

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 15-006

**ADRIENNE HOLMES,
Claimant-Respondent,**

v.

**AMERIHEALTH CARITAS and
AMERIHEALTH CASUALTY,
Employer and Third-Party Administrator-Petitioner.**

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2015 MAY 14 PM 11 54

Appeal from a December 17, 2014 Order
by Office of Workers' Compensation Supervisory Claims Examiner Alice Goldring
OWC No. 718708

Ryan J. Foran for Claimant
Robert C. Baker for Employer

Before JEFFREY P. RUSSELL, LINDA F. JORY, and HEATHER C. LESLIE, *Administrative Appeals Judges*.

JEFFREY P. RUSSELL for the Compensation Review Board.

DECISION AND ORDER

PROCEDURAL HISTORY

An informal conference was held before Claims Examiner Alice Goldring on December 10, 2014, to consider Claimant's request that she be permitted to change treating or managing physicians from Concentra Medical Care to Dr. Michael Franchetti in connection with a claimed work related carpal tunnel injury to her left wrist.

According documents submitted at the conference, specifically, "Employee's Claim Form" and "Employer's First Report of Injury or Occupational Disease", Claimant sustained the injury on June 12, 2014 while working for Employer as a "Care Manager II". The cause of the injury is

identified as “repetitive use of hands”. Those same documents identify her medical provider as “Concentra”.

In the Order issued following the informal conference, the Claims Examiner recited that Claimant stated she was referred by Employer to Concentra and was not advised that she was entitled, under D.C. Code § 32-1507(a), to choose a physician to provide medical treatment, that she is not satisfied with the care being offered at Concentra, and she now wishes to select Dr. Michael Franchetti to treat her.

The Order further states that Employer’s position is that Claimant had treated with Concentra for a lengthy enough time such that Claimant had constructively chosen Concentra, and that Claimant didn’t need any further care.

The Claims Examiner found the change to be in Claimant’s best interests, and authorized it, stating that “As she [Claimant] is experiencing discomfort ... [and] feels she would get better care from Dr. Michael Franchetti”. Order, p. 2.

Employer filed an Application for Review (AFR) of the Order with the Compensation Review Board (CRB), to which appeal Claimant responded by filing “Claimant’s Response to Employer/Insurer’s Application for Review”.

In the AFR, Employer argues that the Order is not supported by substantial evidence and is otherwise in error, as discussed more specifically below.

In Claimant’s response, it is argued that the Order is not arbitrary or capricious, is premised upon facts that reasonably support the order, and is in accordance with the law.

We affirm the Order.

STANDARD OF REVIEW

In review of an appeal from OWC, the CRB must affirm the order under review unless it is determined to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. *See* 6 Stein, Mitchell & Mezones, ADMINISTRATIVE LAW, § 51.93 (2001).

ANALYSIS

Employer does not argue that the Claims Examiner applied the wrong legal standard, and does not contest Claimant’s assertions as described in the Order. Further, although it opposed the provision of further care on reasonableness and necessity grounds, it has not appealed the implied adverse determination on that issue which is contained in the authorization to treat with Dr. Franchetti.

Rather, Employer raises three arguments in seeking to have the Order reversed.

First, citing *Velasquez v. DOES*, 723 A.2d 401 (D.C. 1999), Employer argues that Claimant constructively selected Concentra to treat her work injury by continuing to treat with Concentra for a period of time after retaining the services of counsel to represent her in the claim.

The argument assumes that as of the date counsel was retained, Claimant was aware of her right to choose a physician to treat her work injury, and knowingly elected to have Concentra provide her with ongoing medical care.

Employer's argument is highly speculative, and assumes facts not contained in the Order or found otherwise among the documents submitted at the conference, or even in Employer's recitation of its version of what occurred at the conference. For this reason we reject it.

Second, Employer argues somewhat contradictorily that, rather than selecting Dr. Franchetti, Claimant had already constructively selected another physician, Dr. Ngozi Akabudike.

Employer premises this argument upon Claimant's having submitted a diagnostic report from Dr. Akabudike, which it alleges Claimant testified¹ resulted from Dr. Akabudike having provided her medical care through the University of Maryland Health System. Employer asserts that it was not until the conference that it was aware that Claimant had seen Dr. Akabudike, and that Claimant's failure to produce other treatment records from him somehow establishes that she had elected to have Dr. Akabudike become her managing physician.

It further argues that the Claims Examiner was deprived "of the benefit of Dr. Akabudike's opinion regarding treatment" at the conference, that "[c]learly, Claimant was aware of her right to choose a physician when she selected Dr. Akabudike", and that the claims examiner impermissibly failed to address whether Claimant had selected Dr. Akabudike.

Claimant, in her response, posits that the decision to treat with Dr. Akabudike, under her own private health care plan, doesn't constitute an election under the Act, in part because Employer never paid for the doctor's services or authorized Claimant to consult with him.

We fail to see how a lack of information constitutes a basis upon which the claims examiner should make a decision concerning a change or election of physicians. Nor does Employer assert that it argued at the conference that Dr. Akabudike should be considered the selected physician, that Claimant had sought to have Dr. Akabudike replace Concentra as her managing physician under the Act, or that Employer accepted that election and acted upon it. Thus, we fail to see how the failure of the Claims Examiner to address the question could constitute error.

These arguments also suffer from the same speculative quality as Employer's first argument: there is nothing upon which one can conclusively assume that Claimant was aware of her statutory right to select her own physician when she was seeing Dr. Akabudike. We reject these arguments.

¹ We recognize that statements of a party at an informal conference are not under oath and thus do not, as a technical matter, constitute "testimony".

Lastly, Employer argues that the Claims Examiner's decision that a change of physicians was in Claimant's best interests and authorizing the change is "unsupported by substantial evidence". However, the standard to be applied is whether there was an abuse of discretion, not substantial evidence. No record is created at informal conferences, and the substantial evidence standard is therefore impossible to apply.

Further, the body of the Order makes clear that not only was Claimant seeking a change to get better care, but that she had never been given the opportunity to choose her own physician because Employer had not made her aware of her right to select her own physician when she treated at Concentra, thus the *Velasquez* rule, and not only the "best interests of the claimant" standard, was at issue here.

Velasquez states:

Under workers' compensation, an employee may only be reimbursed for medical costs associated with a designated treating physician. See D.C. Code § 36-307(a)[now D.C. Code § 32-1507(a)]. Though the employee is free to select a physician initially, later changes must be authorized by the employer or the Office of Workers' Compensation in order to maintain coverage. See D.C. Code § 36-307(b)(3), -307(d) [now D.C. Code § 32-1507 (b)(3) and (d)]; 7 D.C.M.R. §§ 212.12-13 (1986); *King v. District of Columbia Dep't of Employment Servs.*, 560 A.2d 1067, 1071 (D.C. 1989). The hearing examiner acknowledged that "the employer must establish that the claimant was aware of her right to choose, and that the chosen physician and the claimant began a 'course of treatment.'"

Id., at 404.

Here, Employer's arguments do not persuasively suggest that Claimant was aware of her right to select her own physician under the Act until she chose to select Dr. Franchetti. The Claims Examiner's decision to authorize the change was therefore not an abuse of discretion.

CONCLUSION AND ORDER

The Order of December 17, 2014 is not arbitrary, capricious, or an abuse of discretion, it is in accordance with the law, and is affirmed.

FOR THE COMPENSATION REVIEW BOARD:



JEFFREY P. RUSSELL
Administrative Appeals Judge

May 13, 2015
DATE