

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR



LISA M. MALLORY
DIRECTOR

COMPENSATION REVIEW BOARD

CRB 12-091

FRANCESCA SMITH,
Claimant-Petitioner,

v.

BANK FUND STAFF FEDERAL CREDIT UNION
and NATIONAL UNION FIRE INSURANCE C/O AIAC,
Employer and Insurance Carrier, Respondents.

Appeal of a May 10, 2012, Final Order recommended by
Claims Examiner Alice Goldring
OWC No. 688396

Krista DeSmyter, Esquire, for the Claimant
Thomas G. Hagerty, Esquire, for the Employer and Insurance Carrier

Before LAWRENCE D. TARR, MELISSA LIN JONES, and JEFFREY P. RUSSELL,¹ *Administrative Appeals Judges*.

LAWRENCE D. TARR, *Administrative Appeals Judge*, for the Compensation Review Board.

DECISION AND REMAND ORDER

OVERVIEW

This case is before the Compensation Review Board (CRB) on the request of the claimant, Francesca Smith, for review of the May 10, 2012, Order issued by Claims Examiner Alice Goldring that denied authorization for the claimant to change treating physicians. Also before the CRB is the employer's Motion Ne Recipiatur and the employer's Motion To Strike the claimant's memorandum reply to the employer's opposition. For the reasons stated we grant both of the employer's motions and also vacate the May 12, 2012 Order.

BACKGROUND FACTS OF RECORD AND PROCEDURAL HISTORY

The claimant, Francesca Smith, worked for Bank Staff Federal Credit Union (employer) as a consumer loan representative. She asserts that she developed DeQuervain's tenosynovitis and bilateral carpal tunnel syndrome because of her work activities. According to the claimant, she

¹ Judge Russell has been appointed by the Director of the DOES as a CRB member pursuant to DOES Administrative Policy Issuance No. 12-01 (June 20, 2112).

received medical care from Dr. James Jenkins, and then from Dr. Linda H. Mosely, pursuant to a referral from Dr. Jenkins. Dr. Mosely has injected the claimant's wrist with steroids and has indicated that the claimant may, in the future, need surgical releases to her wrists.

On March 2, 2012, the claimant, by counsel, filed an Application for Informal Conference that listed as the issue to be discussed "Authorization to treat with Dr. Mosely." Counsel attached to the application a copy of the 2001 Director's decision in *Copeland v. Hospital for Sick Children*, Dir. Dkt. No. 01-40, OWC No. 536532 (July 25, 2001). We note now that in *Copeland*, the only issue decided by the Director involved a claimant's request to change physicians.

On May 3, 2012, the claimant, her counsel, the attorney for the employer and carrier, and the carrier's claims adjuster attended an Informal Conference at the Office of Workers' Compensation (OWC) before Claims Examiner Goldring.

On May 10, 2012, OWC issued an Order that was recommended by the claims examiner and ordered by OWC's claims supervisor. The Order held:

[OWC] has determined that a change of claimant's physician is not in the best interest of claimant as it relates to the December 15, 2011 work-related condition.

On June 11, 2012, the claimant appealed this Order. On July 3, 2012, the employer filed its Opposition and a Motion Ne Recipiatur. The claimant filed a reply to the employer's opposition on August 10, 2012. The employer filed a Motion to Strike the claimant's reply memorandum on August 22, 2010.

JURISDICTION AND THE STANDARD OF REVIEW

Pursuant to 7 DCMR § 230.04, the authority of the CRB extends over appeals from compensation orders, including final decisions or orders issued by OWC. The CRB's standard of review for appeals of OWC's decisions or orders is that the CRB must affirm the order under review unless it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. See, 6 Stein, Mitchell & Mezines, *ADMINISTRATIVE LAW*, § 51.93 (2001).

ANALYSIS

The CRB first shall discuss the employer's two motions.

When the claimant filed her Application for Review, she attached the following exhibits:

- an affidavit from her present counsel
- a January 27, 2012 medical report from Dr. James Jenkins
- a February 13, 2012 prescription pad note from Dr. Jenkins
- a March 15, 2012 report "Independent Medical Evaluation" from Dr. Linda Mosely
- an April 3, 2012 EMG report from Mary S. Babcock, D.O.
- the February 6, 2012 Notice of Informal Conference issued by OWC
- an affidavit from the attorney who represented the claimant at the informal conference

The employer filed a “Motion Ne Recipiatur or In The Alternative, To Strike” requesting the CRB either not receive these documents or strike them from the record, asserting that it was improper for the claimant to file these documents with her review request.

In support of its motion, the employer primarily relies on 7 DCMR §§ 258.3 and 258.4, which sections state what documents must be submitted with an Application for Review. These sections provide:

258.3 An Application for Review must include the following:

- (a) An original and three (3) copies of the Application for Review, and
- (b) an original and three (3) copies of a supporting memorandum of points and authorities setting forth the legal and factual basis for requesting review.

258.4 The Application for Review shall also:

- (a) identify the compensation order or final decision from which the petitioner appeals;
- (b) state whether the compensation order or final decision was issued by the Office of Workers' Compensation or the Administrative Hearings Division; and
- (c) include, by way of attachment to the Application for Review, a copy of the compensation order or final decision appealed.

While these regulations state what documents must be submitted with an Application for Review, they do not specifically state that other documents may not also be submitted. However, D.C. Code §32-1522 (2A) states:

(2A) (A) A party aggrieved by a compensation order may file an application for review with the Board within 30 days of the issuance of the compensation order. A party adverse to the review may file an opposition answer within 15 days of the filing of an application for review.

(B)A Memorandum of Points and Authorities, which sets forth the legal and factual basis for the review or the opposition thereto, shall be filed with an application for review and an opposition answer; no further submissions shall be permitted, unless requested by the reviewing panel.

As the underlined clause mandates, the memorandum of points and authorities sets forth the legal and factual basis for the review and no further submissions are permitted unless asked for by the CRB.

The CRB has not requested any documents. Therefore, the employer’s Motion Ne Recipiatur or In The Alternative, To Strike is granted. The documents attached to the claimant’s memorandum will not be considered.²

² We should point out that except for the two affidavits , the other documents had been forwarded to the CRB pursuant to 7 DCMR 259.1 and 259.2 since they were part of the official record..

The employer also filed a Motion to Strike the claimant's reply to its Opposition brief.

7 DCMR § 258.10 requires that a Reply to a Memorandum in Opposition be filed within five calendar days of receipt of the memorandum. The employer filed its Opposition brief on July 3, 2010. Claimant's reply was filed on August 10, 2012.

The Claimant's reply was filed about four weeks after the Opposition, and is untimely. Therefore, the CRB grants the Employer's Motion to Strike. The claimant's reply to the employer's opposition brief will not be considered.

As to the merits of the claimant's appeal, the May 10, 2012, Order stated that the informal conference was held "to address the issue of change of treating physicians" and concluded:

[OWC] has determined that a change of claimant's physician is not in the best interest of claimant as it relates to the December 15, 2011 work-related condition. The claimant's current treating physician and the Independent Medical Evaluation (IME) physician indicated the claimant's current complaints are not related to the December 15, 2011 work-related condition to the right hand.

It is hereby ORDERED claimant's request for authorization to change her physician is DENIED.

The claimant argues on review that the claims examiner's order is arbitrary and capricious because it decided an issue that was not before OWC and failed to address the issue claimed. The claimant asserts the order did not decide her request for authorization to treat with Dr. Mosely but instead decided whether the claimant can change treating physicians. Curiously, the claimant further asserts at page 5 of her memorandum that she does not need OWC's authorization to treat with Dr. Mosely because she was referred to Dr. Mosely by the doctor the claimant says is her treating physician, Dr. Jenkins.

The employer in opposition does not specifically challenge the claimant's characterization of the informal hearing request. The employer points out that it has controverted this claim "from the beginning by asserting that the alleged accidental injury did not arise out of and in the course of the Claimant-Petitioner's employment".

Support for the employer's statement is found in the May 10, 2012, Order that said "Employer/Carrier's representative's position on the authorization to change her physician is that there is no causal relationship between the accidental injury to her present condition" and in the claimant's application for informal hearing that stated the employer's position was "no causal connection, nature and extent of disability contested".

The employer argues that the CRB should not decide whether the issue before the claims examiner was a request to change treating physicians or was a request for authorization for medical treatment when there has been neither voluntary acceptance nor a formal determination that the claimant's accident arose out of and in the course of treatment. The employer suggests the CRB remand this

matter to OWC to determine the compensability of the claim before deciding whether there is authorization for medical treatment or to change treating physicians.

The CRB can understand why the claims examiner determined the issue of treating physician change. Although the claimant's February 23, 2012, Application for Informal Conference stated as the issue to be discussed "Authorization to treat with Dr. Mosely," the claimant attached to her application a case that solely dealt with the issue of changing treating physician. Moreover, and inconsistent with her informal hearing conference request, the claimant asserts she does not need OWC's authorization to treat with Dr. Mosely.

While we do not fault the claims examiner for the confusion, we are left with, in the appropriate words of the employer, an "incomprehensible muddle" and are faced with an Order that did not decided the issue the claimant wanted decided and did not make a specific finding with respect to the employer's defense that the claimant's accident did not arise out of and in the course of her employment.

Therefore, the CRB must vacated the May 10, 2012, Order, and remand this matter to the claims examiner to determine if the claimed injuries arose out of and in the course of her employment and then, if so, determine the issues relating to authorization for medical treatment.

CONCLUSION AND ORDER

The May 10, 2012, Order is arbitrary, capricious, an abuse of discretion and not in accordance with the law. That Order is VACATED. This case is remanded to OWC for such further action as it deems appropriate consistent with the CRB's decision.

FOR THE COMPENSATION REVIEW BOARD:

LAWRENCE D. TARR
Administrative Appeals Judge

December 6, 2012

DATE