

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services



MURIEL BOWSER
MAYOR

DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 16-040

**DANEASHA STUBBS,
Claimant-Respondent,**

v.

**CARROLL MANOR NURSING AND REHABILITATION and
GALLAGHER BASSET SERVICES,
Self-Insured Employer/Third Party Administrator-Petitioner.**

Appeal from a February 26, 2016 Order
by Claims Examiner Robyn Abrams
OWC No. 728940

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2016 AUG 16 AM 9 47

(Decided August 16, 2016)

Sarah M. Burton for Employer¹
David J. Kapson for Claimant

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

BACKGROUND

Daneasha T. Stubbs (Claimant) was injured while working for Carroll Manor Nursing and Rehabilitation (Employer) as a certified nursing assistant on May 25, 2015. The injury occurred when she twisted her shoulder. She was initially cared for by Dr. Edward Rankin, who treated her conservatively.

After treating with Dr. Rankin until August 25, 2015, unhappy with her progress, Claimant saw Dr. Easton Manderson on August 26, 2015. She did so without obtaining authorization from

¹ Zachary Shapiro represented Carroll Manor Nursing and Rehabilitation at the informal conference that resulted in the Order of February 26, 2016 under review in this appeal.

Employer or the Office of Workers' Compensation (OWC) to change attending physicians. Dr. Manderson recommended surgical intervention.

On September 15, 2015, Employer had Claimant examined by Dr. Louis Levitt for the purpose of an independent medical evaluation (IME). Dr. Levitt authored a report in which he opined that Claimant's injury had nearly resolved, that the recommended surgical procedure was not reasonable and necessary, and that Claimant could return to her pre-injury job. The report was reviewed by Dr. Manderson on September 25, 2015.

Dr. Manderson authored a reply letter to Dr. Levitt, vehemently disagreeing with Dr. Levitt and explaining at length and in detail why he felt the recommended procedure was appropriate.

On October 5, 2015, Dr. Manderson performed the recommended procedure, which he referred to in his operative note as an Arthrotomy and Mumford procedure. This was done without Employer's approval.

At no time did either Claimant or Employer institute Utilization Review (UR) as contemplated by D.C. Code § 32-1507 (b)(6).

On December 4, 2015, the parties attended an informal conference before a Claims Examiner (CE) in OWC.

At the conference, Claimant requested that OWC order payment of temporary total disability (TTD) from September 20, 2015 to the date of the conference and continuing, pay and reimburse Claimant for "causally related medical expenses", authorize further medical care "inclusive of physical therapy", and "approve Dr. Manderson as the treating physician."

Employer also attended the conference and opposed all Claimant's requests, relying upon the IME report of Dr. Levitt.

On February 26, 2016, the CE issued two documents, a Memorandum of Informal Conference (the Memorandum) and an Order.

In the Memorandum, the CE discussed the history of the case, including the IME and Dr. Manderson's reply, and wrote the following:

RECOMMENDATION: The employer/insurer shall:

1. Authorize TTD from 9/20/2015 to the most recent documented disability period.
2. Pay and reimburse any causally related medical expenses
3. Authorize reasonable and necessary medical treatment inclusive of the Mumford operation and physical therapy
4. Dr. Manderson's authorization to proceed as the treating physician is Ordered.

Memorandum at 3.

In the Order, the CE wrote:

BACKGROUND:

The Claimant was treated conservatively with Dr. Edward Rankin and released to modified duty. Despite the treatment given the claimant states she received not [sic] relief from her symptoms.

She sought a second opinion with Dr. Easton Manderson and following his evaluation seeks to continue treatment with him.

The employer/insurer responds that the visit was unauthorized and that their independent medical examiner (IME), Dr. Louis Levitt opines that the claimant reached maximum medical improvement (MMI), is capable of returning to full regular duty, and finds against the recommended treatment of Dr. Manderson.

CONCLUSION:

The OWC is persuaded, based on review of the documentation in the official record that the employer/insurer should authorize the claimant to treat with Dr. Manderson.

Giving consideration to all the documentation the OWC finds that the only reported relief from her symptoms was experienced during the second opinion of Dr. Manderson. And Dr. Manderson provided a response to the IME opinion where he in detail supports his recommendation.

Based on all factors the OWC is persuaded that Dr. Manderson has best supported his opinion and that change is in the best interest of the claimant.

FINDINGS:

Based on the above findings and under the authority of Title 7 DCMR 212.3, the OWC grants the change of physician to Dr. Manderson.

SO ORDERED

Order, at 1 – 2.

On March 21, 2016, Employer filed an Application for Review (AFR) of the Order with the Compensation Review Board (CRB) along with Employer's Brief. Attached to these filings was a copy of the Order. The Memorandum was not attached, was not referenced in the AFR, and is not mentioned in Employer's Brief.

ANALYSIS

Because the Order under review is not based on an evidentiary record produced at a formal hearing, the applicable standard of review by which we assess the determination reached by the CE in OWC is whether the decision is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law. See 6 STEIN, MITCHELL & MEZINES, *Administrative Law*, § 51.03 (2001).

We do not know the procedural status of the Memorandum. Specifically, we do not know whether its recommendations have been rejected by Employer or if Employer has asked for a formal hearing in connection therewith. While it sheds light on the CE's thinking and the basis of the decision to authorize a change in attending physicians, its legal effect is not before us at this time, in that it was not appealed to the CRB.

We have reviewed Dr. Manderson's initial letter concerning his view of the case, Dr. Levitt's IME report, and Dr. Manderson's response to the IME report. They are all contained in the OWC file, and were attached to Claimant's Opposition.

That the CE was aware of the legal basis for her consideration of the change of attending physician request is evident from her citation to and quotation of 7 DCMR §§ 212.12 and 212.13 in the Memorandum. And that she made a reasoned, rational and non-arbitrary decision to authorize the change is clear from her discussion of the competing medical reports and the statements by Claimant at the conference.

The cited regulations provide:

212.12. Once a medical care provider is selected to provide treatment under the Act, an injured employee shall not change to another medical care provider ... without authorization of the insurer or the Office [of Workers' Compensation], except in an emergency. ...

212.13. If the employee is not satisfied with medical care, a request may be made to the Office. The Office may order a change where it is found to be in the best interest of the employee.

The portion of the Memorandum dealing with the change of attending physician request is as follows:

The employer/carrier referred the claimant to Dr. Levitt who opined ... that the claimant has reached maximum medical improvement, and that she could return to full duty.

Dr. Manderson submitted a response to Dr. Levitt ... [in which he] strongly opposed the IME. Based on all the documentation present in the official record the OWC is persuade [sic] that Dr. Manderson should continue the medical care of the claimant

The claimant has had no relief from her symptoms from Dr. Rankin's conservative approach. Reportedly the first sign of improvement came with the injection of Dr. Manderson. And, Dr. Manderson's detailed rebuttal of the IME persuaded OWC to give me [sic] the greater consideration and approve him as the treating physician.

Memorandum at 3.

While the Memorandum also discussed matters not addressed in the Order, it provides a logical and reasonable basis for authorizing a change to Dr. Manderson, the factual basis of which is not challenged by Employer in this appeal.

It cannot escape our notice that there are significant issues related to whether the failure to institute UR in connection with the already provided surgery that may be relevant to Employer's liability or lack thereof for the procedures, but as stated above, those issues are not presently before us.

Nonetheless, so there is no risk of misunderstanding, we stress that nothing in this Decision and Order should be construed as affirming the Memorandum's recommendations concerning Employer's liability for payment of any of Dr. Manderson's medical bills prior to the date of the Order before us, nor should it be construed as placing an obligation upon Employer to reimburse Claimant or pay any provider for any medical care associated with Dr. Manderson's surgical procedures performed prior to OWC's Order.

CONCLUSION AND ORDER

The determination that a change in attending physician is in Claimant's best interest is neither arbitrary nor capricious, and the Order authorizing said change is affirmed.

So ordered.