

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 (Dir. Dkt.) No. 03-150

TERESA AGUNBIANDE,

Claimant – Respondent

v.

WASHINGTON HOSPITAL CENTER AND KEMPER INSURANCE,

Employer/Carrier – Petitioner.

Appeal from an Order of
Claims Examiner Brenda E. Hailes
OWC No. 568828

John Duncan III, Esquire, for the Petitioner

Benjamin T. Boscolo, Esquire, for the Respondent

Before: LINDA F. JORY, FLOYD LEWIS and JEFFREY P. RUSSELL, *Administrative Appeals Judges*.

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

DECISION AND ORDER OF REMAND

JURISDICTION

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 from the Office of Workers' Compensation in the District of Columbia Department of Employment Services (DOES). In that Order, which was filed on November 25, 2003, the Claims Examiner (CE) granted the request of Claimant-Respondent (Respondent) to change her treating physician. Employer-Petitioner (Petitioner) now seeks review of that Order.

As grounds for this appeal, Petitioner alleges as error that the Order is not supported by substantial evidence and is 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).

Turning to the case under review herein, Petitioner alleges that the Claims Examiner's decision to permit Respondent to change treating physicians was arbitrary, capricious, not supported by substantial evidence, contrary to the Act and must be reversed. Respondent contends that the Claims Examiner's decision is supported by substantial evidence, is in accordance with the law and should be affirmed.

Prior to the issuance of the Order in the instant matter, an informal conference was held before the Claims Examiner and on September 24, 2002, the Claims Examiner issued an Order rejecting Respondent's request to change treating physicians from Dr. Michael Dennis. Respondent appealed that denial and on January 29 2003, the Director issued a decision remanding the matter to the Claims Examiner, concluding that the Claims Examiner did not explain why the denial of the request to change physicians was in Respondent's "best interests", as required by *Copeland v. Hospital for Sick Children*, Dir. Dkt. No. 01-40, OWC No. 596532 (July 25, 2001). Thus, the Director remanded the case to OWC for the Claims Examiner to fully explain why denying the request to change physicians was in Respondent's best interests and "issue a decision *de novo* within twenty (20) working days."

On November 25, 2003, in response to the Director's Remand Order, the Claims Examiner concluded that "OWC's position has not changed. . . . [however] because OWC did not respond to the remand order timely, the claimant's request to change her physician is granted. It is **Ordered** that the claimant begin treatment with a physician of choice immediately."

Thus, instead of following the Director's instructions to explain why the denial of the request to change physicians was in Respondent's best interest, the Claims Examiner simply stated that the original position (to deny the requested change) was the same, but again did not explain why. Then, apparently the Claims Examiner felt that because the twenty days deadline was not met,

there was no choice except to grant the requested change. This Panel must disagree with the actions taken by the Claims Examiner in this matter.

The failure of the Claims Examiner to timely comply with the Director's instructions simply can not be the justification for granting a request to change physicians. The Remand Order required the Claims Examiner to explain why, under *Copeland*, the denial of the request to change physicians was in the injured employee's "best interests." After conducting a complete investigation, the Claims Examiner was required to issue a decision based on the evidence, in compliance with the Director's instructions. This was not done.

Furthermore, as cited by Petitioner, the case of *Hughes v. Dist. of Columbia Dep't. of Employment Servs.*, 498 A.2d 567, 571, n. 8 (D.C. 1985), emphasizes that there are some deadlines and time frames, which are not jurisdictional, that are merely "directory rather than mandatory." This deadline was not in any manner jurisdictional in nature or mandatory, but should have been viewed as the desire for OWC to act on the instructions as soon as possible, to avoid any unnecessary delay that might affect the injured employee's right to medical care. The time frame was not as important as the primary concern of explaining why the denial was in Respondent's best interests. Thus, the Claims Examiner, unable to comply within the target date, was still obligated to issue a decision in compliance with the Director's instructions. The twenty day request by the Director should not have been viewed as a mandatory deadline which left the Claims Examiner with no option other than to grant the request to change physicians, once the deadline passed.

As such, this matter must be remanded to the Claims Examiner to explain, under *Copeland*, why the action taken on Respondent's request to change physicians was in her "best interests." Recently, the CRB offered guidance to claims examiners in this area and described, in detail, the importance of explaining why a denial is not inconsistent with the best interests of a claimant. *Lane v. Linens of the Week*, CRB No. 05-207, OWC No. 594244 (May 6, 2005). Without this information, the CRB is unable to determine whether the actions of a claims examiner are arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.

CONCLUSION

The OWC Order of November 25, 2003 is not in accordance with the law, as the Claims Examiner failed to explain why the determination made was in the best interests of Respondent, as ordered by the Director.

ORDER

The Order of November 25, 2003 is hereby VACATED and this matter is REMANDED to OWC for further proceedings consistent with the above discussion.

FOR THE COMPENSATION REVIEW BOARD:

Floyd Lewis
Administrative Appeals Judge

August 19, 2005
DATE