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

Office of Hearings and Adjudication
COMPENSATION REVIEW BOARD

(202) 671-1394-Voice
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CRB No. 07-153

RUDOLPH SHANNON,

Claimant – Petitioner,

v.

HOWARD UNIVERSITY AND SEDGEWICK CLAIMS MANAGEMENT,

Employer/Carrier – Respondent.

Appeal from a Final Order of
Claims Examiner Alice Goldring
OWC No. 616792

Heather C. Leslie, Esquire for the Petitioner

William H. Schladt, for the Respondent

Before: E. COOPER BROWN, *Chief Administrative Appeals Judge*, FLOYD LEWIS and SHARMAN J. MONROE, *Administrative Appeals Judges.*

FLOYD LEWIS, *Administrative Appeals Judge*, on behalf of the Review Panel:

DECISION AND ORDER

Jurisdiction is conferred upon the Compensation Review Board 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]

[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 D.C. Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004, sec. 1102 (Oct. 1, 1994), *codified at* D.C. Code Ann. §§ 32-1521.01, 32-1522 (2005). In accordance with the Director's Policy Issuance, the CRB replaces the Office of the Director in providing administrative appellate review and disposition of workers' and disability compensation claims arising under the D.C. Workers' Compensation Act of 1979, as amended, D.C. Code Ann. §§ 32-1501 to 32-1545 (2005) and the D.C. 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 D.C. Workers' Compensation Administrative Reform and Anti-Fraud Amendment Act of 2004.

BACKGROUND

This appeal follows the issuance of an Order of the Office of Workers' Compensation (OWC) in the District of Columbia Department of Employment Services (DOES). In that Order, which was filed on July 30, 2007, OWC denied the request by Claimant-Petitioner (Petitioner) for authorization to change attending physicians. Petitioner now seeks review of that Order, asserting as error that the Order is arbitrary, capricious, unsupported by substantial evidence, and not in accordance with the law.

ANALYSIS

In the review of an appeal from the Office of Worker's Compensation (OWC), the Compensation Review Board must affirm the Compensation Order or Final Decision 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, § 51.03 (2001).

In the case under review the Claims Examiner (CE) denied Petitioner's request for a change of attending physicians on the grounds that the evidence provided by Petitioner at the Informal Conference was "not sufficient to support the request to change treating physicians at this time." Petitioner's challenge to this ruling is two-fold: He first asserts that Employer-Respondent (Respondent) effectively selected Petitioner's initial attending physician, thus denying him of his right under the Act to make that selection. Secondly, Petitioner asserts that the CE failed to properly support the decision denying Petitioner's request for a change in attending physicians.

In the instant case, the Claims Examiner (CE) found that upon injuring his back at work on June 14, 2005, Petitioner was initially referred by Respondent for treatment at Respondent's Employee Health Center, and then referred by the Health Center to Dr. Janaki Kalyanam, an attending physician at Howard University Hospital who Respondent asserted (without challenge by Petitioner) is not employed by Respondent. The CE also found that Petitioner "opted to be treated by Dr. Kalyanam." The evidentiary record indicates that Petitioner treated with Dr. Kalyanam from mid-July of 2005 until mid-May of 2006, a period of approximately ten months.[2]

D.C. Official Code § 32-1507(b)(3) provides that an injured employee "shall have the right to choose an attending physician to provide medical care under this chapter." This proviso has been interpreted as providing the employee with "an essentially unfettered right to choose an initial attending physician to provide medical care for the injury." *Washington Hospital Center v. D.C. Dept. of Employment Services*, 789 A.2d 1261, 1262 (D.C. 2002). Once an initial attending physician has been selected by the employee, however, that physician may not be changed without authorization from either the employer (or its insurer) or the Office of Workers Compensation (OWC). 7 DCMR § 212.12; *see Washington Hospital Center*, 789 A.2d at 1262.

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[2] The Order also noted that for the period of November 2006 to April 2007, Petitioner was in a treatment program, presumably also at Howard University Hospital, unrelated to his June 14, 2005 work injury.

Presumably Petitioner's challenge based upon the argument that he did not choose Dr. Kalyanam as his attending physician is that authorization of a change of attending physicians is not required because Respondent in effect selected Dr. Kalyanam for Petitioner, thus denying him the opportunity to make the initial selection that is his right under Section 32-1507(b)(3) of the Act. However, our review of the evidentiary record in this case, including the CE's findings set forth in the Order herein appealed, does not reveal that Respondent either directed or referred Petitioner to Dr. Kalyanam for treatment; only that Petitioner was referred by the Health Center to the doctor. Moreover, there is no evidence of record that Petitioner was required to treat with this physician that would undermine or contradict the CE's finding that Petitioner "opted to be treated by Dr. Kalyanam." Finally, Petitioner has failed to draw to our attention any evidence that would dispute Respondent's assertion, as cited by the CE, that Dr. Kalyanam was not an employee of Respondent. Simply put, the problem with Petitioner's argument is that it lacks evidentiary support.

However, even if it were determined that the Health Center's referral of Petitioner to Dr. Kalyanam effectively constituted a referral by Respondent, the fact that Petitioner then proceeded to seek treatment for his work injury from Dr. Kalyanam for the next ten months supports the conclusion that Petitioner nevertheless made a voluntary selection of the doctor as his attending physician. As the D.C. Court of Appeals has noted, while accepting a referral does not necessarily constitute a choice of physicians under the Act, a constructive selection will be deemed to have occurred where the injured employee voluntarily continues to seek follow-up care from the referral physician that extends "beyond reasonable limits." *See, Ceco Steel v. D.C. Dept. of Employment Services*, 566 A.2d 1062, 1064 (D.C. 1989), and *Velasquez v. D.C. Dept. of Employment Services*, 723 A.2d 401, 404 (D.C. 1999).

Having concluded that authorization by OWC of a change in attending physicians was required, the remaining question before us is whether the CE's denial of the requested change was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with applicable law.

Where an employee requests of OWC a change of attending physician because the employee is not satisfied with the medical care that he or she is receiving, OWC may order the requested change when it is determined to be "necessary or desirable," D.C. Official Code § 32-1507(b)(4), and thus "in the best interest of the employee." 7 DCMR § 212.13.[3] Accordingly, in evaluating and ruling upon the requested change in physicians, the Claims Examiner is required to address the reasons presented in support of the requested change and articulate the rationale for the CE's denial or approval thereof, including addressing the question of whether granting the request is in the employee's best interest. *Raynor v. May Company*, CRB No. 06-10, OWC No. 603440 (Dec. 27, 2005); *Lane v. Linens of the Week*, CRB No. 05-207, OWC No. 594244 (May 6, 2005); *Copeland v. Hospital for Sick Children*, Dir. Dkt. No. 01-40 (July 25, 2001).

[3] As the Court of Appeals has noted, "This framework appears to attempt a balance, within the overarching authority of the agency, between ensuring reasonable employee choice and right to effective medical treatment against the employer's right to protection against medical shopping and excessive costs." *Washington Hospital Center*, 789 A.2d at 1263.

In the instant case, Petitioner asserts that he is not satisfied with Dr. Kalyanam's treatment of his condition, apparently involving continuing back pain on his left side that radiates down into his leg, which condition is becoming worse -- assertions to which Respondent has not disagreed.[4]

Mere dissatisfaction with an attending physician's treatment, the Board has previously held, is not by itself sufficient to warrant authorization of a change in attending physicians. *Raynor, supra.* The burden under the Act of establishing entitlement to the requested change of attending physicians is upon the party seeking the relief. *Lane v. Linens of the Week, supra; Raynor, supra*. *See Dunston v. D.C. Dept. of Employment Services,* 509 A.2d 109 (D.C. 1986). Thus, Petitioner must present evidence supporting his claim that the requested change in physicians is in his best interest. Upon our review of the record in this case, we are unable to identify any such evidence. What little evidence of relevance that is identified, such as Petitioner's unexplained one-year hiatus from treatment of any kind by anyone between his last visitation with Dr. Kalyanam and the date of the Informal Conference before OWC,[5] diminishes any claim of necessity and certainly provides no medical support for finding that a change of attending physicians is in Petitioner's best interest. The CE denied Petitioner's request for authorization to change physicians, based upon the determination that the evidence submitted by Petitioner was "not sufficient to support the request to change treating physicians at this time." Order of July 30, 2007. We can find no basis at law for rejecting the CE's conclusion.

Finally, Petitioner's argument that the Order herein appealed must be reversed because the CE did not expressly state why denial of the requested change of physicians was in Petitioner's best interest is to no avail, as it both ignores the burden of proof required of Petitioner and the CE's determination that Petitioner had provided insufficient justification for the requested change sufficient to have met that burden of proof. In *Raynor, supra*, the CRB upheld the denial of a requested change in attending physicians, although the CE in that case did not explicitly address how the denial was in the claimant's "best interest," concluding that the Claims Examiner's reasons were identified and consistent with *Lane v. Linens, supra*. The CRB stated:

> The Board recognizes that the Claims Examiner may determine that there is insufficient justification for such authorization, and if there is such lack of justification, the denial of the requested change may be proper, in that said denial is not inconsistent with a claimant's best interests . . . . While the Claims Examiner did not couch her decision in terms explicitly addressing how

[4] In *Raynor, supra*, the Board noted that because no evidentiary record is created, and none is contemplated by the statutory and regulatory scheme governing informal proceedings before OWC, it is difficult for the Board in considering an appeal from OWC to determine with confidence what reasons were given by a claimant at an informal conference in support of the requested relief. Thus, as further noted in *Raynor,* in addition to examining the contents of the order granting or denying the requested change of attending physician, the Board will necessarily examine any documentation of relevance contained in the OWC case record, as well as any stipulation or agreement between the parties that is presented on appeal delineating the reasons for the requested change.

[5] The CE noted that as of the date of the Informal Conference Petitioner had not been seen and treated by Dr. Kalyanam in over a year, and Petitioner had offered no explanation as to why Dr. Kalyanam had not continued to treat him.

> the denial is in Petitioner's best interests, . . . we are satisfied that the Claims Examiner's reasons are identified and are consistent with Lane, supra, in that nothing in the request would appear likely, at this time, to result in additional medical improvement.

Raynor, at 5.

Therefore, after reviewing this matter, it is concluded that the CE's denial of the request by Petitioner to change attending physicians because there was insufficient justification for the request, will not be disturbed. In so ruling this Review Panel notes, as has the Board on previous occasions, *see e.g. Raynor, supra*, that there is nothing in the Act or regulations, or as a result of this decision, that precludes Petitioner from renewing his request before OWC for authorization to change attending physicians.

CONCLUSION

The Order of July 30, 2007, is not arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law.

ORDER

The Order of July, 30, 2007 is hereby AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

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FLOYD LEWIS
Administrative Appeals Judge

October 19, 2007
DATE