GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

VINCENT C. GRAY
MAYOR

LISA M. MALLORY
DIRECTOR

Compensation Review Board

DEPT. OF EMPLOYMENT SERVICES
COMPENSATION REVIEW BOARD
2012 APR 4 PM 12 03

CRB No. 10-124

GLORIA J. BEYNUM,
Claimant–Respondent,

v.

WASHINGTON HOSPITAL CENTER,
Self-Insured Employer-Petitioner

Appeal from an Order of
Claims Examiner Cathy A. Scruggs and Supervisor Jevan T. Edwards
OWC No. 665124

John C. Duncan, III, Esquire, for the Employer/Petitioner
Eric M. May, Esquire, for Respondent

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

HENRY W. MCCOY, *Administrative Appeals Judge*, for the Compensation Review Board.
LAWRENCE D. TARR, *Administrative Appeals Judge*, concurring separately; and
MELISSA LIN JONES, *Administrative Appeals Judge*, dissenting.

DECISION AND ORDER

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board (CRB) pursuant to D.C. Official Code §§ 32-1521.01 and 32-1522 (2004), 7 DCMR § 230, *et seq.*, and the Department of Employment Services Director's Directive, Administrative Policy Issuance 05-01 (February 5, 2005).

OVERVIEW AND FACTS OF RECORD

This appeal follows the issuance on April 22, 2010 of an Order of the Office of Workers' Compensation (OWC) in the District of Columbia Department of Employment Services (DOES). In that Order, OWC granted Claimant's request for authorization to change her attending physician.

On November 10, 2009, Claimant sustained injuries when she tripped on a broken step in Employer's parking garage when leaving work. Claimant received initial treatment the next day by a nurse practitioner at Employer's Occupational Health Department. After an examination, Claimant was diagnosed with a left ankle contusion, foot contusion, and mild right hand contusion.

At the initial treatment on November 11, 2009, Claimant also signed a form agreeing to receive treatment for her injuries from the Occupational Health Department. From November 11, 2009 to December 4, 2009, Claimant was seen and treated six times by various nurse practitioners from this department, but was not seen by a doctor.

An initial appointment was made for Claimant to see Dr. Ross Myerson at Occupational Health on December 3, 2009. Claimant had a physical therapy session at National Rehabilitation Hospital (NRH) the same morning and arrived, by her estimate, fifteen minutes late for her appointment; by which time the doctor had left. On December 9, 2009, Claimant elected to start treating with Dr. Jeffrey Phillips and has continued treating with him.

After Claimant requested authorization to change physicians, an informal conference was convened by Claims Examiner (CE) Cathy Scruggs on March 15, 2010. Authorization to change physician was the only issue for resolution after the claim for temporary total disability benefits was withdrawn.

After hearing testimony from Claimant and reviewing the exhibits submitted by both parties, CE Scruggs issued an Order on April 22, 2010 that granted the request to change physicians, deeming it to be necessary and in Claimant's best interest. Employer has timely appealed with Claimant filing in opposition.

In its appeal, Employer asserts the OWC Order is not supported by substantial evidence in the record, is contrary to law, and is arbitrary and capricious. Claimant argues to the contrary that the Order should be affirmed.

ANALYSIS

In the review of an appeal from the Office of Workers' Compensation (OWC), the CRB 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*, § 51.03 (2001).

In presenting the issue before her for resolution, the CE noted that D.C. Official Code § 32-1507(4) provides that the Mayor shall supervise the medical care rendered to an injured employee

and may order a change in physician when it is deemed necessary or desirable. In addition, 7 DCMR § 212.12 provides that once an injured employee has selected a physician to provide treatment, in order to change that physician, a request must be made to OWC, which has the authority to order the change if it is found to be in the employee's best interest.

We also note 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).

Janey, supra, at 2.

In the instant matter, after listening to the Claimant's testimony at the informal conference and reviewing the exhibits submitted, the CE reasoned:

> "Careful consideration was given to the arguments and evidence presented by both parties. I find the evidence demonstrates that the claimant signed a consent form to treat with the medical doctors at Occupational Health., (sic) however, I find the medical care was provided by a Nurse Practitioner and not a physician. I further find the claimant was scheduled to see a physician at Occupational Health on December 3, 2009 but the physician was unable to see her and as a result thereof claimant consulted Dr. Phillips.
>
> In addition, I find the records clearly demonstrate that the treatment claimant received at Occupational Health did not cause any improvement in her condition. Nonetheless, the Workers' Compensation Act requires that if the claimant is not satisfied with the medical services being provided and desires a change, the claimant must seek authorization prior to changing physicians."

OWC Order at 3.

In arguing that the CE erred, factually and legally, in approving Claimant's request to change physicians, Employer challenges the CE's finding that the records demonstrate that the treatment Claimant received at Occupational Health did not result in any improvement in her condition. Employer claims this is factually inaccurate and points to its Informal Conference Exhibits 1, 2, 4, and 5. We find no support for Employer's position in the exhibits referenced.

Employer's Exhibit 1 is an undated[1] chronology of Claimant's appointments at the Occupational Health Department prepared by Nurse Practitioner Amy May starting November 11, 2009. No results are recounted for the three office visits in November. On December 1, 2009, it is noted that Claimant reported severe pain in her left ankle which was not improving and she was scheduled for an appointment with Dr. Myerson.[2] At a follow-up on December 8, 2009, it is noted that Claimant was examined and there was no change in her injury.

Employer's Exhibit 2 consists of the actual treatment notes from November 11th to December 8, 2009.[3] Except for the December 4th report where Claimant relates that she's feeling a little better but still has numbness and swelling in her left foot and calf, all of the reports consistently report on-going complaints of pain and soreness, concluding with the December 8th office visit where it is reported that following physical therapy Claimant asserts she hurts all over with pain to both ankles radiating up both legs to the back of her knees.

Employer's Exhibit 4 contains the radiological reports, an MRI of the lumbar spine and x-rays of the left foot and ankle. As the x-rays of the foot and ankle were performed on November 11, 2009, they do not provide support for an opinion that treatment by Occupational Health has improved Claimant's condition. As for the MRI of the lumbar spine taken on December 2, 2009, it merely provides an assessment of certain degenerative changes, but there is no further assessment as to how this relates to Claimant's overall condition. Employer's Exhibit 5 containing the physical therapy reports also provide no support for the argument advanced by Employer.

Employer also argues that the substantial evidence in the records suggests that if Claimant had kept her scheduled appointments with Dr. Myerson and physical therapy appointments at NRH instead of going off on her own to seek treatment, it would be reasonable to conclude that improvement in her condition would have occurred. What Employer seeks to have happen is for us to reassess the medical evidence in its favor, which is beyond our authority to do in the absence of clear error; and we find none. In addition, what Employer would have us do is engage in conjecture as to the possible change in Claimant's condition had she remained in treatment with Occupational Health. Such action is totally outside our authority.

Employer correctly points out that the CRB has rejected mere dissatisfaction with an attending physician's treatment as the sole basis for authorizing a change. Speaking to this issue, the CRB stated

> "Mere dissatisfaction with an attending physician's treatment, the Board has previously held, is not by itself sufficient to warrant authorization of a change in attending physicians. *Raynor, supra.* The burden under the Act of

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[1] While Employer asserts this document was prepared on March 10, 2010, that is only the date that is stamped across the top of document showing when it was faxed. No date appears in the text to indicate when Nurse May prepared and signed the document.

[2] Nurse May mistakenly stated December 1, 2009 as the appointment date with Dr. Myerson. The actual appointment date was December 3, 2009.

[3] The actual in-office treatment dates were Nov. 11th, 12th, 16th, Dec. 1st, and 8th, 2009. December 2nd and 4th were telephone consultations.

> establishing entitlement to the requested change of attending physicians is upon the party seeking the relief. *Lane v. Linens of the Week, supra*; *Raynor, supra. See Dunston v. D.C. Dept. of Employment Services*, 509 A.2d 109 (D.C. 1986). Thus, [the claimant] must present evidence supporting his claim that the requested change in physicians is in his best interest."

Shannon v. D.C. Dept. of Employment Services, CRB No. 07-153, OWC No. 616792 (October 19, 2007).

In reviewing the record evidence in this case, it shows that after Claimant was injured on November 11, 2009, she was seen and treated only by nurse practitioners over the course of five office visits and two telephone consultations between November 11th and December 8, 2009. The CE found that although Claimant agreed to be treated by the doctors at Occupational Health, all of her medical care during that period was provided by nurse practitioners.

The CE also found that when Claimant was finally scheduled to see a doctor for the first time, by the time she arrived at his office, he was unable to see her. While the parties argue over how late Claimant was for this appointment, Employer saying it was an hour, Claimant saying it was only fifteen minutes, the Case Management Note for December 3, 2009, which is Employer's Exhibit 2, records that Claimant arrived for her appointment with Dr. Myerson at 12 noon and that "He was not able to see her." As the CE's finding is taken almost verbatim from Employer's exhibit, it is supported by substantial evidence. The CE determined that it was at this time that Claimant decided on her own to seek treatment from Dr. Phillips.

In evaluating and ruling upon the requested change, a claims examiner is required to address the reasons presented in support of the requested change and articulate the rationale for the denial or approval thereof, including addressing the question of whether granting the request is in the employee's best interest. *Raynor, supra; Lane, supra*; *Copeland v. Hospital for Sick Children*, Dir. Dkt. No. 01-40 (July 25, 2001). In the instant matter, the CE has explained the rationale for her conclusion.

While it is recognized that technically no evidentiary record is created, nor is one contemplated by the statutory and regulatory scheme governing informal proceedings before OWC, the CRB, in considering an appeal from OWC, will necessarily examine any documentation of relevance contained in the OWC case record. As noted above, the exhibits submitted by both parties at the Informal Conference were examined.

In granting Respondent's request to change her attending physician, the CE has made findings that appear from an examination of the contents of the Order under review to be based upon Claimant's testimony, which, given the finding by the CE was deemed credible, and corroborated by reference to exhibits submitted by the parties.

Claimant elected to be treated by the doctors in Employer's occupational health unit. It is uncontested that through a month of treatment, Claimant was not seen by any doctor, only nurse practitioners. The CE accepted Claimant's testimony that the course of treatment produced no improvement in her condition and this is born out by the treatment reports in the case record. The record shows that Claimant's condition improved under Dr. Phillip's care in that she was released to

light duty, as opposed to being taken off work after her condition regressed after the full duty release by Occupational Health. By this reasoning as supported by the record, the CE's decision was made in the best interests of the Claimant and can not be deemed arbitrary.

The CE found that medical treatment with Dr. Phillips during the period December 9, 2009 to February 4, 2010 was not unauthorized. However, there is nothing in the record to justify that treatment with Dr. Phillips be authorized as of February 5, 2010. As the CE correctly stated, a claimant must seek authorization prior to changing physicians. Accordingly, the Order authorizing Claimant's request to change physicians is amended[4] to change the date of the authorized change to the date of the Order, April 22, 2010.

We take issue with the reasoning of colleague in dissent. We do not advocate a narrow reading of 7 DCMR 212.12. Rather we take guidance from the statute, § 32-1507(4), which states the Mayor "may order a change of *physician*...when in his judgment such change is necessary or desirable." (Emphasis added.) In addition, our colleague cites no authority interpreting "medical care provider" to mean anything other than a licensed physician.

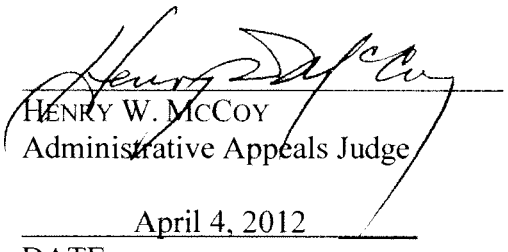
The Claimant had every expectation under the Act and the regulations that she would be seen and have her injury diagnosed by a physician when she signed to have her treatment provided by Employer's Occupational Health unit. Claimant went to a month of treatment sessions without seeing a physician and when she was finally scheduled to see one, the physician left before she arrived.

While we in no way endorse the unauthorized action taken by Claimant in changing her treating physician, we take the position that the CE properly considered the evidence in making the decision authorizing a change and for that change to become effective on April 22, 2010. Taking all the evidence into consideration, the CE found Claimant to be credible and that it was in her best interest to authorize the change in physician. Contrary to our colleague's opinion, we conclude the record provides justification for the decision reached and thus we affirm.

CONCLUSION AND ORDER

The Order of April 22, 2010 is not arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law. The Order of April 22, 2010 is AMENDED to authorize Claimant's change of physician effective April 22, 2010.

FOR THE COMPENSATION REVIEW BOARD:



HENRY W. MCCOY
Administrative Appeals Judge

April 4, 2012
DATE

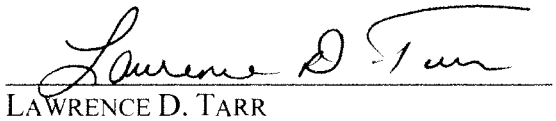
[4] Section 32-1521.01(d)(2) of the Act.

LAWRENCE D. TARR, Administrative Appeals Judge, concurring:

I concur with Judge McCoy's decision that the claimant is authorized to change attending physicians as of April 22, 2010.

I do so not because of any statutory or regulatory interpretation of "physician" or "medical care provider." I find the change is in the claimant's best interest because her ability to work improved under Dr. Phillip's care. While the claimant was released to full duty on November 23, 2009, on December 1, 2009, Occupational Health Department released her from all work. The claimant began with Dr. Phillips on December 9, 2009, and under his care improved to the point where she was released to light duty work.

I therefore agree with the determination that the claims examiner's decision is neither arbitrary, capricious, an abuse of discretion and is in accordance with the law.



LAWRENCE D. TARR
Administrative Appeals Judge

MELISSA LIN JONES, Administrative Appeals Judge, dissenting:

The majority affirms the April 22, 2010 Order granting Ms. Gloria L. Beynum's request for authorization to change physicians because her care at Washington Hospital Center Occupational Health ("Occupational Health") was deficient in that Ms. Beynum was seen by a nurse practitioner, not a physician. In support of its position that the claims examiner appropriately determined a change is in Ms. Beynum's best interests, the majority references 7 DCMR 212.12 which states in pertinent part

> Once a medical care provider is selected to provide treatment under the Act, an injured employee shall not change to another medical care provider or hospital without authorization of the insurer or the Office, except in an emergency. (Emphasis added.)

Contrary to the majority's interpretation, this regulation does not state "once an injured employee has selected a physician to provide treatment, in order to change that physician, a request must be made to [the Office of Workers' Compensation.]" The regulation is not that narrow.

Nonetheless, on November 11, 2009, Ms. Beynum signed a Workers' Compensation Rights and Responsibility Form. By doing so, Ms Beynum agreed "to be treated by Washington Hospital Center Occupational Health providers," and she was. One would be hard pressed to understand why a nurse practitioner's opinion that Ms. Beynum was unable to return to work is sufficient to substantiate that Ms. Beynum was disabled (and thereby was entitled to wage loss benefits) and that Ms. Beynum needed additional medical care including diagnostic testing which she received (and

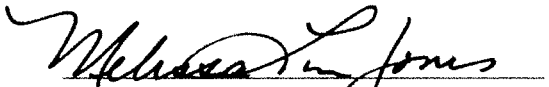
thereby was entitled to medical benefits) while dismissing that same nurse practitioner as insufficient to require the proper procedure be followed to effectuate a change of physician prior to that change.

Furthermore, a careful review of the record reveals Ms. Beynum was not seen by a physician at Occupational Health because of her own derelictions. On December 1, 2009, Ms. Beynum arrived to her appointment late enough that Dr. Ross S. Meyerson had left without seeing her; on more than five other occasions, Ms. Beynum failed to appear for her appointments.[5] Failure to attend medical appointments scheduled with a doctor cannot serve to justify a claimant's change of physicians on the grounds that the claimant was not seen by a doctor; failure to attend medical appointments cannot serve to justify a claimant's change of physicians on the grounds that the claimant's condition was not improving.

If Ms. Beynum was dissatisfied with her progress at Occupational Health despite attending appointments and complying with reasonable treatment, she legitimately could have requested a change of physicians in advance of seeing another doctor. Instead, Ms. Beynum created a situation at Occupational Health that prevented her from seeing a physician and prevented her from improving. She then used that situation to justify a change in physician she already had made.

Finally, in the concurring opinion, one judge justifies this change of physicians as in Ms. Beynum's best interest "because her ability to work improved under Dr. Phillip's care." This approach looks not to the treatment provided by the authorized provider (which in-and-of itself should or should not justify a change) but looks to justify the unauthorized change because of a good outcome with the new provider; this approach only serves to validate an incalcitrant claimant's failure to comply with a provider's treatment plan by accepting progress under the care of an unauthorized physician as sufficient grounds to justify the unauthorized change retroactively.

There is no justification for affirming the April 22, 2010 Order.



MELISSA LIN JONES
Administrative Appeals Judge

[5] On December 3, 2009, December 10, 2009, December 15, 2009, December 17, 2009, and December 24, 2009, Ms. Beynum failed to attend appointments with Dr. Meyerson. Ms. Beynum also failed to attend several physical therapy appointments until she was discharged for noncompliance.

APPEAL RIGHTS

Any party aggrieved by this Decision and Order may petition the District of Columbia Court of Appeals for its review. D.C. Court of Appeals Rule 15 (a) requires that the Petition for Review be filed within thirty (30) calendar days of the mailing date shown on the Certificate of Service.

The Court of Appeals is located at 430 E Street, N.W. Washington, D.C. 20001. The Court is open from 8:30 a.m. to 5:00 p.m., Monday through Friday, except legal holidays.

In addition to filing a Petition for Review with the Court of Appeals, you must send a copy of the Petition and any motions, briefs, or other documents that you submit to the court, to the opposing party in this case, and also to:

Todd S. Kim, Solicitor General
Office of the Attorney General
441 4th Street, NW, Suite 4005
Washington, DC 20001

and

Compensation Review Board
Labor Standards Bureau
Department of Employment Services
4058 Minnesota Avenue, NE, Suite 4005
Washington, DC 20019

CERTIFICATE OF SERVICE

I certify that on April 4, 2012 the attached Decision and Remand Order was deposited in the U.S. mail, postage pre-paid addressed as indicated below, or hand delivered, as noted:

Eric M May Esq 1201 15th St NW Suite 320 Washington DC 20005	Certified Mail; Return Receipt Requested No. 7005 3110 0000 9465 6726
John C Duncan Esq Duncan & Hopkins 11130 Main St, Suite 310 Fairfax VA 22030	Certified Mail; Return Receipt Requested No. 7005 3110 0000 9465 6719
Gloria Beynum 3221 Ely Place SE, Apt. #2 Washington DC 20019	First Class Mail
Office of Hearings & Adjudication D.C Department of Employment Services Washington DC 20002	Hand Delivery
Office of Workers' Compensation D.C. Department of Employment Services Washington, DC 20002	Hand Delivery

Clerk, Compensation Review Board