

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. 05-213

ANTONIO. GUERRERO,

Claimant - Petitioner

v.

CLARK CONSTRUCTION, AND ST. PAUL FIRE AND MARINE INSURANCE,

Employer/Carrier - Respondent

Appeal from an Order of
Claims Examiner Peggy Hendricks
OWC No. 592187

Matthew Peffer, Esquire, for the Petitioner

Michael E. Ollen, Esquire, for the Respondent

Before LINDA F. JORY, SHARMAN J. MONROE , *Administrative Appeals Judges* and FLOYD LEWIS,
Acting Administrative Appeals Judge.

LINDA F. JORY, *Administrative Appeals Judge*, on behalf of the Review Panel

DECISION AND ORDER

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 (1994), and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005).¹

¹Pursuant 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 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

Pursuant to § 230.04, the authority of the Compensation Review Board 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 the public and private sector Acts.

BACKGROUND

This appeal follows the issuance by the Office of Workers' Compensation (OWC) in the District of Columbia Department of Employment Services (DOES) of a Memorandum of Informal Conference, which became final and appealable by operation of law. In that Memorandum, which was filed on February 10, 2005, the Claims Examiner concluded that OWC no longer had jurisdiction over claimant's request for a change of physicians.

As grounds for this appeal, Petitioner alleges the Claims Examiner's decision is arbitrary, capricious, unsupported by substantial evidence and not in accordance with the law and should therefore be reversed.

ANALYSIS

In the 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). for the reasons set forth herein, the Board concludes herein, that the Claims Examiner's February 10, 2005 order is not in accordance with the law, is vacated and the matter remanded to OWC to consider if it is in the best interest of claimant to change his treating physician.

Petitioner asserts that the Claims Examiner's decision finding that OWC no longer had jurisdiction over the issue of change of physician is "clearly erroneous and inconsistent with the plain language of the statute." Petitioner relies on 7 D.C.M.R. § 212.13 which states "if the employee is not satisfied with medical care, a request for change may be made to the Office. The Office may order a change where it is found to be in the best interest of the employee" and asserts:

There is no prohibition on how many or for what reasons an injured worker may seek authorization to change physicians. Thus, there is no limiting language in this provision on the employee's right to requests a change of physician. Nothing by the prior order precludes claimant from requesting a change of physicians at this time.

Respondent opposes Claimant-Petitioner's request for a reversal asserting the issue of a change of physician has already been addressed in the August 12, 2004 order, that was not appealed and therefore has become final by operation of law. Respondent also notes that in the August 12,

1978, as amended, D.C. Official Code §§ 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.

2004 order the Claims Examiner did in fact order a switch of physicians to obtain a second opinion from a physician who speaks Spanish for a one time visit only. Employer asserts that since the issue has already been decided and not appealed, the Claims Examiner's determination that OWC no longer has jurisdiction of the issue of change of physicians is in accordance with the law.

Upon review of the record, the Panel agrees with Petitioner on all three counts: that OWC did have jurisdiction over Petitioner's second request for a change in physicians; the Act provides no guidelines as to how many times or for what reasons an injured worker may seek authorization to change physicians; and, that nothing in the prior order precludes Petitioner from requesting a change of treating physicians at this time.

OWC does not hold evidentiary hearings, and there is no hearing transcript to review to determine if in fact Petitioner was only requesting a one time change in physicians in order to obtain a second opinion only with regard to his disability status by a Spanish speaking physician, at the August 11, 2004 informal conference. Thus, the panel can only rely on the claim for relief listed by the Claims Examiner in the August 12, 2004 order which is:

Claimant claims entitlement to authorization to switch physicians to get a second opinion from a physician who speaks Spanish.

In the first order, the Claims Examiner concluded an examination by a physician who speaks Spanish would be in Claimant's best interest, but limited Claimant's switch to obtain a second opinion from a physician who speaks Spanish to a one time visit only. As noted above, although not clear, it is possible that Petitioner only asked for the one time visit. Nevertheless, the Panel concludes Petitioner's failure to appeal this limited decision, does not preclude him from requesting a change of his treating physician pursuant to 7 D.C.M.R § 212.13; and D.C. Official Code § 32.1507(b)(4).

Petitioner clearly did seek to change his treating physician at the more recent informal conference. Petitioner provided the name of the physician he wished to change to, specifically, Dr. Julio C. Gonzalez. Nevertheless the Claims Examiner concluded that "because change of physicians was previously addressed" and "until additional information is provided to modify the Order, that OWC no longer has jurisdiction."

The panel agrees with Petitioner that nothing in the Act, or in the regulations promulgated to implement the Act, specifically regulation 7 D.C.M.R § 212, limits an employee's right to request a change of physicians. Similarly, the panel cannot conclude that the order issued by OWC on August 12, 2004 precludes Petitioner from requesting a change of treating physicians at this time, notwithstanding Petitioner's prior request to obtain a second opinion for a Spanish-speaking physician.

Accordingly, the subsequent order issued by the Claims Examiner on February 10, 2005, which concluded in its Recommendation that OWC no longer has jurisdiction over the issue of change in physician is not in accordance with the law. OWC retained jurisdiction because the OWC has sole authority to process a request to change physicians. *See Renard v. Dist. of Columbia Dep't.*

of Employment Servs., 731 A.2d 413 (D.C. 1999). Moreover, neither the Act, nor the regulations limits an employee's right to request a change in treating physicians.

CONCLUSION

The Order of February 10, 2005 denying Claimant-Petitioner's claim for relief for lack of jurisdiction is not in accordance with the law as OWC retains sole authority on a request to change treating physicians.

ORDER

The Memorandum of Informal Conference issued on February 10, 2005 is hereby REVERSED and REMANDED to OWC to reconsider Claimant - Petitioner's request to change treating physicians pursuant to § 32-1507 (b)(4) of the Act and 7 D.C.M.R. § 212.13.

FOR THE COMPENSATION REVIEW BOARD

LINDA F. JORY
Administrative Appeals Judge

June 1, 2005
DATE