

ISSUE

The issue is whether OWCP properly exercised its discretion in denying appellant's request to change her treating physician.

FACTUAL HISTORY

This case has previously been before Board.⁴ The facts and circumstances as set forth in the Board's prior decision are set forth herein by reference. The relevant facts are set forth below.

On December 31, 2010 appellant, then a 44-year-old city carrier, injured her left lower extremity in a work-related fall.⁵ OWCP initially accepted her traumatic injury claim (Form CA-1) for unspecified sprain of the left knee/leg. It later expanded the acceptance of the claim to include left knee derangement of meniscus. Between March 2011 and December 2014, appellant underwent four OWCP-approved left knee surgical procedures. The latest procedure, a December 2, 2014 arthroscopic debridement of left medial meniscal tear, was performed by Dr. Eric E. Sides, a Board-certified orthopedic surgeon.⁶ OWCP paid wage-loss compensation for temporary total disability beginning March 26, 2011, and placed appellant on the periodic compensation rolls effective April 10, 2011.

In February and March 2015 appellant requested a change of treating physicians from Dr. Sides to Dr. Richard S. Westbrook, a Board-certified orthopedic surgeon. Dr. Westbrook initially examined appellant on February 17, 2015, and diagnosed left knee traumatic arthritis. He advised that she needed a left total knee arthroplasty (TKA) secondary to her 2010 employment-related post-traumatic arthritis.⁷

In investigative memorandums dated March 4 and 10, 2015, the employing establishment's Office of the Inspector General (OIG) advised that it had conducted an investigation on appellant from the latter part of 2012 through 2014, including video surveillance. The memorandums also summarized investigative interviews with appellant, Dr. Sides, and his office manager, T.S. Dr. Sides asserted during his interview that the rehabilitation and recuperative process following appellant's second surgery in December 2014 should be complete and that the procedure was a success. He noted, however, that she continued to complain of pain and weakness. The employing establishment noted that Dr. Sides expressed his frustration with appellant's recuperative process,

⁴ By decision dated July 28, 2015, OWCP terminated appellant's entitlement to wage-loss compensation effective July 29, 2015. In a January 10, 2017 decision, the Board affirmed OWCP's termination decision. Docket No. 16-1321 (issued January 10, 2017). Findings made in prior Board decisions are *res judicata* absent any further review by OWCP under section 8128 of FECA. See *K.W.*, Docket No. 17-1861 (issued March 28, 2018).

⁵ Appellant tripped over a lawn ornament while delivering mail.

⁶ By letter dated October 4, 2013, OWCP recognized/authorized Dr. Sides as appellant's treating physician. In addition to the December 2014 arthroscopy, Dr. Sides also performed a January 24, 2014 left knee partial medial meniscectomy.

⁷ In a March 31, 2015 follow-up report, Dr. Westbrook reiterated the need for knee replacement surgery.

and that he was surprised by her inability to improve her condition regardless of his prescribed treatment plans.

Dr. Sides advised that appellant's subjective complaints were inconsistent with her medical findings. He reported that he had tried to gradually return appellant to her previous job and had outlined medical limitations which afforded her the ability to perform a limited-duty job function with the employing establishment. Appellant, however, was reluctant to accept Dr. Sides' recommendations. He indicated that appellant's recovery should have progressed at a faster rate as a consequence of his two left knee surgeries. Dr. Sides was then advised that surveillance had been conducted on appellant and she had been observed performing many daily tasks, such as walking, driving, and shopping in a fully functional manner.⁸

After viewing the video surveillance footage, Dr. Sides concluded that the activity witnessed in the video was in complete contrast with appellant's subjective statements of her abilities and activity. He asserted that, based upon the subjective statements of appellant during their initial consultation, he believed her to have been severely limited in her physical capabilities and daily activities. Dr. Sides advised that he did not expect appellant to have been performing the activities that he witnessed on the video. He opined that appellant had not been honest regarding her progress and capabilities during their consultations and indicated that, in light of the evidence presented, he now believed appellant to be fully capable of performing her job function with no restrictions. Dr. Sides noted that he would discuss his opinions with appellant during her March 16, 2015 consultation and advise her that he intended to release her to full duty with no restrictions.

In the March 10, 2015 investigative interview of appellant, the employing establishment noted that she became evasive and changed the subject throughout her interview when asked to describe her physical capabilities and daily activities during her treatment by Dr. Sides. Appellant also complained about her past medical treatment and declared that she was never going to return to work. She stated that, due to her dissatisfaction with her medical treatment, she had sought out a new doctor who was willing to perform surgery on her knee.

Effective June 4, 2015, appellant retired from the employing establishment. The Office of Personnel Management approved her disability retirement.

⁸ In a March 2015 summary of the investigative video, the employing establishment's OIG advised that, on November 13, 2012, appellant was seen walking around her residence and shopping at a department store, and then stopping at a local eatery. The memorandum indicated that appellant was seen walking in a normal fashion without any noticeable limp or hindrance. In addition, subsequent surveillance was conducted on appellant on several occasions from November 2012 through October 2013. On these occasions appellant was observed driving to and from local restaurants, stores, office buildings, and other businesses. The memorandum indicated that appellant was observed walking to and from her residence and car, walking across parking lots, stepping up onto and down off of curbs, and carrying groceries and various bags of pet food items without the use of a shopping cart. She did not appear to be utilizing the assistance of braces or other assistive devices to aid in her ability to walk. The memorandum noted that, upon her arrival to a physician's appointment, appellant continued to walk with said pronounced limp, but during surveillance activities conducted later that same afternoon, her limp was no longer noticeable and she appeared to walk with very little difficulty.

A June 8, 2015 handwritten note without letterhead, allegedly written by Dr. Sides, but containing an illegible signature, indicated that he was turning over the function of attending physician to Dr. Richard Westbrook, a Board-certified orthopedic surgeon.

In a June 9, 2015 report, Dr. Westbrook indicated that appellant presented with pain and swelling on the left side and stated that her symptoms had been chronic. He noted appellant's complaints that her symptoms were moderately severe and occurred continuously. Dr. Westbrook diagnosed pain in her lower leg, joint, traumatic arthritis of left knee, derangement of meniscus, and sprain and strain of unspecified site of knee and leg. He listed his impressions and noted that appellant continued to have significant left knee pain which had not been helped by injections, medication, physical therapy, or anti-inflammatory drugs. Dr. Westbrook noted that appellant was awaiting approval for a total knee replacement on the left side. In an accompanying duty status report (Form CA-17), he indicated that appellant was unable to perform any employment duties due to her left knee injury.

By letter dated June 17, 2015, OWCP informed appellant that it had received the June 8, 2015 note. It observed that the note was not on Dr. Sides' letterhead, it contained no explanation for discontinuing treatment, and that the signature was illegible. OWCP concluded that the note was written by appellant. It denied appellant's request to treat with Dr. Westbrook, and that she remained under the care of Dr. Sides.

In a June 17, 2015 report, Dr. Sides noted that appellant was post left knee arthroscopic medial meniscal debridement. He listed his impression as derangement of meniscus, not otherwise classified, osteoarthritis, unspecified lower leg, and tear medial meniscus of the knee. Dr. Sides opined that, after reviewing the surveillance video of appellant, it was clear that she was more than capable of completing the tasks required for her regular duty. Therefore, he released her to regular duty and indicated that she should be placed at maximum medical improvement.

By decision dated July 6, 2015, OWCP denied appellant's request to change treating physicians from Dr. Sides to Dr. Westbrook. It noted that Dr. Sides was a qualified, Board-certified orthopedic surgeon, who specialized in knee osteoarthritis, knee surgery, and knee replacement arthroplasty. OWCP found that the record supported that appellant received appropriate treatment from Dr. Sides. Accordingly, it concluded that the evidence of record demonstrated that she was under the care of a qualified specialist and her treatment had been appropriate.

Counsel timely requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

In a July 7, 2015 report, Dr. Westbrook diagnosed traumatic arthritis of left knee, derangement of meniscus, not otherwise classified, and sprain and strain of unspecified site of knee and leg. He noted that appellant continued to have increasing left knee pain and was waiting for approval to proceed with surgical intervention for knee replacement. Dr. Westbrook reiterated in a work capacity evaluation that she could not work.

In an August 18, 2015 report, Dr. Westbrook advised that appellant continued to have left knee pain stemming from the accepted work injury. He reported that her symptoms were constant

and moderate to severe and rated her pain as a 6 to 8 on a scale of 1 to 10. Dr. Westbrook advised that these symptoms were aggravated by ascending stairs, descending stairs, daily activities, and walking. He reiterated the previous diagnosis of traumatic left knee arthritis and prescribed a course of physical therapy. Dr. Westbrook noted that he was awaiting approval for appellant's proposed left knee replacement surgery.

During the hearing, which was held on February 29, 2016, appellant alleged that she wanted to show images of her December 2, 2014 left knee surgery to a therapist, but Dr. Sides had improperly shredded the images. Appellant stated that she was considering filing a negligence action against Dr. Sides. She further asserted that when she consulted Dr. Sides for treatment she was often seen by a physician assistant and not by the doctor personally.

By decision dated April 4, 2016, OWCP's hearing representative affirmed the July 6, 2015 decision, finding that OWCP did not abuse its discretion in denying appellant's request to change her treating physician. He found that the evidence of record did not support transfer of care to Dr. Westbrook, as the record did not establish that Dr. Sides did not provide sufficient care. The hearing representative noted that Dr. Sides was a qualified practitioner in an appropriate medical specialty and performed two authorized surgical procedures related to the accepted injury. He found that appellant's allegations regarding improper use of a physician assistant and erroneous destruction of medical records were unsubstantiated. The hearing representative further found that appellant's personal opinion as to Dr. Sides' office administration or methods had no probative value. He, therefore, concluded that the evidence of record did not support a transfer of care.

LEGAL PRECEDENT

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.⁹ 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.¹⁰ OWCP will approve the request if it determines that the reasons submitted are sufficient.¹¹ 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.¹²

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

⁹ 20 C.F.R. § 10.316(a).

¹⁰ *Id.*

¹¹ *Id.* at § 10.316(b).

¹² *Id.*; see also *P.M.*, Docket No. 12-1212 (issued January 24, 2013).

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.¹³

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.¹⁴

ANALYSIS

The Board finds that OWCP properly exercised its discretion in denying appellant's request to change her treating physician.

OWCP found that appellant's request was unwarranted as the record did not establish that Dr. Sides provided insufficient care. OWCP's hearing representative found that Dr. Sides is a qualified practitioner in an appropriate medical specialty and performed two authorized surgical procedures related to the accepted injury. He further found that appellant's allegations regarding improper use of a physician assistant and erroneous destruction of medical records were not supported. Additionally, the hearing representative found that appellant's personal opinion as to Dr. Sides' office administration or methods had no probative value.

As noted above, OWCP has broad discretion in choosing the means to achieve the goal of providing treatment to a claimant. The only limitation on its authority is that of reasonableness, and 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. The Board finds that, under these standards, OWCP has not abused its discretion in denying appellant's request to change her treating physician.

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.

¹³ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Authorizing Examination and Treatment*, Chapter 3.300.6c(1) (February 2012).

¹⁴ See *T.R.*, Docket No. 14-1514 (issued January 8, 2014); *R.G.*, Docket No. 12-811 (issued June 15, 2012); *Daniel J. Perea*, 42 ECAB 221 (1990).

CONCLUSION

The Board finds that OWCP properly exercised its discretion in denying appellant's request to change her treating physician.

ORDER

IT IS HEREBY ORDERED THAT the April 4, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 20, 2018
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board