

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA MARÍA MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 12-135

DIONNE R. BUTCHER-WALLACE,
Claimant–Petitioner,

v.

D.C. WATER AND SEWER AUTHORITY,
Self-Insured Employer–Respondent.

Appeal from a July 25, 2012 Order of
Claims Examiner Telita Estes
OWC No. 687714

Matthew Peffer, Esquire, for the Petitioner
Douglas A. Datt, Esquire, for the Respondent

Before JEFFREY P. RUSSELL,¹ HEATHER C. LESLIE,² *Administrative Appeals Judges*, and LAWRENCE D. TARR, *Chief Administrative Appeals Judge*.

JEFFREY P. RUSSELL, for the Compensation Review Board.

ORDER OF DISMISSAL WITHOUT PREJUDICE

Petitioner’s initial injury, which occurred January 6, 2012, is described by her first treating physician, Dr. Cox, as having been sustained while she using a computer desktop mouse. According to his report of January 19, 2012 the injury occurred when a cabinet door cover fell from above, “and landed on her [right] wrist pinning [it] against the desktop.” In the report Dr. Cox states specifically that Petitioner was experiencing “altered feeling over the dorsum of the hand, waves of cold, and at least initial pain on the dorsum of the hand.” Notably, he added explicitly that “The pain is not ulnar based whatsoever.”

By the time of this initial evaluation by Dr. Cox, Petitioner had already undergone an MRI of her right wrist. According to Dr. Cox’s report, it revealed “no damage to the bone or ligament structure.

¹ Judge Russell is appointed by the Director of DOES as a Board member pursuant to DOES Administrative Policy Issuances No. 12-01 (June 20, 2012).

² Judge Leslie is appointed by the Director of DOES as a Board member pursuant to DOES Administrative Policy Issuances No. 12-02 (June 20, 2012).

There was an incidental noted tear of the triangular fibrocartilage. The patient is completely asymptomatic with respect to this.”³

Dr. Cox concluded that Petitioner had sustained a “Wrist contusion with radial neurapraxia” which he “expected to resolve with time.” He felt that she should finish the course of physical therapy that she had commenced, and could return to work in her regular job as an accountant the following Monday, four days hence.⁴

Petitioner is then reported by Dr. Cox on January 26, 2012 to have attempted to return to work on the 23rd, but that after five hours she had to leave work due to aching and numbness in the wrist and forearm. Dr. Cox indicated that he felt a limited schedule of four hour days for “a couple of weeks” was appropriate. He also prescribed occupational therapy and Voltaren gel, a topical non-steroidal anti-inflammatory drug (NSAID) for pain relief.

On February 8, 2012, Respondent referred Petitioner to Dr. James Higgins, for an independent medical evaluation (IME), with its advance approval for Petitioner to change treatment from Dr. Cox to Dr. Higgins if Petitioner so desired. He reviewed the MRI and performed an examination. The examination was completely normal except for pain at the “ulnar border of the wrist”, which at that point he “suspected” was the result of the TFCC, and tingling in the forearm which he suspected was the result of neuritis caused by the impact of the cabinet cover on her wrist. He recommended immobilization of the wrist, avoidance of using the right hand, and steroidal injection to treat the TFCC.

Petitioner agreed to proceed with Dr. Higgins’s treatment plan, obtained the injection, and returned on March 7, 2012. Coming as it did with Respondent’s assent, this change of physician was authorized.

In the report of the March 7, 2012 visit, Dr. Higgins questions the causal relationship of the TFCC to the work injury, noting that while it was “sustained seemingly from her injury at work”, that “her mechanism of injury was not the typical axial loading and extension of the wrist injury that we normally see in association with TFCC injury”. He also states that on examination “I cannot illicit [sic] any pain on palpation whatsoever. She appears completely nontender. She has full range of motion. She has no tenderness in the ulnar border of the TFCC” and “While the patient carries the diagnosis of a TFCC injury from her MRI [sic]. It does not appear that she has physical exam findings that are congruent with this diagnosis. She also did not respond favorably to the cortisone injection and for that reason I suspect that the TFCC injury that was detected on MRI is not actually the source of her current symptoms”. He advised therapy, a wrist splint and continued limits on her use of the right hand at work, limited to four hours a day for a week and eight hour shifts with continued limits on using the hand, until a re-evaluation in four weeks time.

³ The “incidental tear of the triangular fibrocartilage” is referred to elsewhere in the medical reports as “TFCC”.

⁴ Although in the January 19, 2012 report, authored on a Thursday, his return to work authorization was given as January 24, 2012, in an off-work slip authored that same day Dr. Cox gave the return to work date as January 23, 2012, which was the following Monday.

The return visit occurred April 2, 2012. Petitioner reported symptoms of vertigo, which Dr. Higgins did not feel had any relationship to the work injury or to any medications associated with the treatment rendered. He again noted the subjective nature of her symptoms, describing them being “diffuse both volarly and dorsally” and stating that “They do not appear to be consistent with TFCC injury. I believe the TFCC injury demonstrated on the MRI is not clinically relevant.” He did state that he “believe[s] she does have radial neuritis” and conjectured that she might have “some atypical presentation of carpal tunnel syndrome from the contusion that is causing her global hand pain”. He ordered a nerve conduction study (NCS), caveating that if the “study is normal and she has completed therapy, there will be no further treatments I can offer her.”

Respondent had the study, and returned to Dr. Higgins on May 1, 2012. The NCS was negative for carpal tunnel syndrome, but was consistent with “ulnar neuropathy across the elbow” which he did “not believe ... is at all related to her work injury nor does it explain her symptoms.”

Dr. Higgins concluded his comments stating:

I do not believe that the finding of a TFCC injury on the MRI nor the finding [on the NCS] of ulnar compression of the elbow are related to her injury that she sustained three and a half months ago. I cannot provide her with further diagnoses and therefore I am unable to provide her further recommendations. She states that the cortisone injection was not very helpful for her nor did she gain much improvement with therapy. I would not consider surgical intervention for her ulnar nerve compression nor arthroscopy for her reported TFCC injury as I do not believe this is consistent with her current examination. From my standpoint she can return to work without restriction at this time. I believe it will be worth her while to obtain a second opinion if she wishes. She can follow up with me on a prn basis.

Respondent paid certain temporary wage loss benefits, and declined to pay others. The administrative record before us does not disclose the particulars of those payments. Petitioner sought authorization to change her treating physician, seeking to obtain additional care from Dr. Ricardo Pyfrom, which request Respondent denied. Petitioner also sought to have certain temporary wage loss benefits awarded, and authorization to change her physician to Dr. Pyfrom, at an informal conference conducted in the Office of Workers’ Compensation (OWC) on June 26, 2012.

Following the informal conference, on July 5, 2012, the Claims Examiner (CE) issued two separate decisions, one dealing with the wage loss claims, and the other with the change of physician request.

The CE issued a recommendation of an award of temporary partial disability benefits from January 27 to February 23, 2012, and from March 5 to March 9, 2012, and denied any claims for ongoing wage loss benefits thereafter. We have no information concerning the basis of the CE’s decision in this regard. That decision was rejected by Petitioner, and she requested a formal hearing by filing an Application for Formal Hearing (AFH) in the Administrative Hearing Division (AHD) on August 3, 2012, identifying as the issue to be resolved “Temporary partial disability benefits from March 10, 2012 through July 11, 2012 and temporary total disability benefits from July 12, 2012 through present and continuing”.

The second issuance was an Order, in which the CE denied the authorization for change of physicians. In the Order, after reciting that Petitioner had initially treated with Dr. Cox, and that thereafter she elected to treat instead with Dr. Higgins, the CE wrote:

Claimant alleged that she continued to suffer pain and stiffness. Claimant stated that she complained to the carrier that Dr. Higgins was not addressing the issue and has become nonresponsive.

The claimant stated that she would like to treat with Dr. Ricardo Pyfrom, M.D. for her right wrist and forearm condition. The claimant stated she has increased pain and numbness in her right wrist and forearm as a result of the January 6, 2012 work-related incident and she needs to receive care from Dr. Pyfrom.

Employer/Carrier's representative [sic] position on authorization to change physician is that claimant changed from Dr. Cox to Dr. Hughes, and that they oppose to [sic] any other changes.

[...]

Notwithstanding claimant's claim that she needs medical care for her wrist pain and discomfort; [sic] however, based on Dr. Higgins' May 1, 2012 report, the finding of a TFCC injury on the MRI nor [sic] the finding of ulnar nerve compression of the elbow are related to her injury on January 6, 2012. The office has determined that a change of physician is not the [sic] best interest of claimant based on the fact that there is insufficient evidence to warrant a change.

Petitioner appealed the Order to the CRB. In her appeal, Petitioner argues that the Order does not address why treating with Dr. Pyfrom is not in her best interests, and that the stated basis, that being the lack of a causal relationship between the TFCC and the ulnar compression, on the one hand, and the work injury on the other is arbitrary and capricious in that it fails to accord Petitioner the benefit of the statutory presumption that these conditions are causally related to the work injury under *Whitaker v. DOES*, 668 A.2d 844 (D.C. 1995). Petitioner also argues that Dr. Higgins supports a change in physician when he stated that he had nothing further to offer by way of additional diagnoses, and referenced a second opinion. Lastly, Petitioner argues that the two decisions are inconsistent, in that some portion of the wage loss claim was granted.

Respondent argues that there was nothing presented to the CE or identified by Petitioner in this appeal explaining or supporting how a change to Dr. Pyfrom is likely to bring out improvement of her condition, and characterizes Petitioner's position on this issue as being "mere frustration or dissatisfaction" with Dr. Higgins, which it contends is an insufficient basis to support a change of physicians over the employer's objections. Respondent also argues that Petitioner's characterization of Dr. Higgins's referring to a second opinion is no more than acceding to the wishes of a patient and does not represent a medical opinion that a second opinion is needed. Finally, Respondent argues that the CE's determination that Petitioner's ongoing complaints are unrelated to the work

injury is supported by both Drs. Cox and Higgins, and justifies the denial of the change of physician request.

A determination that a change of physician request should be denied on the grounds that the change request is for the purpose of obtaining care for conditions unrelated to the work injury is not, in and of itself improper. The problem with the CE's actions in this case, however, is that the statute provides Petitioner with a presumption of causal relationship, which requires consideration of whether the presumption was invoked, was it thereafter overcome, and was the evidence thereafter reweighed and considered without reference to the presumption.

Quite arguably, in this case, the failure to acknowledge and apply the *Whitaker* presumption would be harmless, given that the only medical opinions that were presented concerning the medical causal relationship of the ulnar/elbow and TFCC conditions were those of Dr. Cox and Dr. Higgins, to the effect that they are not related to the work incident, and indeed do not even explain Petitioner's complaints, regardless of whether the underlying conditions (as opposed to the complaints) are causally related.

The complexity of this case is enhanced by the bifurcated nature of the resolution of the issues that were presented, a problem not of the CE's making to be sure in light of the fact that change of physician issues are solely the province of the Office of Workers' Compensation while the wage loss questions can, and in this instance apparently have been, brought to AHD.

At this juncture in the proceedings, there is a case pending in AHD to resolve the claims for wage loss benefits, the basis for which granting and denial we do not know, and which may rest in whole or in part upon resolution of the medical causal relationship issues.

In order to avoid conflicting determinations concerning what conditions Petitioner suffers from, whether they are or are not disabling, and whether they are or are not causally related, we see no alternative to dismissing this appeal without prejudice pending the outcome of the contested proceedings now before AHD. Upon the conclusion of those proceedings Petitioner may re-file her appeal of this matter, either independently or in conjunction with any appeal that may be taken from the AHD proceedings.

Accordingly, this appeal is dismissed without prejudice to Petitioner's having 30 days following the issuance of a dispositive order in the companion case arising from the AFH filed following the rejection of the Recommendation or Memorandum recommending the award and denial of the various wage loss claims as discussed above.

FOR THE COMPENSATION REVIEW BOARD:

JEFFREY P. RUSSELL
Administrative Appeals Judge

February 22, 2013
DATE