, as amended, §§ 32-1501 *et seq*. and the District of Columbia Government Comprehensive Merit Personnel Act of 1978, D.C. Code, as amended, D.C. Code § 1-623.1 *et seq*., defines the term "competent medical evidence."

While D.C. Code § 32-1507(3) states "The employer shall have the right to choose an attending physician" and § 32-1507(A) states that a physician is defined as "physician, dentist, or chiropractor," the Act has not been interpreted to limit medical care only to those services provided by doctors, dentists or chiropractors.

For example, in *WMATA v. DOES and Young, Intervenor,* 770 A.2d 965, at 966, 971 (D.C. 2001), the Court referred to the claimant's "treating psychologist". In *Jones v. PEPCO*, Dir. Dkt. No 02-48, OHA No. 02-073, OWC No. 253357 (February 11, 2003), the DOES Director, who at that time decided agency appeals in workers' compensation cases, held the claimant was entitled to the presumption of compensability, relying on the opinion of claimant's "treating psychologist. Similarly, in *Flowers v. Market Strategies, Inc.,* Dir. Dkt. No 00-13, OHA No. 98-619A, OWC No. 529024 (January 30, 2002), the Director held the opinion of the claimant's treating psychologist was sufficient evidence to invoke the presumption of compensability.

Moreover, in this case the employer referred the claimant to Kaiser Permanente, who then referred the claimant to Ms. Ford. We agree with Claimant that it is inequitable for the employer to argue that Ms. Ford's opinion is not competent medical evidence for the purposes of the presumption:

> An injured worker should not be penalized for following the directives and referrals of those from whom she sought medical assistance. It was not Claimant's decision to see a medical doctor or a licensed clinical social worker for her treatment. Rather, she sought out treatment from Kaiser Permanente, and as her medical provider, Kaiser then referred her for treatment with Ms. Ford. Claimant sought out Kaiser to help her with her condition, and it was Kaiser who thereafter

> directed Claimant's medical care by sending her to see a LCSW. In continuing to see Ms. Ford, Claimant was simply following the directions of WMATA's [Employee Assistance Program] and Kaiser in order to receive treatment for her injury. Claimant should not be penalized for following her [sic] the instructions and orders of her treating medical providers.

Claimant's Memorandum at 8-9.

Additionally, the 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.

Although not a workers' compensation case, we find the following statement by the United States Supreme Court in *Jaffee v. Redmond*, to be instructive:

> All agree that a psychotherapist privilege covers confidential communications made to licensed psychiatrists and psychologists. We have no hesitation in concluding in this case that the federal privilege should also extend to confidential communications made to licensed social workers in the course of psychotherapy. The reasons for recognizing a privilege for treatment by psychiatrists and psychologists apply with equal force to treatment by a clinical social worker such as Karen Beyer. Today, social workers provide a significant amount of mental health treatment. See, *e.g.*, U.S. Dept. of Health and Human Services, Center for Mental Health Services, Mental Health, United States, 1994 pp. 85-87, 107-114; Brief for National Association of Social Workers et al. as *Amici Curiae* 5-7 (citing authorities). Their clients often include the poor and those of modest means who could not afford the assistance of a psychiatrist or psychologist, *id.*, at 6-7 (citing authorities), but whose counseling sessions serve the same public goals. Perhaps in recognition of these circumstances, the vast majority of States explicitly extend testimonial privilege to licensed social workers. We therefore agree with the Court of Appeals that "drawing a distinction between the counseling provided by costly psychotherapists and the counseling provided by more readily accessible social workers serves no discernible public purpose." 51 F.3d at 1358, n. 19.

518 U.S. 1, 15-17 (U.S. 1996) (Emphasis added).

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 on the *Jones* 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 the evidence without the benefit of the presumption.

ORDER

The ALJ's Compensation Order of August 27, 2012 is not supported by substantial evidence in the record and is not in accordance with the law. Accordingly, the Compensation Order is VACATED AND REMANDED for further consideration in accordance with this Decision and Remand Order.

FOR THE COMPENSATION REVIEW BOARD:

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Lawrence D. Tarr
Chief Administrative Appeals Judge

October 30, 2013
DATE