GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR

F. THOMAS LUPARELLO
INTERIM DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 14-002

CORALYNN SMITH,
Claimant–Respondent,

v.

D.C. WATER AND SEWER AUTHORITY and PMA INSURANCE GROUP,
Employer/Insurer-Petitioners.

Appeal from an December 11, 2013 Final Order of
Claims Examiner Jahi Greene and Claims Supervisor Jevan Edwards
OWC No. 681997

Douglas Datt, for the Petitioner
Matthew Peffer, for the Respondent

Before HEATHER C. LESLIE, HENRY W. MCCOY, and JEFFREY P. RUSSELL, *Administrative Appeals Judges*.

HEATHER C. LESLIE, for the Compensation Review Board, HENRY W. MCCOY, dissenting.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

On June 16, 2011, Claimant was injured in the course of her employment. The claim was accepted by Employer and benefits were paid.

Claimant came under the care and treatment of Dr. Marc Danziger. After a period of time, Claimant became dissatisfied with her treatment by Dr. Danziger and requested an informal conference with the Office of Workers Compensation (OWC).

An informal conference was held on November 12, 2013 and attended by Claimant, her counsel, counsel for Employer and the Claims Examiner. A Final Order was issued on December 11, 2013 granting Claimant's request for authorization to switch physicians.

Employer timely appealed. Employer argues that the Order is arbitrary, capricious and not in accordance with the law. Claimant opposed, arguing the Final Order is not arbitrary, capricious, nor an abuse of discretion and is in accordance with the law and that the Final Order should be affirmed.

THE STANDARD OF REVIEW

As an initial matter, in its review of an appeal from OWC, the Compensation Review Board (CRB) must affirm said decision 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).

DISCUSSION AND ANALYSIS

A request for authorization for a change of treating physicians is governed by D. C. Code § 32-1507 (b)(4) and 7 DCMR § 213.13. The code provisions states:

> The Mayor shall supervise the medical care rendered to injured employees, shall require periodic reports as to the medical care being rendered […], shall have full authority to determine the necessity, character, and sufficiency of any medical aid furnished or to be furnished, and may order a change of physician […] when in his judgment such change is necessary or desirable.

The referenced regulation states:

> If the employee is not satisfied with medical care, a request for change may be made to [OWC], [which] may order a change where it is found to be in the best interests of the employee.

In *Copeland v. Hospital for Sick Children*, Dir. Dkt. No. 01-40, OWC No. 536532 (July 25, 2001), the Director interpreted the preceding provisions to require a claims examiner to address a claimant's arguments "and testimony"[1] concerning the reasons for seeking a change of physicians, if the request is denied, and to explain how such a denial is "in the best interests of Claimant".

The CRB has noted in *Lane v. Linens of the Week,* CRB No. 05-207, OWC No. 594244, (May 6, 2005), that the D.C. Workers' Compensation "Act places the burden upon a claimant to establish entitlement to the specific relief requested" citing *Dunston v. DOES* , 509 A.2d 109 (D.C. 1986). Further, the applicable regulation was noted to be structured so as to maintain that requirement, requiring a "finding" that the requested change is "in the best interests of" Claimant seeking the change. Dissatisfaction with the medical care alone was said to be insufficient; in the absence of a finding that the change is necessary to foster the best interests of Claimant, a denial of the request is allowed.

In the Final Order, the Claims Examiner wrote:

> Counsel for Claimant testified that Claimant was dissatisfied with the quality of treatment being rendered by her treating physician Dr. Danzinger [sic] . Claimant is said to have been unaware of the worker's compensation law, and did not know she had the option to choose her own physician. Claimant states that she has been

[1] It should be noted that in proceedings before OWC, there is no oath administered, no opportunity for cross-examination under oath, and no transcript of proceedings, hence there is no "testimony" or "evidence of record".

> working in constant pain for the last two years and none of the treatment options suggested by Dr. Danzinger [sic]have been helpful. Claimant claims that she has lost faith in Dr. Danzinger's [sic] ability to remedy her symptoms and or complaints. Claimant previously informed her legal counsel of her displeasure with the treatment she was being rendered and a 2nd opinion doctor was said to have been set up by employer/carrier counsel; however Claimant states that she has not been provided any feedback from that 2nd opinion visit and does not know what diagnosis the other physician reached in terms of her condition and its progression or lack thereof. It is for these reasons that Claimant has come before the Office of Worker's Compensation seeking authorization for a change of physician.

Final Order, page 1.

The claims examiner concluded:

> It is the opinion of this examiner that a change of physician is in the best interest of Claimant. It is clear that Claimant's condition is not improving and she would feel more comfortable receiving treatment from another physician.

Id.

Employer argues that the claims examiner did not address why the requested change in physicians was in Claimant's best interest and that the reasons for the requested change in physicians outlined by the order are not sufficient to warrant a change in conditions. We reject Employer's arguments.

The claim's examiner noted that Claimant 1) was dissatisfied with Dr. Danziger's treatment; 2) was unaware that she had the option to choose her own physician; 3) had been working in pain for two years; 4) Dr. Danziger's treatment options were not helpful; 5) had "lost faith in Dr. Danzinger's [sic] ability to remedy her symptoms and or complaints; and, 6) the 2nd opinion doctor set up by Employer had not provided any feedback from her visit. Based upon these findings, the claim examiner noted Claimant was not improving and determined Claimant would feel more comfortable receiving treatment from another physician.

Contrary to Employer's argument, the claim examiner listed several reasons why Claimant was seeking a change and not just "dissatisfaction" with Dr. Danziger's treatment. Based upon the lack of improvement and Claimant's testimony she had worked in pain for 2 years without relief, the claim examiner concluded a change of physician would be in the best interest of Claimant and that she would feel more comfortable with another physician. We find no error in this and find the claim examiner adequately addressed the issue pursuant to *Lane, supra*.

CONCLUSION AND ORDER

The December 11, 2013 Final Order is AFFIRMED,

FOR THE COMPENSATION REVIEW BOARD:

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HEATHER C. LESLIE
Administrative Appeals Judge

April 21, 2014
DATE

HENRY W. MCCOY, *Administrative Appeals Judge*, dissenting:

The majority has decided to affirm the December 11, 2013 OWC Final Order granting Claimant's request for authorization to change her treating physician. In doing so, the majority has accepted the reasons given by the Claims Examiner (CE) that the requested change would be in Claimant's best interest. However, as the Claims Examiner's reasons are not based upon any findings of fact derived from any record evidence, I cannot join with my colleagues and must dissent.

It is now generally accepted that the proper standard to be applied by OWC in determining whether to authorize a change in the attending physician is found in *Janey v. Washington Convention Center*, CRB No. 06-032 (June 21, 2006), where it was stated:

> "…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 consistent with the 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]

It is also significant to recognize that technically no evidentiary record is created or sworn testimony taken, nor is either contemplated by the statutory and regulatory scheme governing

[2] *Janey, supra*, at 2.

informal proceedings before OWC. However, the CRB, in considering an appeal from OWC, will necessarily examine any documentation of relevance contained in the OWC case record. In the Final Order, the CE references no exhibits from either party but does reference that "Counsel for Claimant testified" and what Claimant "said" or "claims". And, it is on that basis that I take issue with the CE's reasons.

The CE's listed reasons and my responses are:

(1) Counsel for Claimant *testified* that Claimant was dissatisfied with Dr. Danziger's treatment, but there is no sworn testimony at this proceeding, least of all from counsel;

(2) Claimant is *said* to be unaware that she had the option to choose her own physician, but the CE makes no definitive finding that takes into consideration Employer's argument that Claimant acknowledged receipt of a certified letter advising her of this right;

(3) Claimant *states* that she has been working in constant pain for 2 years and none of Dr. Danziger's treatment options have been helpful, however this statement by Claimant is not a finding of fact, nor does it address the type of pain, the number of visits, or the nature of the treatment options; making this merely the adoption of Claimant's subjective assessment;

(4) Claimant has "lost faith in Dr. Danzinger's [sic] ability to remedy her symptoms and or complaints", which amounts to another expression of Claimant's subjective dissatisfaction with Dr. Danzinger;

(5) Claimant had previously informed her counsel of her displeasure with Dr. Danziger's treatment, which is another expression of dissatisfaction;

(6) Claimant was seen by a second physician at Employer's behest but she was not informed of any diagnosis rendered or received a copy of any resulting report, which begs the question why a doctor would not provide such a report to a patient or why Claimant or her counsel did not request a copy to support to assist in meeting her burden on the requested authorization to change physicians.

Contrary to the majority's decision to accept the above as reasons why Claimant a change of physician would be in Claimant's best interest, I take the position that these "reasons" are merely an endorsement of Claimant's dissatisfaction with Dr. Danziger's treatment. These stated reasons have no basis in fact and the decision to accept them flies in the face of the standards set by the CRB in *Lane* and *Janey*.

With regard to the CE's statement that it is "clear" that Claimant's condition is not improving and she would feel more comfortable receiving treatment from another physician, I see nothing in the record that makes it "clear" that her condition is not improving insofar as no baseline has been established. In addition, while Claimant might feel more comfortable receiving treatment from another physician, the CE doesn't explain how such a change would present the opportunity for some type of medical improvement. See *Janey, supra*.

As there are no findings in the record to support the CE's conclusion that a change in physician would be in Claimant's best interest, I must respectfully dissent.

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HENRY W. MCCOY
Administrative Appeals Judge