

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA MARÍA MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 12-177

JAMIL F. MUHAMMAD,
Claimant–Petitioner,

v.

EASTERN ELECTRIC and ZURICH INSURANCE,
Employer and Insurer–Respondent.

Appeal from a September 28, 2012 Compensation Order on Remand of
Administrative Law Judge Anand K. Verma
AHD No.03-035C, OWC No. 576531

Benjamin T. Boscolo, Esquire, for the Petitioner
Mark T. Krause, Esquire, for the Respondent

Before JEFFREY P. RUSSELL, and MELISSA LIN JONES, *Administrative Appeals Judges*, and
LAWRENCE D. TARR, *Chief Administrative Appeals Judge*.

JEFFREY P. RUSSELL, for the Compensation Review Board; LAWRENCE D. TARR, *Chief
Administrative Appeals Judge, dissenting in part and concurring in part.*

DECISION AND REMAND ORDER

BACKGROUND

This case has a long and somewhat complex procedural and factual history, which will be discussed in more detail later in the Decision and Remand Order. Suffice it to say at this point that following a decision of the District of Columbia Court of Appeals (DCCA) reversing the Compensation Review Board’s (CRB’s) affirmance of a Compensation Order on Remand, the CRB remanded the matter for the purpose of determining whether Mr. Muhammad had demonstrated that he is permanently and totally disabled.

In response to the CRB’s Decision and Remand Order, the ALJ issued a Compensation Order on Remand on September 28, 2012 (the COR). In the COR, although he misidentified the issue in the “Issue” section as being “Whether Claimant’s psychiatric condition is medically causally related to the March 21, 2002 injury”, the ALJ properly identified the Claim for Relief as being a claim for permanent total disability benefits, and review of the Findings of Fact and Analysis sections of the

COR demonstrate that the ALJ properly considered the issue of nature and extent of disability, as opposed to medical causal relationship.

After considering the evidence adduced by the parties, including Mr. Muhammad's treating orthopaedic physician having released him to return to "light duty" work, and Eastern Electric's labor market evidence, the ALJ denied the claim for permanent total disability benefits. He made no alternative award for any other class of benefits.

Mr. Muhammad filed a timely appeal of the COR, to which Eastern Electric has filed a timely opposition.

We vacate the denial of benefits and remand for further consideration of the claim.

STANDARD OF REVIEW

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.

DISCUSSION AND ANALYSIS

In the process of the appeals in this case, it has been established as the law of the case that Mr. Muhammad suffers both physical and psychiatric effects as a result of his work injury. And, as the DCCA noted numerous times in its remand to the CRB, this finding is based upon the ALJ's acceptance of the opinion of Dr. Schulman, Eastern Electric's IME psychiatrist, to the effect that "Mr. Muhammad suffered a mental illness 'as a consequence to his participation in vocational rehabilitation', which Mr. Muhammad was required to attend as a result of the March 2002 injury." *Muhammad v. DOES*, 34 A.3d 488 (D.C. 2012), at 497.

As the DCCA noted:

Over the five years in which Mr. Muhammad has attempted to resolve his case through the workers' compensation system, the legal landscape for claims for psychological injury has changed dramatically. When Mr. Muhammad originally filed his claim, this jurisdiction applied an "objective standard" requiring "the claimant [to] show [] that the actual working conditions could have caused a similar emotional injury in a person who was not significantly predisposed to such injury." *Dailey v. 3M Co.*, H&AS No. 85-259, 1988 D.C. Wrk. Comp. LEXIS 1 at*8 (D.C. Dep't of Employment Serv's. May 19, 1988); see also *Porter v. District of Columbia Dep't of Employment Serv's.*, 625 A.2d 886, 889 (D.C. 1993) (endorsing the

objective test). However, in *McCamey* [*v. District of Columbia Dep't of Employment Serv's.*, 947 A.2d 1191 (D.C. 2008)(en banc)] we rejected this “objective standard”, which delves into an “employee’s particular susceptibilities,” as contrary to the fundamental, humanitarian purposes of the Workers’ Compensation Act. 947 A.2d at 1206, 1209. Two years later, in *Ramey*[*v. District of Columbia Dep't of Employment Serv's.*, 997 A.2d 694 (D.C. 2010)] we upheld the Board’s decision to “adopt[] the test announced by this court in *McCamey* for use in physical-mental cases, for application in mental-mental cases.” 997 A.2d at 700 (reviewing the Board’s mental-mental rule announced in *Ramey v. Potomac Electric Power Co.*, CRB No. 06-38, 2008 WL 3338467 (D.C. Dep’t of Employment Servs. July 24, 2008)).

In 2008, we also decided *Nixon v. District of Columbia Dep't of Employment Serv's.*, which discussed whether an injury sustained as a result of vocational rehabilitation may be considered as “aris[ing] both out of and in the course of employment.” 954 A.2d 1016, 1024 (D.C. 2008)(quoting *McCamey*, 947 A.2d at 1200)(other citations omitted). In *Nixon*, we remanded for a determination of whether a claim flowing from vocational rehabilitation “might be covered as involving what Professor Larson refers to as a ‘quasi-course of employment injury.’” *Id.*, at 1025 (quoting 1 ARTHUR LARSON & LEX K. LARSON, LARSON’S WORKERS’ COMPENSATION LAW § 10.05 (2008)).

[...]

On remand in *Nixon*, the ALJ determined that where the “[e]mployer was under a statutory duty to provide vocational rehabilitation [and the] [c]laimant was under a similar duty to participate,” the resulting injury may be compensable as a workplace injury. *Nixon v. District of Columbia Housing Authority*, CRB No. 06-80(R), 2009 WL 1689630, at *6 (D.C. Dep’t of Employment Servs. May 5, 2009). Although the ALJ accepted the quasi-course of employment doctrine, the Board did not review that order and, as far as we are aware, it has never decided the question presented in *Nixon*.

[...]

Muhammad, id., at 492 – 494.

The DCCA continued later:

But as discussed above, *Nixon*, if adopted, would provide this causal link [between the March 2002 work injury and Mr. Muhammad’s psychiatric injury]. [...] Resolving the issue raised in *Nixon* therefore must be a primary focus on remand.

Id., at 497.

The CRB, on remand, did as instructed, concluding:

Because the psychological injuries sustained by Mr. Muhammad occurred during mandated vocational rehabilitation activities, they qualify as quasi-course of employment injuries [footnote omitted]. Therefore, the claimant has proven the requisite causal connection between his psychiatric condition and his employment.

At the formal hearing, the employer also defended the claim on the ground that the claimant had not proven he was permanently and totally disabled. The ALJ did not decide this issue because he found no medical causation between the claimant's psychiatric condition and the accident at work. Since that determination is now reversed, we must remand this case to the ALJ to determine whether claimant is permanently and totally disabled, and the appropriate period for those benefits.

Muhammad v. Eastern Electric, et al., CRB No. 09-132(R), AHD No. 03-035C, OWC No. 576531 (Decision and Remand Order (DRO), May 18, 2012), at 6.

It is that DRO to which the ALJ was responding in the instant COR.

In the COR, the ALJ considered the fact that Mr. Muhammad's treating orthopaedic physician, the now-deceased Hampton Jackson, released Mr. Muhammad to "light duties" as of the date of Dr. Jackson's June 10, 2005 deposition. However, there are no specific findings concerning what physical restrictions Dr. Jackson placed on Mr. Muhammad, or to what degree the ALJ accepts Dr. Jackson's views.

Further, he has ignored the DCCA's decision and the CRB's previous decision that the claimant proved the causal connection between his employment and his psychiatric condition. The ALJ failed to make a finding whether the claimant's psychiatric condition inhibits or prevents him from seeking or obtaining employment.

Therefore we must remand this case to the ALJ and again instruct him to make specific findings whether the claimant's psychiatric condition inhibits or prevents him from seeking or obtaining employment. In this regard we note that ALJ identified an inaccurate legal standard at page 7 of the COR when he stated the evidence must be viewed in a light favorable to one party.

Finally, it can not be ignored that, as the DCCA pointed out, the legal landscape has changed dramatically in the area of psychiatric injury and disability since this case first arose. On remand, we urge the ALJ to consider obtaining additional input from the parties, either by written memoranda or a new evidentiary hearing, concerning matters that did not appear to be highly relevant at the inception of this litigation, but which have become more significant as the "legal landscape" has changed.

In any event, in order to withstand review under the substantial evidence standard, an agency decision must contain record based findings of fact on each contested material issue, and conclusions of law that flow rationally from those facts. There are no findings concerning what effect, if any, Mr. Muhammad's physical or psychiatric injuries have upon his capacity to seek, obtain and retain employment, nor are there any such findings concerning the degree to which Mr. Muhammad, even if employable, is able to earn wages in comparison to his pre-injury earnings.

For these reasons, the denial of the claim for relief must be vacated and the matter remanded for further consideration of the claim.

CONCLUSION AND ORDER

The failure to make specific findings of fact concerning whether Mr. Muhammad's disability, if any, is permanent, and what limitations, if any, Mr. Muhammad's physical and psychiatric injuries place on his capacity to seek, obtain and retain employment, or to make such findings of fact concerning the degree to which, if employable, Mr. Muhammad is nonetheless partially disabled, render the denial of benefits unsupported by substantial evidence and not in accordance with the law.

The denial of the claim is vacated, and the matter is remanded for further consideration in a manner consistent with the foregoing Decision and Remand Order.

FOR THE COMPENSATION REVIEW BOARD:

JEFFREY P. RUSSELL
Administrative Appeals Judge

June 4, 2013
DATE

DISSENTING in part AND CONCURRING in part:

I respectfully dissent from the majority's finding that the ALJ did not decide what effect, if any, the claimant's physical injuries have upon his capacity to seek work.

The ALJ did make a specific finding that the claimant was physically unable to return to his pre-injury work. At page 4, the ALJ found that the claimant met his burden under *Logan* to prove his inability to return to his usual employment:

In the instant case, Dr. Jackson's testimony that Claimant was unable to return to his pre-injury manual labor position as of May 10, 2005 meets his requisite burden.

COR at 4.

Indeed, the employer did not appeal this finding and twice acknowledges in its written statement that Dr. Jackson placed permanent physical restrictions on the claimant's ability to work. (Employer's memorandum at 2 and 3).

I concur with the majority that this case must be remanded so that the ALJ can analyze the claimant's claim for permanent total disability benefits with respect to his psychiatric condition in accordance with the standard of proof stated in the *Logan* decision.

I also agree with the majority in urging the ALJ to obtain additional input from the parties. This is a claim for continuing benefits. However, the formal hearing took place over a year before the law with respect to psychiatric injuries and disability determinations was clarified by the Court of Appeals' *McCamey* decision. I believe this is the rare case where due process requires that the parties be permitted to supplement the record with additional evidence.

/s/ Lawrence D. Tarr
LAWRENCE D. TARR
Chief Administrative Appeals Judge