

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

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



**LISA M. MALLORY**  
**DIRECTOR**

**CRB No. 12-023**

**ERIC T. DALY,**  
**Claimant–Petitioner,**

**v.**

**R.J. REYNOLDS and ACE ESIS, INC.,**  
**Employer-Respondent.**

Appeal from a Compensation Order on Remand by  
The Honorable Anand K. Verma  
AHD No. 10-193A, OWC No. 655062

Michael J. Kitzman, Esquire for the Petitioner  
Anthony J. Zaccagnini, Esquire for the Respondent

Before MELISSA LIN JONES, HEATHER C. LESLIE,<sup>1</sup> and JEFFREY P. RUSSELL,<sup>2</sup> *Administrative Appeals Judges*.

MELISSA LIN JONES, *Administrative Appeals Judge*, for the Compensation Review Board.

**DECISION AND REMAND ORDER**

**JURISDICTION**

Jurisdiction is conferred upon the Compensation Review Board (“CRB”) pursuant to §§32-1521.01 and 32-1522 of the District of Columbia Workers’ Compensation Act of 1979, D.C. Code, as amended, §32-1501 *et seq.*, (“Act”), 7 DCMR 250, *et seq.*, and the Department of Employment Services Director’s Administrative Policy Issuance 05-01 (February 5, 2005).

**FACTS OF RECORD AND PROCEDURAL HISTORY**

The fact underlying this claim are set forth in *Daly v. R. J. Reynolds*, CRB No. 11-058, AHD No. 10-193A, OWC No. 655062 (January 10, 2012). Because those facts have not changed, they are not reiterated here.

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<sup>1</sup> Judge Leslie has been appointed by the Director of the DOES as a temporary CRB member pursuant to DOES Administrative Policy Issuance No. 11-02 (June 13, 2011).

<sup>2</sup> Judge Russell has been appointed by the Director of the DOES as a temporary CRB member pursuant to DOES Administrative Policy Issuance No. 11-01 (June 23, 2011).

At this point in the process, the facts underlying the procedural posture of this matter are of principal importance. On May 27, 2011, the administrative law judge (“ALJ”) issued a Compensation Order denying Mr. Eric T. Daly’s request for authorization for continuing medical treatment and payment of outstanding medical bills.<sup>3</sup> Because the ALJ had applied the presumption of compensability to the issue of reasonableness and necessity of ongoing treatment, the matter was remanded by the CRB for analysis of the evidence in accordance with the applicable law:

On remand, the ALJ shall consider the evidence and issue a new decision as to whether the claimant is entitled to continuing psychiatric treatment in the form of telephonic therapy from Dr. Smothers. In reaching this decision, the ALJ should not utilize a presumption-type analysis but should analyze the record evidence and determine whether the claimant met his burden of proving, by a preponderance of the evidence, that the proposed treatment plan is reasonable and necessary.<sup>[4]</sup>

On January 31, 2012, the ALJ issued a Compensation Order on Remand. The ALJ denied Mr. Daly’s claim for continuing telephone therapy with Dr. Smothers because “the [ALJ] is not inclined to allow claimant continuing telephone therapy.”<sup>5</sup>

Mr. Daly appeals this Compensation Order on Remand for the following reasons:<sup>6</sup>

- The Compensation Order on Remand does not apply the proper legal analysis;
- The Compensation Order on Remand relies upon nonexistent “evidence;” and
- The Compensation Order on Remand reaches medical conclusions not supported by substantial evidence in the record.

#### ISSUES ON APPEAL

1. Does substantial evidence in the record support that the ALJ properly considered the directives in the January 10, 2012 Decision and Remand Order?
2. Is the January 31, 2012 Compensation Order on Remand supported by substantial evidence and in accordance with the law?

#### ANALYSIS

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<sup>7</sup> in

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<sup>3</sup> *Daly v. R. J. Reynolds*, AHD No. 10-193A, OWC No. 655062 (May 27, 2011).

<sup>4</sup> *Daly v. R. J. Reynolds*, CRB No. 11-058, AHD No. 10-193A, OWC No. 655062 (January 10, 2012). The payment of certain medical treatment by Dr. Kenneth R. Smothers in 2009 and 2010 was not appealed.

<sup>5</sup> *Daly v. R. J. Reynolds*, AHD No. 10-193A, OWC No. 655062 (January 31, 2012).

<sup>6</sup> R. J. Reynolds has not filed any response in this appeal.

the record and whether the legal conclusions drawn from those facts are in accordance with applicable law.<sup>8</sup> 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.<sup>9</sup>

Mr. Daly argues the ALJ failed to analyze the record-evidence to determine if Mr. Daly met his burden of proving his proposed treatment plan is reasonable and necessary. The totality of the ALJ's examination of the evidence in regards to whether or not Mr. Daly met his burden is as follows:

[T]he undersigned notes that even Dr. Smothers in his September 27, 2009 examination recognized claimant's difficulty of managing his symptoms due to psychotherapy via phone. Patently inherent in the telephone therapy is a risk that claimant could aptly embellish his symptoms over the phone by faking his voice and concealing his expressions, not otherwise subjected to personal observation and verification. Further, an in-person treatment vis-a-vis a phone therapy is imperative in properly diagnosing and planning an ameliorative therapy, especially where claimant complains of an adjustment disorder with depressed mood, panic attacks, anxiety and insomnia. Furthermore, the need for an ongoing telephonic psychotherapy also becomes suspect in light of its unproductiveness thus far and claimant's well observed and reported level of functioning otherwise in the society. For these reasons, the undersigned is not inclined to allow claimant continuing telephone therapy.<sup>[10]</sup>

When the issue for resolution is reasonableness and necessity of medical treatment, the utilization review process is mandatory.<sup>11</sup> Once a utilization review report has been submitted into evidence, that report is not dispositive but is entitled to equal footing with an opinion rendered by a treating physician.<sup>12</sup> The ALJ

is free to consider the medical evidence as a whole on the question, and is not bound by the outcome of the UR report. The issue should be decided based upon the ALJ's weighing of the competing medical evidence and [the ALJ] is free to accept either the

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<sup>7</sup> "Substantial evidence" is relevant evidence a reasonable person might accept to support a conclusion. *Marriott International v. DOES*, 834 A.2d 882, 885 (D.C. 2003).

<sup>8</sup> Section 32-1521.01(d)(2)(A) of the Act.

<sup>9</sup> *Marriott, supra*.

<sup>10</sup> *Daly v. R. J. Reynolds*, AHD No. 10-193A, OWC No. 655062 (January 31, 2012).

<sup>11</sup> See *Gonzalez v. UNNICO Service Company*, CRB No. 07-005, AHD No. 06-155, OWC No. 604331 (February 21, 2007).

<sup>12</sup> See *Children's National Medical Center v. DOES*, 992 A.2d 403 (D.C. 2010).

opinion of treating physician who recommends the treatment, or the opinion of the UR report, without the need to apply a treating physician preference.<sup>[13]</sup>

Regardless of which opinion the ALJ gives greater weight, it is incumbent upon the ALJ to explain why one opinion is chosen over the other.<sup>14</sup>

In the Compensation Order on Remand, the ALJ offers no explanation of what medical opinion is relied upon and no analysis of why the law requires the outcome reached. Consequently, the law requires we, again, remand this matter for the ALJ to appropriately “consider the evidence and issue a new decision as to whether the claimant is entitled to continuing psychiatric treatment in the form of telephonic therapy from Dr. Smothers.”<sup>15</sup>

Furthermore, after incorporating by reference the findings of fact made in the May 27, 2011 Compensation Order, in the Compensation Order on Remand the ALJ stated, “predicated on the evaluation of the entirety of evidence, I find claimant’s alleged psychiatric symptoms subjective and exaggerated and his testimony thereto incredible.”<sup>16</sup> Although an ALJ’s credibility determinations often are entitled to deference,<sup>17</sup> credibility determinations, like all other findings of fact, must be supported by substantial evidence in the record when reviewed as a whole,<sup>18</sup> and even though a formal hearing in this matter took place on April 5, 2011, the only witness who testified at the formal hearing was Dr. Smothers.<sup>19</sup> Mr. Daly did not testify, thereby making it impossible that his alleged testimony regarding his symptoms is incredible. On remand, the ALJ’s findings of fact must be confined to evidence in the record; drawing conclusions from facts not in evidence is reversible error.

Similarly, the ALJ determined 1. there is “a risk that claimant could aptly embellish his symptoms over the phone by faking his voice and concealing his expressions,”<sup>20</sup> 2. “an in-person treatment vis-a-vis a phone therapy is imperative in properly diagnosing and planning an ameliorative therapy, especially where claimant complains of an adjustment disorder with depressed mood, panic attacks, anxiety and insomnia,”<sup>21</sup> and 3. “the need for an ongoing telephonic psychotherapy also becomes

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<sup>13</sup> *Green v. Washington Hospital Center*, CRB No. 08-208, AHD No. 07-130, OWC No. 628552 (June 17, 2009).

<sup>14</sup> *Haregewoin v. Loews Washington Hotel*, CRB No. 08-068, AHD No. 07-041A, OWC No. 603483 (February 19, 2008). The Compensation Review Board’s Decision and Order transposes the claimant’s name; the claimant’s name is Haregewoin Desta not Desta Haregewoin. See *Desta v. Loew’s Washington Hotel*, AHD No. 07-041A, OWC No. 603483 (December 7, 2007).

<sup>15</sup> *Daly v. R. J. Reynolds*, CRB No. 11-058, AHD No. 10-193A, OWC No. 655062 (January 10, 2012).

<sup>16</sup> *Daly v. R. J. Reynolds*, AHD No. 10-193A, OWC No. 655062 (January 31, 2012).

<sup>17</sup> *Dell v. DOES*, 499 A.2d 102, 106 (D.C. 1985).

<sup>18</sup> See *Davis v. Western Union Telegraph*, Dir. Dkt. 88-84, H&AS No. 87-751, OWC No. 098216 (March 4, 1992).

<sup>19</sup> Dr. Smithpeter’s deposition transcript was received in evidence, but that testimony is irrelevant to this issue.

<sup>20</sup> *Daly v. R. J. Reynolds*, AHD No. 10-193A, OWC No. 655062 (January 31, 2012).

<sup>21</sup> *Id.*

suspect in light of its unproductiveness thus far and claimant's well observed and reported level of functioning otherwise in the society.”<sup>22</sup> Even if an ALJ may draw reasonable inferences from the evidence,<sup>23</sup> without substantial evidence in the record to support such inferences, those inferences cannot be upheld on appeal, particularly when those inferences go beyond legal conclusion into the realm of medical conjecture.

If there is evidence in the record to support the ALJ’s conclusions, the ALJ remains free to cite that evidence in support of those conclusions. If, however, there is no evidence in the record to support the ALJ’s conclusions, the ALJ exceeds the scope of authority in rendering medical opinions.<sup>24</sup>

Finally, in the terse “Analysis” section of the Compensation Order on Remand, the ALJ, *sua sponte*, raised issues regarding the suitability of the CRB’s prior directives. As this ALJ has been reminded previously:

[I]t is up to the District of Columbia Court of Appeals to determine whether or not the CRB is correct or incorrect. This concept is the best way to insure prompt resolution of disputes in an orderly, predictable, and equitable fashion in a manner that maximizes the efficient use of limited administrative and judicial resources.<sup>[25]</sup>

#### CONCLUSION AND ORDER

The instructions in the January 10, 2012 Decision and Remand Order are clear. Equally as clear is the ALJ’s failure to comply with those instructions through findings of fact, an analysis of an application of the law to those facts, and a rational conclusion reached through that analysis.<sup>26</sup> Consequently, the law requires we vacate the January 31, 2012 Compensation Order on Remand and remand this matter for further proceedings consistent with this Decision and Remand Order as well as the January 10, 2012 Decision and Remand Order.

FOR THE COMPENSATION REVIEW BOARD:

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MELISSA LIN JONES  
Administrative Appeals Judge

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April 3, 2012  
DATE

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<sup>22</sup> *Id.*

<sup>23</sup> See *George Hyman Construction Co. v. DOES*, 498 A.2d 563, 566 (D.C. 1985).

<sup>24</sup> See *Seals v. The Bank Fund Staff Federal Credit Union*, CRB No. 09-131, AHD No. 144, OWC No. 653446 (May 20, 2010).

<sup>25</sup> *Majors v. Washington Metropolitan Area Transit Authority*, CRB No. 11-098, AHD No. 10-139, OWC No. 657877 (January 26, 2012).

<sup>26</sup> See D.C. Code §2-501 *et seq.* (2006).