

FACTUAL HISTORY

On March 6, 2007 appellant, then a 62-year-old technician, filed a traumatic injury claim alleging injury to his lower back on that date while adjusting his driver's seat in the performance of duty. OWCP accepted his claim for a lumbar sprain and permanent aggravation of a herniated disc. Appellant returned to work as an office assistant on June 13, 2011. By decision dated August 23, 2011, OWCP reduced his compensation based on his actual earning in that position.

OWCP initially authorized Dr. Andre Coates, a Board-certified internist, to serve as appellant's treating physician. On September 18, 2007 it approved appellant's request to change his treating physician to Dr. John Coats, Board-certified in family medicine. On March 2, 2009 OWCP again approved his request to change physicians and authorized Dr. Babak Sheikh, a Board-certified orthopedic surgeon, to serve as the treating physician.³

On June 4, 2009 OWCP determined that a conflict in medical opinion arose between Dr. Coats, appellant's treating physician and Dr. David B. Lotman, a Board-certified orthopedic surgeon referral physician. Appellant was referred to Dr. Philip Averbuch, a Board-certified orthopedic surgeon, for an impartial medical examination and an opinion regarding his work capacity and the necessity for disc surgery at L4-5. Dr. Averbuch performed an examination and submitted a referee report dated June 25, 2009. He opined that the disc surgery was necessary and related to the work injury. Dr. Averbuch further opined that appellant was not capable of working in his date-of-injury job but, if he underwent the suggested surgery, he would be able to return to work in some limited capacity within six months.

In an April 29, 2011 report, Dr. Sheikh stated that appellant had not shown up for his scheduled February and March 2011 appointments and became argumentative when questioned about his failure to appear. He provided examination findings and advised that the amount of pain appellant described was significantly more than the objective findings. Dr. Sheikh diagnosed chronic spinal stenosis. He stated that appellant had been offered a job that he did not want to accept. The modified position provided that appellant could sit, walk or stand for three hours, reach above the shoulder for three hours, twist for about an hour, operate a vehicle at work for two hours, operate a vehicle to and from work for one hour, push and pull a maximum of 15 pounds, lift a maximum of 5 pounds, squat, kneel or climbing with 3 pounds. Dr. Sheikh opined that the proposed work limitations were medically suitable.

Appellant returned to modified duty, four hours a day, on June 13, 2011. By decision dated August 23, 2011, OWCP reduced his wage-loss benefits based on his actual earnings as a modified office assistant, which it found fairly and reasonably represented his wage-earning capacity.

On July 1, 2011 appellant requested authorization for treatment by Dr. Averbuch, the physician who served as a referee previously in his case. He noted the proximity of Dr. Averbuch's office to his home and wife's law office as the primary reason for the request to change physicians. In a letter dated July 27, 2011, OWCP informed appellant that it could not

³ Appellant was also treated simultaneously by Dr. Seth Wachsmann, a Board-certified anesthesiologist, for pain management.

authorize a change in physicians because his care and treatment by Dr. Sheikh and Dr. Wachsman appeared appropriate. Appellant was told that he could make an appointment at his cost with a specialist and submit a report, which would then be considered in relation to his request to change physicians.

On August 25, 2011 appellant again requested authorization to change his treating physician from Dr. Sheikh to Dr. Averbuch, stating that he had been advised that he had a one-time right to request such a transfer. On August 30, 2011 OWCP again informed him that it could not authorize a transfer and reminded him that it had already authorized a change of physicians.

In a letter dated September 15, 2011, appellant contended that OWCP had distorted the facts to support its denial of his request to change physicians. He stated that Dr. Coates stopped taking Federal Workers' Compensation cases in 2007 because OWCP (Mr. Halbur) was rude and unprofessional. Therefore, appellant was forced to find another doctor. He reiterated his request to obtain treatment from Dr. Averbuch because his office was close to his wife's law office and only a mile from his home.

By decision dated October 3, 2011, OWCP denied appellant's request to change physicians, finding that there was no evidence to indicate that the treatment he was receiving was other than proper and adequate. Noting that the distance from appellant's home to Dr. Sheikh's office was seven miles and that both of his treating physicians were located between his home and work, the claims examiner discounted appellant's argument regarding the proximity of Dr. Averbuch's office. The claims examiner informed appellant that his attending physician was authorized to refer him to another appropriate specialist for an evaluation.

On November 8, 2011 appellant requested reconsideration, reiterating his reasons for requesting a transfer of care from Dr. Sheikh to Dr. Averbuch. He stated:

"Dr. Averbuch's office is right next door to University Hospital, where he can treat patients. Should I ever need emergency help, his office is only about I mile from my home.

"My wife's Law Office is only minutes from our home and Dr. Averbuch's office and the hospital, should she need to take me for any emergency. With south Florida traffic, and my medical condition, seeing Dr. Averbuch in Tamarac where we live is many miles less to drive, and would be much less of an inconvenience for my wife and her clients should she need to transport me and interrupt her schedule and appointments.

"Dr. Philip Averbuch has been approved by OWCP to treat me in the past."

By decision dated December 15, 2011, OWCP denied modification of its October 3, 2011 decision, finding that the evidence did not reflect that appellant was receiving inadequate treatment.

In a letter dated December 21, 2011, appellant stated that his last appointment with Dr. Sheikh was unpleasant and that he was unprofessional and discourteous. Dr. Sheikh

reportedly never “laid a hand” on appellant in an effort to examine him, but merely told him he had arthritis; treated him like a number that he had to get rid of; and ignored the fact that he was laying on a table with severe sciatic pain. Appellant also contended that, due to traffic and construction, commuting time to Dr. Sheikh’s office from his home was at least 45 minutes.

On February 16, 2012 appellant again requested reconsideration. He stated that he never wanted to see Dr. Sheikh again, reiterating that he was unpleasant, failed to ask how he was doing; turned his back on him; rudely asked why he missed his last appointment and did not examine him.

OWCP routed the case to a medical adviser for review and an opinion as to whether the care and treatment provided by Dr. Sheikh was reasonable and adequate. In a March 29, 2012 report, Dr. James W. Dyer, a Board-certified orthopedic surgeon and OWCP medical adviser, reviewed a history of injury and treatment, recounting appellant’s prior surgery, physical therapy treatment and epidural injections. He reviewed the medical record, including recent magnetic resonance imaging (MRI) scans which confirmed L4-5 degenerative disc disease, disc protrusion and stenosis. Dr. Dyer opined that the care and treatment of appellant had been reasonable and adequate.

By decision dated April 5, 2012, OWCP denied modification of its December 15, 2011 decision. The claims examiner found that appellant had not submitted sufficient evidence to support authorization of a change of physicians.

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.⁴

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 or her reasons for desiring a change of physician. OWCP will approve the request if 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.⁵

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.

⁴ 5 U.S.C. § 8103(a).

⁵ 20 C.F.R. § 10.316.

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.⁶

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 his or 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.⁷

ANALYSIS

Appellant sought authorization to change physicians from Dr. Sheikh to Dr. Averbuch, primarily because Dr. Averbuch's office was in a more convenient location. Additionally, he alleged that Dr. Sheikh was rude, unprofessional and inattentive. The Board finds that OWCP did not abuse its discretion in denying appellant's request to change physicians.

The evidence does not establish, as appellant claims, that the commuting time between appellant's home and Dr. Sheikh's office was overburdensome or unreasonable. On the contrary, the record suggests that the distance from appellant's home to Dr. Sheikh's office was seven miles, which the Board has determined to be reasonable. Appellant's contention that it would be more convenient for him and his wife if he were being treated by Dr. Averbuch does not establish abuse of discretion on the part of OWCP.

Appellant contends that his request should be granted because Dr. Sheikh did not pay proper attention to his care and behaved in a rude and unprofessional manner. He stated that his dislike of Dr. Sheikh is not a sufficient reason for OWCP to determine that a change of physician is warranted. Appellant failed to submit any evidence that Dr. Sheikh was unprofessional or provided inadequate treatment. Dr. Dyer, an OWCP medical adviser, reviewed the record and opined that Dr. Sheikh's treatment was reasonable and adequate.

⁶ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Authorizing Examination and Treatment*, Chapter 3.300.5.c (February 2012).

⁷ *R.G.*, Docket No. 12-881 (issued June 15, 2012); *Daniel J. Perea*, 42 ECAB 221 (1990).

On appeal, appellant reiterated arguments made previously, including that Dr. Sheikh was unprofessional, rude and inattentive to his care. For reasons stated, the Board finds that OWCP did not abuse its discretion in denying appellant's request to change physicians.⁸

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that OWCP properly exercised its discretion in denying authorization for a change of physician.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 5, 2012 is affirmed.

Issued: January 24, 2013
Washington, DC

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

⁸ As noted by the claims examiner in his October 3, 2011 decision, appellant's attending physician is authorized to refer him to another appropriate specialist for an evaluation.