GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services
Labor Standards Bureau

Office of Hearings and Adjudication
COMPENSATION REVIEW BOARD

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CRB No. 06-032

SELITA JANEY,

Claimant–Petitioner,

v.

WASHINGTON CONVENTION CENTER AND THE PMA GROUP,

Employer/Carrier–Respondent.

Appeal from a Compensation Order of
Claims Examiner Rosita Clemmons
OWC No. 588716

Matthew E. Peffer, Esquire, for the Petitioner

Gerard J. Emig, Esquire, for the Respondent

Before E. COOPER BROWN, *Chief Administrative Appeals Judge*, SHARMAN J. MONROE and JEFFREY P. RUSSELL, *Administrative Appeals Judges*.

JEFFREY P. RUSSELL, *Administrative Appeals Judge*, for the Compensation Review Panel:

DECISION AND ORDER

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board (CRB) pursuant to D.C. Official Code §§ 32-1521.01 and 32-1522 (2004), 7 DCMR § 230, and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005).[1] Pursuant

[1] Pursuant to Administrative Policy Issuance No. 05-01, dated February 5, 2005, the Director of the Department of Employment Services realigned the Office of Hearings and Adjudication to include, *inter alia*, establishment of the Compensation Review Board (CRB) in implementation of the District of Columbia Fiscal Year 2005 Budget Support Act of 2004, Title J, the District of Columbia Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, *codified at* D.C. Official Code § 32-1521.01. In accordance with the Director's Directive, the CRB replaces the Office of the Director in providing administrative appellate review and disposition of workers' and disability compensation claims arising under the District of Columbia Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §§ 32-1501 to 32-1545 (2005), and the District of Columbia Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Code Ann. §§ 1-623.1 to 1-643.7 (2005), including responsibility for administrative appeals filed prior to October 1, 2004, the effective date of the District of Columbia Workers'

to § 230.04, the authority of the CRB extends over appeals from compensation orders, including final decisions or orders granting or denying benefits, by the Administrative Hearings Division (AHD) or the Office of Workers' Compensation (OWC), under public and private sector Acts.

BACKGROUND

This appeal follows the issuance of a Memorandum of Informal Conference, which became final by operation of law and appealable, from OWC, in the District of Columbia Department of Employment Services (DOES). In that Memorandum, which was filed on February 28, 2006, the Claims Examiner denied Petitioner's request for authorization to change physicians.

As grounds for this appeal, Petitioner alleges as error that the decision is arbitrary, capricious and unsupported by substantial evidence. Respondent opposes said appeal, and asserts that it is a decision properly within the discretion of the Claims Examiner, and is properly and adequately justified internally and by reference to the documentary record before the Claims Examiner.

ANALYSIS

In review of an appeal from OWC, the Board 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 & Mezines, ADMINISTRATIVE LAW, § 51.93 (2001).

Turning to the case under review herein, as both parties point out, this is the second denial of the request to change physicians rendered in connection with this claim. The first was issued on February 3, 2004, and was appealed to the CRB. The Compensation Order was reversed and remanded to the Claims Examiner, because the reviewing panel determined that the order denying the authorization to change physicians did not explain how the denial was "in the best interests" of the Claimant, citing *Copeland v. Hospital for Sick Children*, Dir. Dkt. No. 01-40 (July 25, 2001).

Subsequent to that remand, the CRB has had occasion to discuss more fully the meaning of the "best interests" standard. In *Lane v. Linens of the Week*, CRB No. 05-207, OWC No. 594244 (May 5, 2005), it was noted and held that the Claims Examiner may determine that there is insufficient justification for the requested change of physicians, and that in the event of such a finding, denial of the requested change may be proper, in that said change is not inconsistent with a claimant's best interests, where it is determined that such a change is unlikely to result in medical improvement. *See also*, *Raynor v. May Company, d/b/a Hecht's*, CRB No. 06-010, OWC No. 603440 (December 27, 2005).[2]

Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004.

[2] Such a rule is necessary to make sense of the "best interests" standard, because there would be no point to requiring authorization to change physicians where such approval must of necessity be granted in any case where it is requested, unless it can be demonstrated that such a change will actually do a claimant active physical harm. That is, the best interests standard must allow for the denial of the requested change where such a change is not demonstrated to actually be in a claimant's best interests. While *Copeland*, *supra*, remains the law, reading *Copeland* to compel granting authorization to change physicians except in such cases where such a change is positively shown to be detrimental to a claimant's well being (an instance of such rare and unlikely occurrence as to be a virtual impossibility) is an absurdity.

While the remand was pending, a second informal conference was held on February 17, 2006.[3] Following the informal conference, which was conducted by a Claims Examiner different from the original Claims Examiner, the Compensation Order (in the form of a Memorandum of Informal Conference) was issued.

After reviewing the records previously submitted by the parties, including medical records from Dr. Douglas Weaver (a chiropractor who has treated Claimant for the complained of injury, and who authored a report dated July 22, 2003 in which he opined that Petitioner's complaints had all resolved without any residual permanent impairment) and an independent medical evaluation (IME) report authored by Dr. Marc Danziger (an orthopaedic surgeon who examined Petitioner at Respondent's request, and who also opined that Petitioner's work injuries had resolved) on September 9, 2003, the Claims Examiner issued the Compensation Order denying the requested authorization to change physicians. As the basis therefore, she cited the noted treating and IME medical reports and concluded that they outweighed Petitioner's subjective view that her condition had not improved or resolved. In reaching this conclusion, the Claims Examiner noted that it is a claimant's burden to establish entitlement to the requested change of physicians, which burden includes demonstrating that such a change is in her best interests. The Claims Examiner specifically noted that "There has been no evidence submitted that would otherwise determine that change of physician is likely to result in some type of medical improvement".

From these references by the Claims Examiner, it is apparent that she applied the proper test to Petitioner's request, and reached a reasonable conclusion based upon the medical reports of the treating chiropractor and the IME orthopaedic surgeon. Such a decision is, perforce, neither arbitrary, capricious nor unsupported by the documentary evidence before her. Accordingly, the Compensation Order must be, and is, affirmed.[4]

Finally, although Petitioner asserts that she has never been treated for one aspect of her claimed injury, that being the claimed injury to the right knee, such an assertion is neither clearly accurate on this record, nor dispositive of the claim of entitlement to change to a new physician to treat the knee. Review of the records considered by the Claims Examiner makes clear that Dr. Weaver was aware of the initial complaints of knee pain; he notes them specifically in his May 19, 2003 evaluation report, and following several weeks of treatment, he specifically "removes" the diagnosis of "knee sprain from her diagnosis list" on June 25, 2003. What specific treatment was provided by

[3] Review of the OWC file does not reveal whether the informal conference was requested by either of the parties, or was scheduled by OWC *sua sponte*. That is, although the Memorandum of Informal Conference (constituting the Compensation Order under review herein) of February 28, 2006 indicates that the informal conference was requested on January 11, 2006, the OWC file does not contain any such request from a party, nor does it contain a copy of any notice scheduling such conference. It does contain the Claims Examiners notes from that conference, so it does appear that such occurred.

[4] We note, but do not accept, Petitioner's argument on appeal that, because Dr. Weaver is a chiropractor, "Ms. Janey has not received treatment for her right knee complaints *from a qualified physician*" (emphasis added). Were there some difference of opinion between Dr. Weaver and Dr. Danziger, we might agree that Dr. Danziger's professional and education qualifications might entitle his opinion to greater weight than that of Dr. Weaver. However, there is no such issue presented, given that they agree with one another in this case. Further, as Respondent points out, the Act includes chiropractors within the definition of "physician", making clear that a claimant may, for better or worse, elect a chiropractor for treating or attending physician purposes under the Act. *See*, D.C. Code § 32-1501 (17A).

Dr. Weaver to Petitioner's knee is not clear from the records before the agency. However, it is clear that Dr. Weaver was aware of the knee complaints initially, that he prescribed a course of treatment during which he monitored Petitioner's overall progress, including her right knee condition, and that he specifically "removed" knee complaints following at least a month of care. Further, Dr. Danziger clearly examined Petitioner's knee before rendering his opinion that Petitioner has no ongoing injury to the knee as of his IME. To assert that Petitioner has somehow had her knee condition ignored in the course of this case, either medically or by the Agency, is not sustainable.

CONCLUSION

The Compensation Order, being the Memorandum of Informal Conference of February 28, 2006 is neither arbitrary nor capricious, and is within the discretion of the Claims Examiner, as it is based upon substantial documentary evidence submitted, and is otherwise in accordance with the law.

ORDER

The Compensation Order in the form of the Memorandum of Informal Conference of February 28, 2006 is hereby AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

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JEFFREY P. RUSSELL
Administrative Appeals Judge

_____June 21, 2006_____
DATE