

**United States Department of Labor
Employees' Compensation Appeals Board**

R.G., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Tampa, FL, Employer**

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**Docket No. 12-881
Issued: June 15, 2012**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On March 31, 2012 appellant filed a timely appeal from a January 3, 2012 merit decision of an Office of Workers' Compensation Programs' (OWCP) hearing representative who denied authorization of a change of physician. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether OWCP abused its discretion in denying appellant's request to change physicians for purposes of surgery.

FACTUAL HISTORY

OWCP accepted that on June 7, 2008 appellant, then a 50-year-old city letter carrier, sustained a left shoulder injury in the performance of duty retrieving a parcel from the back of

¹ 5 U.S.C. § 8101 *et seq.*

his truck. He did not stop work. OWCP accepted appellant's claim for disorder of the bursae tendons and articular cartilage disorder of the left shoulder. On August 12, 2008 appellant underwent left shoulder arthroscopy. On June 9, 2009 he requested his claim be accepted for a right shoulder injury alleging that he injured his right shoulder rotator cuff during the rehabilitation of his left shoulder. Appellant stopped work on March 13, 2009 and requested disability compensation. On June 22, 2010 OWCP accepted the claim to include right rotator cuff tear.

In a June 30, 2010 report, Dr. Brian C. Oliver, a Board-certified orthopedic surgeon, stated that appellant suffered from bilateral recurrent rotator cuff tears in both shoulders and a full thickness articular cartilage loss involving the glenoid of the left shoulder. He explained that appellant continued to have aggravation of both shoulders and was unable to work as a letter carrier. Dr. Oliver related that he discussed an attempt at complex reconstructive surgery involving appellant's right shoulder rotator cuff and shoulder arthroplasty.

In an October 6, 2010 report, Dr. Mark Frankle, a Board-certified orthopedic surgeon, examined appellant for complaints for bilateral shoulder pain with the right worse than the left. He reviewed appellant's medical history and noted that a 2008 magnetic resonance imaging (MRI) scan demonstrated a right rotator cuff tear. Examination of the right shoulder revealed forward flexion motion to 150 degrees with maximum abduction to 150 degrees. Neer's sign, Hawkin's sign, O'Brien's, Speed's and Yergason's tests were negative. No atrophy or mild subacromial crepitation was noted. Dr. Frankle also spoke with appellant about arthroscopic repair of his rotator cuff and augmentation with graft jacket.

In a July 12, 2010 report, Dr. Frankle noted that the most recent MRI scan revealed a large full thickness tear of the supraspinatus extending into the infraspinatus with significant retraction near the level of the glenoid. He discussed the surgical treatment options with appellant and recommended an arthroscopic attempt at partial repair with augmentation with graft jacket.

In a November 4, 2010 statement, appellant related that Dr. Oliver felt that he could no longer assist him and recommended that he see Dr. Frankle regarding a total reverse shoulder operation. Because Dr. Frankle did not accept federal workers' compensation cases, appellant sought treatment under his own insurance. Dr. Frankle recommended an allograft patch augmentation on appellant's right shoulder. He explained that he had not yet performed one of these operations, but had studied them recently and felt confident that he could perform the procedure. Appellant explained that he did some research to find a physician who was more familiar with the procedure and identified Dr. Taylor Brown, a Board-certified orthopedic surgeon with a sports medicine subspecialty, at the Houston Bone and Joint Center who had performed approximately 50 such operations.

On February 13, 2011 appellant stated his preference to have Dr. Stephen Snyder, a Board-certified orthopedic surgeon, in California perform the surgery as the physician was considered the "grandfather" of this specific procedure; but Dr. Snyder did not take federal workers' compensation cases. He related his attempts to contact several other physicians in Florida that Dr. Snyder recommended but learned that they had never performed the surgery he required. Although Dr. Frankle had taken a five-hour course with Dr. Snyder and felt confident

that he could perform the arthroscopic tendon allograft augmentation procedure, appellant did not want to be his first surgical attempt.

On February 25, 2011 appellant requested authorization to be treated by Dr. Taylor Brown, a Board-certified orthopedic surgeon, in Texas. OWCP advised him that it could not authorize a procedure that would be performed by a surgeon in Texas and requested that he submit medical evidence to establish that the medical procedure was necessary.

In a March 1, 2011 narrative statement, appellant explained that Dr. Brown was very familiar with the procedure and recommended surgery after reviewing appellant's most recent MRI scans and x-rays. He noted that Dr. Brown had performed more than 50 procedures as of October 2010 and had a 75 percent success rate. Appellant submitted medical reports by Dr. Frankle regarding his medical treatment.

In a letter dated April 6, 2011, OWCP denied authorization for a change of physician. It explained that it was not the policy of OWCP to transfer medical supervision to a different state unless there was compelling reason to do so and noted that the evidence failed to establish that a specialist in his local area was unable to perform the desired medical procedure. OWCP stated that appellant's treating physician was authorized to refer him to another appropriate specialist in his local area for evaluation.

On April 25, 2011 OWCP received an undated statement. Appellant reiterated his preference that a surgeon with more experience in the procedure perform the arthroscopic tendon allograft augmentation procedure. He explained that Dr. Brown had performed over 50 of these procedures with 75 percent success and that he had not found a specialist in Florida with sufficient experience in performing this procedure.

In an April 27, 2011 report, Dr. Brown stated that he was a Board-certified orthopedic surgeon who practiced in Texas and specialized in sports medicine and arthroscopy of the knee, shoulder and elbow. He reviewed appellant's medical records and noted a rotator cuff tear involving the supraspinatus and infraspinatus tendons after a previous rotator cuff repair. Dr. Brown opined that appellant would benefit from an arthroscopic revision rotator cuff repair with allograft patch augmentation, capsular release with lysis of adhesions and biceps tenodesis.

On June 1, 2011 OWCP referred appellant's record to Dr. James Dyer, a district medical adviser, regarding whether the proposed right shoulder surgery was warranted and whether the surgery should be performed in Texas due to unavailability in Florida. Dr. Dyer concluded that the proposed arthroscopic revision rotator cuff with allograft augmentation procedure was medically warranted, but stated that the surgery did not need to be performed in Texas. He explained that there were several orthopedic shoulder surgeons in Florida, particularly in Tampa or Jacksonville, Florida who could perform the procedure with allograft augmentation. Dr. Dyer opined that appellant should proceed with Dr. Frankle.

By decision dated June 8, 2011, OWCP authorized the right shoulder procedure, but denied appellant's request to have the surgery performed by Dr. Brown in Texas. It noted that Dr. Dyer concluded that Dr. Frankle in Tampa, Florida was qualified to perform the required surgery. OWCP further noted that it was not policy to transfer medical supervision unless there

was a compelling reason to do so and pointed out that there was no evidence to demonstrate that his current medical treatment was anything other than proper and adequate.

In a June 21, 2011 narrative statement, appellant disagreed with Dr. Dyer's recommendation that Dr. Frankle perform the surgery. He explained that Dr. Frankle was inexperienced with the surgical procedure and did not accept federal workers' compensation claimants; therefore, he had to pay for Dr. Frankle's services through his private insurance. Appellant also resubmitted Dr. Brown's April 27, 2011 letter.

On June 22, 2011 appellant requested an oral hearing which was held on October 13, 2011. He stated that he had worked for the employing establishment as a city letter carrier for 27½ years. Appellant described his employment duties and the June 7, 2008 injury. He was initially treated by Dr. Oliver and referred to Dr. Frankle, who recommended the specific right shoulder procedure. Dr. Frankle advised appellant that although he had never performed this surgery, he had a five-hour course with Dr. Snyder, a pioneer of this surgery. He attempted the procedure during that time but could not complete it. Appellant stated that he wanted a surgeon with more experience, but he could not find a surgeon in Florida with experience in performing this particular procedure. He explained that he found Dr. Brown in Texas through Dr. Snyder's office and noted that Dr. Brown had completed over 50 surgeries with a 75 percent success rate.

In an October 25, 2011 narrative statement, appellant explained that he was not comfortable having Dr. Frankle perform the right shoulder surgery because he did not have enough experience. He reiterated that there were no surgeons with extensive experience in performing this procedure in his local area and that Dr. Brown was the closest physician with the best credentials regarding the procedure who also accepted federal workers' compensation. Appellant resubmitted various medical reports and treatment notes dated from October 6, 2010 to April 27, 2011.

By decision dated January 3, 2012, an OWCP hearing representative denied appellant's request to have the authorized right shoulder surgery performed by Dr. Brown in Texas. She found that the evidence failed to demonstrate that the treatment he currently received was other than proper and adequate or that the authorized surgery could not be performed in his local area.

LEGAL PRECEDENT

The payment of medical expenses incident to securing medical care is provided for under section 8103 of FECA. The pertinent part provides that an employee may initially select a physician to provide medical services, appliances and supplies, in accordance with such regulations and instruction as the Secretary considers necessary.²

When the physician originally selected to provide treatment for a work-related injury refers the employee to a specialist for further medical care, the employee need not consult OWCP for approval. In all other instances, however, the employee must submit a written request to OWCP with his reasons for desiring a change of physician. OWCP will approve the request if

² *Id.* at § 8103(a).

it determines that the reasons submitted are sufficient. Requests that are often approved include those for transfer of care from a general practitioner to a physician, who specializes in treating conditions like the work related one or the need for a new physician when an employee has moved.³

Any transfer of medical care should be accomplished with due regard for professional ethics and courtesy. No transfer or termination of treatment should be made unless it is in the best interest of the claimant and the government. Employees who want to change attending physicians must explain their reasons in writing and OWCP must review all such requests. OWCP may approve a change when: the original treating physician refers the claimant to another physician for further treatment; the claimant wants to change from the care of a general practitioner to that of a specialist in the appropriate field or from the care of one specialist to another in the appropriate field; or the claimant moves more than 50 miles from the original physician (since OWCP has determined that a reasonable distance of travel is up to a roundtrip distance of 100 miles). It must use discretion in cases where other reasons are presented.⁴

The Board has recognized that OWCP, acting as the delegated representative of the Secretary of Labor, has broad discretion in approving services provided under FECA. OWCP has the general objective of ensuring that an employee recovers from her injury to the fullest extent possible in the shortest amount of time. It, therefore, has broad administrative discretion in choosing means to achieve this goal. The only limitation on OWCP's authority is that of reasonableness. Abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deductions from established facts. It is not enough to show merely that the evidence could be construed to produce a contrary conclusion.⁵

ANALYSIS

On March 1, 2011 appellant submitted a written request to change physician for his authorized right shoulder surgery. He explained that his treating physician, Dr. Oliver, declined to perform the procedure and that he had selected Dr. Brown to perform the procedure based upon his experience and expertise. OWCP denied his request. The Board finds that OWCP did not abuse its discretion in denying that request.

Appellant's treating physician referred appellant to Dr. Frankle, who recommended that appellant undergo an arthroscopic attempt at partial repair with augmentation with graft jacket. Appellant explained that he was uncomfortable with Dr. Frankle performing the surgery because he had not previously performed the procedure and appellant did not want to be his first attempt at the procedure. He also noted that Dr. Frankle did not accept OWCP cases and, therefore, he had to pay Dr. Frankle with his private insurance. Appellant related that the closest physician he

³ 20 C.F.R. § 10.316.

⁴ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Authorizing Examination and Treatment*, Chapter 3.300.5.c (February 2012).

⁵ *Daniel J. Perea*, 42 ECAB 221 (1990).

found with experience performing an arthroscopic revision rotator cuff with allograft augmentation procedure was Dr. Brown in Texas. Although OWCP authorized the right shoulder surgery, it denied appellant's request to have the surgery performed by Dr. Brown in Texas. While appellant's concern about Dr. Frankle's inexperience with this particular procedure has some merit, as does his concern that Dr. Frankle did not accept OWCP claimants, Dr. Dyer concluded that there were several orthopedic surgeons in Florida, particularly in Tampa or Jacksonville, who could perform the procedure. The Board finds that the January 4, 2012 decision of the hearing representative did not preclude appellant from selecting another physician in Florida to perform the authorized procedure.

The Board finds that OWCP did not abuse its discretion by denying appellant's request that Dr. Brown be authorized to perform his surgery. Dr. Brown's practice is located in Houston, Texas, which is some 980 miles away from Tampa, Florida. Therefore, a roundtrip for surgery would be 1,960 miles, which far exceeds the 100 mile roundtrip radius that OWCP has found to be reasonable.⁶ The Board finds that this is an unnecessary distance to travel, especially since Dr. Dyer found that several orthopedic surgeons in the Tampa and Jacksonville, Florida area who were capable of performing this particular surgery.⁷ In a similar case,⁸ appellant requested authorization for medical treatment in New York, even though he lived in Florida. The Board found that the fact that some physicians would not accept workers' compensation cases or the fact that he did not feel comfortable with other physicians, were not sufficient reasons to establish that returning to New York for medical treatment was reasonable and necessary.

The Board finds that OWCP properly exercised its discretion in denying authorization for a change of physician to perform appellant's right shoulder surgery. There is no proof of manifest error, clearly unreasonable judgment or illogical action. Appellant failed to submit any evidence or explanation to demonstrate that OWCP's decision to deny the change in physicians was unreasonable. The Board finds that OWCP did not abuse its discretion by refusing to authorize Dr. Brown to perform appellant's right shoulder surgery.

CONCLUSION

The Board finds that OWCP properly exercised its discretion in denying authorization for a change of physician to perform appellant's right shoulder surgery.

⁶ *Supra* note 4.

⁷ *See D.L.*, Docket No. 10-318 (issued September 8, 2010).

⁸ *A.O.*, Docket No. 08-850 (issued January 28, 2009).

ORDER

IT IS HEREBY ORDERED THAT the January 3, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 15, 2012
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board