

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA MARÍA MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 12-181

**ROBERTA WEST,
Claimant-Petitioner,**

v.

**WASHINGTON HOSPITAL CENTER and SISCO,
Employer/Insurer-Respondent.**

Appeal from a October 11, 2012 Compensation Order on Remand By
Administrative Law Judge Linda F. Jory
AHD No. 99-276A, OWC No. 281076

Richard W. Galiher, Jr., Esquire for the Petitioner
William P. Dale, Esquire for the Respondent

Before MELISSA LIN JONES and HENRY W. MCCOY, *Administrative Appeals Judges* and
LAWRENCE D. TARR, *Chief Administrative Appeals Judge*.

MELISSA LIN JONES for the Compensation Review Board.

DECISION AND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

On January 16, 1995 while working for the Washington Hospital Center (“WHC”), Ms. Roberta West injured her back. The details of Ms. West’s medical treatment are set forth below as appropriate.

WHC made voluntary payments of compensation, but by the end of 1997, a dispute arose over Ms. West’s entitlement to additional indemnity benefits and causally related medical care. Following a formal hearing, Administrative Law Judge (“ALJ”) Jeffrey P. Russell awarded Ms. West temporary partial disability benefits from November 1, 1997 through February 1, 1998 and causally related medical care “including the medical care obtained by claimant in connection with her psychological injury and the care obtained following her discharge from the NRH program.”¹

¹ *West v. Washington Hospital Center*, OHA No. 99-276A, OWC No. 281076 (November 9, 1999). Ms. West subsequently sought modification of the November 1999 Compensation Order, and that request was addressed in

Eventually, this matter worked its way to the D.C. Court of Appeals. The Court remanded the matter to resolve the law:

[T]he Director's decision before us gives no evidence of any present resolution of the broad issues that we understand were involved in the *Sibley* remand. We thus find ourselves in essentially the same position as we were in *Sibley*, including here the closely related issues of attending physician. We are unable to determine or assess the Director's current position as to the precise criteria that determines who is the attending physician, the procedures for authorizing changes, when such procedures must be resorted to, and when (what appears to be a common practice in modern medicine) referrals, consultations, and second opinions will be permitted under the DCWCA without seeking such authorization (including the issue of successive referrals). The whole area is one of obvious importance, calling for as clear-cut rules as possible. As in *Sibley*, on the record before us, we must remand the case to DOES for further appropriate proceedings.^[2]

On remand, the Director recognized "a key distinction between referrals and changes in attending physicians."³ Ultimately, the Director concluded "all physicians in a chain of referrals that originated with the attending physician are authorized, even successive referrals."⁴

When the matter returned to the D.C. Court of Appeals, Ms. West's psychological injury claim was consolidated with her physical injury claim.⁵ The Court remanded both cases to the Compensation Review Board ("CRB"):

ORDERED that the consolidated case No. 03-AA-582, is remanded to the CRB with instructions to develop or specify the "precise criteria" required in our 2002 remand decision to the Director, and it is

FURTHER ORDERED that the consolidated case is remanded to the CRB for further consideration in light of our 2008 *McCamey* opinion.^[6]

multiple Compensation Orders and appeals. Because the issue of entitlement to indemnity benefits is not presented in this appeal, the details of those proceedings are not included in this decision.

² *Washington Hospital Center v. DOES*, 789 A.2d 1261, 1265 (D.C. 2002)

³ *West v. Washington Hospital Center*, Dir. Dkt. No. 99-97, H&AS No. [99-]276A, OWC No. 281076 (May 14, 2003), p. 3.

⁴ *Id.* at p. 4.

⁵ The issues regarding Ms. West's psychological injury claim were resolved by ALJ Linda F. Jory in her October 11, 2012 Compensation Order on Remand, and neither party has appealed her rulings in that regard; therefore, those issues no longer are before this tribunal.

⁶ *Washington Hospital Center v. DOES*, Nos. 03-AA-582 and 05-AA-876 (D.C. May 30, 1997).

On March 14, 2011, the Compensation Review Board remanded the case for additional findings of fact necessary to decide the issues presented by the D.C. Court of Appeals. Because the CRB lacks authority to issue policy directives or advisory opinions, the CRB identified existing precedent to assist the ALJ with analyzing specific issues on remand:

One point of contention in this case, and one that the ALJ will need to resolve on remand, relates to referrals that were initiated at the claimant's request. An injured worker may suggest a preferred referral to an attending physician. However, to be valid, the referral must be the doctor's decision, and not done as an accommodation to the injured worker. [Footnote omitted.]

Although we cannot state with certainty on the record before us, another unsettled area that may be presented by this case concerns secondary and tertiary referrals, that is where the attending physician refers a claimant to a physician and that physician refers the claimant to another physician. For example, attending physician Dr. A refers the claimant to Dr. B, Dr. B refers the claimant to Dr. C, and Dr. C refers the claimant to Dr. D.^[7]

In a detailed Compensation Order on Remand dated October 11, 2012, ALJ Jory ruled Ms. West's "medical and psychological treatments after her treatment with Dr. Richard Norris are not the responsibility of [WHC]." ⁸ Ms. West appeals this Compensation Order on Remand and raises several legal issues on appeal that are detailed below; ⁹ she has not appealed the ruling that her psychological injury is causally related to her January 16, 1995 on-the-job accident and injury.

In opposition, WHC asserts Ms. West has not presented any legal or rational justification for her argument that ALJ Russell should have been appointed to resolve this matter; thus, having failed to raise this issue below despite notice that ALJ Jory was deciding this case, WHC contends Ms. West's due process rights have not been violated. WHC also contends Ms. West selected Dr. Robert O. Gordon as her treating physician; therefore, his medical treatment as well as that provided by doctors treating Ms. West on Dr. Gordon's referrals is the responsibility of WHC until Ms. West changed physicians to Dr. Richard Norris. According to WHC, Ms. West's request to see Dr. Michael E. Batipps did not result in a change of attending physician, and it is not responsible for his bills or for any bills from doctors to whom he referred Ms. West. In the end, WHC asserts the Compensation Order on Remand should be affirmed because ALJ Jory's findings of fact and conclusions of law are supported by the evidence and the law.

⁷ *West v. Washington Hospital Center*, CRB No. 99-097(R), H&AS No. 99-276A, OWC No. 281076 (March 14, 2011), p. 8.

⁸ *West v. Washington Hospital Center*, AHD No. 99-276A, OWC No. 281076 (October 11, 2012).

⁹ Ms. West's factual arguments have not been addressed as the CRB lacks authority to reweigh the evidence. *Marriott, supra*.

ISSUES ON APPEAL

1. Does the CRB have authority to review the March 14, 2011 Decision and Remand Order previously issued by this tribunal in this case?
2. Were Ms. West's due process rights violated by the reassignment of this case from ALJ Russell to ALJ Jory?
3. Did ALJ Jory commit reversible error by rejecting the facts in this case as established by previous orders and opinions?
4. Is the October 11, 2012 Compensation Order supported by substantial evidence and in accordance with the law?

ANALYSIS¹⁰

PRELIMINARY MATTERS

Initially, Ms. West attempts to appeal the CRB's March 14, 2011 Decision and Remand Order; however, the CRB's appellate authority is limited to review of Compensation Orders and final decisions.¹¹ The CRB has no authority to conduct appellate review of a Decision and Remand Order previously issued by this tribunal in the same case, and the only decision on review in this appeal is the October 11, 2012 Compensation Order on Remand issued by ALJ Jory.

In addition, Ms. West requests *en banc* review. Pursuant to 7 DCMR §255.8, *en banc* review is discretionary and may be granted if two or more panels disagree concerning resolution of an issue. In this case, granting the *en banc* request is inappropriate and would needlessly delay this decision; therefore, Ms. West's request for *en banc* review is denied.

DUE PROCESS

Ms. West asserts there was insufficient legal basis for this matter to be resolved on remand by ALJ Jory because ALJ Jory failed to issue an Order to Show Cause or otherwise provide Ms. West with an opportunity to object to ALJ Jory resolving this matter. If the procedural posture of this case were as Ms. West describes it, there could be merit to her argument; however, her position overlooks some key events which provided her and WHC sufficient notice and opportunity to object to ALJ Jory's further handling of this case.

¹⁰ The scope of review by the CRB is limited to making a determination as to whether the factual findings of the appealed Compensation Order are based upon substantial evidence in the record and whether the legal conclusions drawn from those facts are in accordance with applicable law. Section 32-1521.01(d)(2)(A) of the District of Columbia Workers' Compensation Act, as amended, D.C. Code §32-1501 to 32-1545. Consistent with this standard of review, the CRB is constrained to uphold a Compensation Order that is supported by substantial evidence, even if there also is contained within the record under review substantial evidence to support a contrary conclusion and even if the CRB might have reached a contrary conclusion. *Marriott International v. DOES*, 834 A.2d 882, 885 (D.C. 2003).

¹¹ 7 DCMR §266

On September 13, 2012, ALJ Jory issued an Order requesting the parties attend a status conference on November 6, 2012.¹² Less than 2 weeks later, ALJ Jory wrote to Ms. West's attorney and WHC's attorney and advised them that she was in receipt of the entire evidentiary file including the briefs filed pursuant to an order issued on May 31, 2011.¹³ As a result, she was cancelling the status conference because "it appears that I have everything I need in order to comply with the Court's order in both cases. A Compensation Order on Remand will issue without further delay." Although ALJ Jory did not issue an Order to Show Cause announcing the reassignment of this matter, both ALJ Jory's Order and her letter put counsel on notice that she had been tasked with issuing the Compensation Order on Remand. Neither party objected to this assignment; therefore, there are no due process grounds for vacating the October 11, 2012 Compensation Order on Remand.

MEDICAL EXPENSES

DR. ROBERT O. GORDON AND DR. MICHAEL E. BATIPPS

Because the CRB lacks authority to reweigh the evidence, the facts regarding Ms. West's treatment are those found by ALJ Russell and ALJ Jory.

To begin,

Claimant was treated initially for her injury by Dr. Robert O. Gordon and other orthopaedic physicians in his office, including Dr. Robert Collins.^[14]

It is beyond dispute that a claimant has the initial right to choose a treating physician.¹⁵ It also is beyond dispute that

[i]n reviewing the agency's determination that a claimant chose a treating physician, we will closely examine the claimant's conduct after the point at which the evidence shows she recognized her right to make that choice. *Velasquez*, 723 A.2d at 404-405 ("as the hearing examiner appropriately noted . . . [it is] continued treatment by [a physician] *after* the first evidence of [claimant's] cognizance of her right to choose her own treating physician that may or may not establish [that physician] as the sole authorized treating physician" (emphasis in original)).^[16]

¹² The CRB has taken official notice of the contents of the Office of Hearings and Adjudications' administrative file.

¹³ Based upon this representation and others in the October 11, 2012 Compensation Order on Remand, we find no merit to Ms. West's unsubstantiated accusation that ALJ Jory failed to review the evidentiary record as part of her deliberations.

¹⁴ *West v. Washington Hospital Center*, OHA No. 99-276A, OWC No. 281076 (November 9, 1999).

¹⁵ *Brown v. Washington Metropolitan Area Transit Authority*, CRB No. 05-211, OWC No. 597186 (May 6, 2005).

¹⁶ *Wiley v. DOES*, 984 A.2d 201, 204-205 (D.C. 2009)

Ms. West argues she did not exercise her right to treat with Dr. Gordon despite seeing him 11 times for treatment. Eleven visits constitutes constructive selection through “follow-up care extended beyond reasonable limits,”¹⁷ and ALJ Jory made an affirmative finding that Ms. West “had knowledge of her right to select a physician and did so when she treated with Dr. Gordon for six month[s].”¹⁸

Even so, the medical expenses in dispute are those for care on and after April 30, 1996, the date Ms. West’s work hardening program at the National Rehabilitation Hospital ended.¹⁹ Upon completing that program,

Claimant returned to either Dr. Cooney or Dr. Batipps in this deteriorated condition, and was referred by one of them to Dr. Martin R. McClaren for the purpose of obtaining facet block injections. In conversation with Dr. McClaren, claimant expressed her growing sense of sadness and depression, and he referred claimant to a psychologist, Dr. Philip L. Briley, who treated claimant for approximately 2 months.^[20]

Ms. West’s condition did not improve in work hardening, and

Because her condition failed to improve, the claimant, with the agreement of Dr. Gordon and upon approval of the employer, sought further evaluation from a neurologist, Dr. Michael E. Batipps, with whom the claimant had treated in the past for a prior injury. In turn, Dr. Batipps referred claimant to a neurosurgeon, Dr. F. Donald Cooney, for further evaluation.^[21]

It is not clear from this passage whether the “approval of the employer” for “further evaluation from” Dr. Batipps constituted a change of physician or authorization for specific treatment with Dr. Gordon retaining control of Ms. West’s course of treatment, and although ALJ Russell ruled Dr. Batipps was Ms. West’s treating physician:

In this case, claimant’s treating physician is, in my view, Dr. Batipps, not Dr. Norris. Although employer may reasonably have believed otherwise, as I view the evidence, claimant’s overall care has been managed by Dr. Batipps. He agreed with a recommendation made by the claimant herself to try a course of therapy at NRH. There was no indication in that recommendation that he was abandoning his relationship with the claimant’s case, or that he was in some sense

¹⁷ *Velasquez v. DOES*, 723 A.2d 401, 404 (D.C. 1999)

¹⁸ *West v. Washington Hospital Center*, AHD No. 99-276A, OWC No. 281076 (October 11, 2012).

¹⁹ *West v. Washington Hospital Center*, OHA No. 99-276A, OWC No. 281076 (November 9, 1999).

²⁰ *Id.*

²¹ *Id.*

relinquishing the care of the claimant to Dr. Norris for all purposes and for all time.^[22]

the Court of Appeals demanded close analysis of “the specific circumstances surrounding the several actions of WHC [regarding Dr. Batipps’ status].”²³

In response, ALJ Jory found Ms. West did not make a request to change treating physicians to Dr. Batipps²⁴ and dispelled Ms. West’s exaggeration that she had received “specific permission” from WHC to change physicians to Dr. Batipps:

Counsel’s assertion that claimant received “specific permission” from the Hospital’s Employee Health unit to change to Dr Batipps is an exaggeration at best and not supported by her vague testimony in her deposition. Claimant testified in her deposition that after Dr. Gordon discussed the MRI results with her Dr. Gordon told her she should see a neurosurgeon. Claimant further testified that she told Dr. Gordon she did not want surgery and asked if she could go to her neurologist. Claimant testified that Dr[.] Gordon said yes.

* * *

The fact that her treating physician did not oppose her seeking treatment from a neurologist does not meet the requirement of obtaining authorization from the Office of Workers['] Compensation or the insurer.^[25]

ALJ Jory clearly found:

Dr. Batipps was accepted as a physician Dr. Gordon referred claimant to but *not as a treating physician*, therefore, Dr. Batipps’ referral to another physician does not render employer responsible for payment of medical bills unless claimant asked either OWC or the employer/carrier if she could make a change in her treating physician [which ALJ Jory found she did not].^[26]

Ms. West had an affirmative duty to make sure treatment was rendered by an authorized physician,²⁷ and there is no basis in the record for disturbing ALJ Jory’s findings.

²² *Id.*

²³ *Washington Hospital Center v. DOES*, 789 A.2d 1261, 1264 (D.C. 2002).

²⁴ *West v. Washington Hospital Center*, AHD No. 99-276A, OWC No. 281076 (October 11, 2012).

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Williams v. Wells Fargo Alarm System*, Dir. Dkt. No. 95-3, H&AS No. 92-390, OWC No. 183606 (October 4, 1996).

DR. F. DONALD COONEY

At this point, the law has been established:

[T]he attending physician may refer a claimant to another physician for treatment without approval of either the OWC or the employer. Approval to change physicians is not needed for a series of referrals, each from the attending physician. *Medical Associates v. DOES*, 565 A.2d 86 (1989), *Sibley Memorial Hospital v. DOES*, 711 A.2d 105 (1998) *Frazier v. Washington Hospital Center*, CRB 07-41, OWC 624682 (2007). [Footnote omitted.]^[28]

Dr. Batipps “referred claimant to a neurosurgeon, Dr. F. Donald Cooney, for further evaluation.”²⁹ Because Dr. Batipps was not Ms. West’s attending physician, he did not have the authority to obligate WHC to pay for treatment obtained through his referrals; however, “when Dr[.] Batipps referred claimant to Dr. Donald Cooney, employer agreed to accept this referral and Dr. Cooney’s bills were paid by employer however payment of Dr. Cooney’s bills, in the undersigned’s view, does not equate to authorization of a change in treating physicians See HT at 228, 229.”³⁰ Thus, ALJ Jory correctly ruled Dr. Cooney’s treatment was not authorized beyond that already paid for by WHC.

DR. RICHARD NORRIS

Since 1999, WHC has disputed Ms. West’s medical care following her discharge from Mr. Norris’ work hardening program. Following Dr. Cooney’s evaluation, Ms. West “recommended to her doctors that she try a course of work hardening at a program at the National Rehabilitation Hospital in Bethesda, Maryland, (hereinafter, NRH) and Dr. Richard Norris. Her physicians agreed, and the employer authorized this program as well, beginning in April of 1996.”³¹ Specifically, “Claimant asked Dr. Clooney [*sic*] about work hardening and Dr. Clooney [*sic*] agreed that it was appropriate for claimant to see Dr. Norris at the National Rehabilitation Hospital.”³² More importantly,

Claimant went to NRH. NRH contacted Sharon Russell of insurer and requested authorization to treat claimant. Ms. Russell denied authorization. Claimant’s attorney contacted Ms[.] Russell by telephone and asked Ms. Russell if claimant could change her treating physician to Dr. Norris. The reason for the change provided to Ms. Russell was that Dr. Clooney [*sic*] had nothing further to offer claimant and claimant was no longer comfortable with going to Dr. Clooney

²⁸ *West v. Washington Hospital Center*, CRB No. 99-097(R), H&AS No. 99-276A, OWC No. 281076 (March 14, 2011).

²⁹ *West v. Washington Hospital Center*, OHA No. 99-276A, OWC No. 281076 (November 9, 1999). See also, *West v. Washington Hospital Center*, AHD No. 99-276A, OWC No. 281076 (October 11, 2012).

³⁰ *West v. Washington Hospital Center*, AHD No. 99-276A, OWC No. 281076 (October 11, 2012).

³¹ *West v. Washington Hospital Center*, OHA No. 99-276A, OWC No. 281076 (November 9, 1999).

³² *West v. Washington Hospital Center*, AHD No. 99-276A, OWC No. 281076 (October 11, 2012).

[sic]. Ms. Russell obtained Dr[.] Clooney's [sic] records and authorized changing claimant's treating physician to [D]r. Richard Norris of NRH.^[33]

Moreover,

The undersigned also disagrees with claimant's position that claimant's request to treat with Dr. Norris was not a request for a change in physicians as Dr. Norris was providing or overseeing only a work hardening "program" and when the "program" was completed claimant would then return to her treating physician.

This argument fails not only because Dr. Batipps was never considered claimant's treating physician and whether or not claimant would keep treating with Dr. Norris when the work hardening program ended is speculation and self serving speculation at that. The fact that the work hardening program ended and that Dr. Norris had no other treatment to offer claimant or that he had no objection to claimant returning to Dr[.] Cooney, if claimant did not request authorization from employer or OWC to switch her treating physician, employer is not responsible for making payments for treatment rendered by Dr. Batipps or any of the physicians he referred her to, with the exception of Dr[.] Cooney, who Dr. Norris has agreed to return claimant to but Dr. Norris cannot relinquish his title as the treating physician until authorized by employer or OWC.^[34]

Thus, ALJ Jory appropriately ruled that as of March 13, 1996, Dr. Norris was Ms. West's attending physician, and in order for WHC to be obligated to pay for treatment by referral, the referral must have come from Dr. Norris.

DR. ANDREW PANAGOS

WHC referred Ms. West to Dr. Panagos for an independent medical examination.³⁵ Ms. West was seen by Dr. Panagos on at least 6 occasions from September 1995 to October 1997. WHC is obligated to pay for independent medical examinations conducted at its request.

DR. MARTIN R. MCCLAREN

Following work hardening, either Dr. Cooney or Dr. Batipps referred Ms. West to Dr. McClaren for facet block injections.³⁶ Because neither Dr. Cooney nor Dr. Batipps was Ms. West's

³³ *Id.*

³⁴ *Id.*

³⁵ *West v. Washington Hospital Center*, OHA No. 99-276A, OWC No. 281076 (November 9, 1999). See also, *West v. Washington Hospital Center*, AHD No. 99-276A, OWC No. 281076 (October 11, 2012).

³⁶ *West v. Washington Hospital Center*, OHA No. 99-276A, OWC No. 281076 (November 9, 1999).

attending physician, ALJ Jory correctly ruled WHC is not obligated to pay for treatment resulting from either one of their referrals to Dr. McClaren.

DR. PHILIP L. BRILEY

Dr. McClaren referred Ms. West to Dr. Briley.³⁷ As explained above, Dr. McClaren was not an authorized physician, and ALJ Jory correctly ruled WHC is not obligated to pay for treatment by Dr. Briley upon Dr. McClaren's referral.

DR. DANIEL R. IGNACIO

Dr. Batipps referred Ms. West for a course of physical therapy with Dr. Ignacio.³⁸ Because Dr. Batipps was not Ms. West's attending physician, ALJ Jory correctly ruled WHC is not obligated to pay for treatment resulting from Dr. Batipps' referral to Dr. Ignacio.

DR. RHODES

Dr. Batipps referred Ms. West to a Dr. Rhodes for a nerve block.³⁹ Because Dr. Batipps was not Ms. West's attending physician, ALJ Jory correctly ruled WHC is not obligated to pay for treatment resulting from his referral to Dr. Rhodes.

DR. KIMBERLY ANDERSON

Dr. Batipps referred Ms. West to a psychiatrist, Dr. Anderson.⁴⁰ Because Dr. Batipps was not Ms. West's attending physician, ALJ Jory correctly ruled WHC is not obligated to pay for treatment resulting from his referral to Dr. Anderson.

DR. RONALD L. HARMON

Because Ms. West's mental state was deteriorating, Dr. Briley contacted Dr. Batipps and recommended changing Ms. West's medication. In response, Dr. Batipps referred Ms. West to Dr. Harmon, a psychiatrist.⁴¹ Because Dr. Batipps was not Ms. West's attending physician, ALJ Jory correctly ruled WHC is not obligated to pay for treatment resulting from his referral to Dr. Harmon.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

CONCLUSION AND ORDER

The CRB lacks authority to review the March 14, 2011 Decision and Remand Order issued by this tribunal in this case. At this time, review is limited to the October 11, 2012 Compensation Order on Remand issued by ALJ Jory.

Ms. West's due process rights were not violated by the reassignment of this matter from ALJ Russell to ALJ Jory.

The facts in this case as established by previous orders and opinions required clarification and elaboration; ALJ Jory's findings of fact are supported by substantial evidence in the record. In addition, ALJ Jory's conclusions are in accordance with the law. The October 11, 2012 Compensation Order on Remand is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

MELISSA LIN JONES
Administrative Appeals Judge

August 15, 2013
DATE