

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

March 27, 2013
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

KAZEM NASSERI,
Claimant Below, Petitioner

vs.) **No. 11-0973** (BOR Appeal No. 2045223)
(Claim No. 2005022288)

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER**
Commissioner Below, Respondent

and

CCBCC OPERATIONS, LLC,
Employer Below, Respondent

MEMORANDUM DECISION

Petitioner Kazem Nasserri, by Robert Stultz, his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. The West Virginia Office of Insurance Commissioner, by Jon Snyder, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated May 24, 2011, in which the Board affirmed an October 26, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's March 23, 2010, decisions denying authorization for a left total knee replacement, and denying a request to reopen the claim for consideration of temporary total disability benefits. The Court has carefully reviewed the records, written arguments, and appendices contained in the briefs, and the case is mature for consideration.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Rules of Appellate Procedure.

Mr. Nasserri was working for CCBC Operations on November 24, 2004, when he injured his left knee. From the record, it appears Mr. Nasserri has suffered various knee injuries throughout his employment. On February 17, 2010, Dr. Zervos requested authorization for a left total knee replacement. Dr. Zervos also requested that the claim be reopened for consideration of temporary total disability benefits. On March 23, 2010, the claims administrator denied authorization for the left total knee replacement, and denied the request to reopen the claim for consideration of temporary total disability benefits.

The Office of Judges affirmed the claims administrator's Orders, and held that the surgical procedure and request to reopen were not related to the compensable injury in this claim. Mr. Nasserri disputes this finding and asserts that per the opinion of Dr. Zervos, he is entitled to the requested surgery, and temporary total disability benefits while he was off recovering from such surgery. The West Virginia Office of Insurance Commissioner maintains that the denial of the requests is supported by a preponderance of the evidence.

In affirming the claims administrator's Orders, the Office of Judges noted that Dr. Zervos consistently stated that Mr. Nasserri needed a total knee replacement, however, he failed to relate that need to his 2004 injury specifically rather than other long standing knee conditions and other injuries. The Office of Judges concluded that the evidence did not establish that the surgery was medically related to the compensable injury in this claim. The Office of Judges also noted that the evidence did not show an aggravation or progression of the compensable condition in this claim warranting a reopening of the claim for temporary total disability benefits. The Board of Review reached the same reasoned conclusions in its May 24, 2011, decision. We agree with the reasoning and conclusions of the Board of Review.

For the foregoing reasons, we find that the decision of the Board of Review is not in clear violation of any constitutional or statutory provision, nor is it clearly the result of erroneous conclusions of law, nor is it based upon a material misstatement or mischaracterization of the evidentiary record. Therefore, the decision of the Board of Review is affirmed.

Affirmed.

ISSUED: March 27, 2013

CONCURRED IN BY:

Justice Robin J. Davis
Justice Margaret L. Workman
Justice Allen H. Loughry II

DISSENTING:

Chief Justice Brent D. Benjamin
Justice Menis E. Ketchum