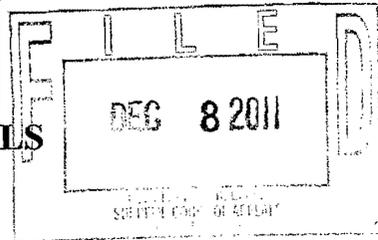


WEST VIRGINIA SUPREME COURT OF APPEALS



JOHN P. HALE, JR.,
Petitioner

vs.

SUPREME COURT NO. 101028
APPEAL NO. 2044114
JCN: 2004024859
CRN: 001054108RSD404312517Q
DATE OF INJURY: 11/22/03
OOJ CASE ID: OOJ-A308-002979

ROCKSPRING DEVELOPMENT, INC.,
Respondent

CLAIMANT/PETITIONER'S SUPPLEMENTAL BRIEF

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**SUPPLEMENTAL BRIEF ON BEHALF OF
CLAIMANT/PETITIONER JOHN PHILLIP HALE JR.**

NATURE OF THE PROCEEDINGS

This claim is before this Honorable Court pursuant to the Petition for Review filed by John Phillip Hale Jr. (hereinafter “claimant”), which Petition this Court has accepted. Claimant and Rockspring Development, Inc. (hereinafter “employer”) have filed their respective briefs, and this Court by Order dated November 9, 2011, requested oral argument and supplemental briefs responding to a specific issue. The claimant submits this supplemental brief in response to this Honorable Court’s request.

**1. WHETHER THE CLAIMS ADMINISTRATOR
ERRED IN DENYING THE CLAIMANT AN INITIAL
PSYCHIATRIC EVALUATION PURSUANT TO W. VA.
C.S.R. §§ 85-20-9.10(g) AND 12.4 (2005)?**

The Claims Administrator erred in denying the compensability of the claimant’s psychiatric problems, as the claimant’s treating physician, Dr. Bonifacio Aranas (hereinafter “Dr. Aranas”), followed the prescribed Sections 9.10 and 12.4 of W. Va. C.S.R. 85-20 (hereinafter “Rule 20”).

Rule 20-9.10(g) states, “The following services require prior review and authorization before services are rendered and reimbursement made:

g. Psychiatric treatment (does not include the initial psychiatric consultation)..."

The claimant/petitioner, John Phillip Hale, asserts an initial psychiatric consultation does not require prior authorization or review by the Claims Administrator. However, in the instant claim, the Claims Administrator not only denied such an initial psychiatric consultation, but also, it denied the addition of the claimant's psychiatric conditions to the claim on the basis that an initial psychiatric consultation must be authorized, which is in direct opposition to the aforementioned sections contained in Rule 20.

Nonetheless, section 9.10(g) is not to be read alone. Rather, it is to be considered in conjunction with the entirety of Section 85-20-9 for its full context, but more significantly here with W. Va. C.S.R. § 85-20-12.4, which states,

As a prerequisite of coverage, the treating physician of record must send the injured worker for a consultation with a psychiatrist who shall examine the injured worker to determine 1) if a psychiatric problem exists; 2) whether the problem is directly related to the compensable condition; and 3) if so, the specific facts, circumstances, and other authorities relied upon to determine the causal relation. (2005).

In the instant claim, the claimant, upon his mother's insistence, sought treatment for his psychological problems. As early as 2004, he began seeing William Downs, MSW, who noted the claimant had previously dealt with anxiety, but that the compensable injury in this claim "exacerbated" that psychiatric condition. The claimant thereafter saw Richard Gardner, PA-C, who diagnosed him with Major Depressive Disorder, Recurrent, Moderate and Panic Disorder without Agoraphobia. As a result of these findings, the claimant's psychiatric condition came to the attention of his treating physician in 2008.

Then, the claimant's treating physician, Dr. Aranas comported with these two aforementioned sections of Rule 20 together, and as a result, he completed a Diagnosis Update form, dated October 14, 2008. While it may appear that form would trigger an Order from the Claims Administrator to determine whether the claimant's depression should be held compensable, according to section 12.4, the applicable rule here, that was not prescribed. Rather, according to that section, the claimant is to be sent for a psychiatric consultation, i.e., the initial evaluation contemplated by section 9.10(g), and from that consultation, the evaluating psychiatrist must determine whether the claimant is suffering with depression, whether the depression was directly related to the compensable injury and provide the documentation that supports his or her determinations. In so doing, section 12.4 lends itself to the notion that a medical professional is to determine whether and to what extent the claimant suffers with a psychiatric condition, rather than allowing non-medical entities make that determination. It is noteworthy to add, additionally, neither section 9.10(g) nor 12.4 specifies a specific time frame within which a claimant's physician must request such a referral.

Here, the Claims Administrator made no such referral, failing to fulfill section 12.4 and failing to procure an initial consultation report addressing the requirements set forth in that section. The claimant would not deny that his physician could make such a referral, just as the Claims Administrator could. However, all parties could agree the Claims Administrator is in a better position to know the contents of Rule 20 and how the process moves along to determine if a claimant has a psychiatric condition and whether and to what extent it is compensable, especially considering this set of rules was put forth specifically for Claims Administrators, who manage the medical portion of claims. Furthermore, although the claimant's treating physician

did not act entirely correctly by completing a Diagnosis Update form, the elements, so to speak, were there for the Claims Administrator to refer the claimant for an initial psychiatric evaluation in accordance with Rule 20.

Nevertheless, the Claims Administrator, with knowledge from section 9.10(g), denied the claim, stating it never authorized such an initial evaluation. As previously mentioned, and in accordance with sections 9.10(g) and 12.4, the Claims Administrator essentially “put the cart before the horse.” Consistently with Rule 20, the Claims Administrator, rather, should have referred the claimant first for the initial evaluation, as it is permitted under the rule. The Claims Administrator should defer such a determination to a psychiatric professional, rather than make such a determination as non-psychiatric or medical professionals, and refer the claimant for the initial psychiatric evaluation, which would be performed by a psychiatrist of the Claims Administrator’s choosing. Then, based upon the determination of a psychiatric expert, the Claims Administrator is to put forth an order.

Instead, the claimant, on his own, sought treatment for his psychiatric problems, and he concedes he sought treatment for those problems before his compensable injury in this claim. As this Honorable Court held in Powell v. SWCC, a claimant need not prove his condition is compensable to the exclusion of all other possible causes. 273 S.E.2d 832 (1980). Also, as he sought his own treatment, it appears the Claims Administrator in its Order uses that act to penalize the claimant.

It is significant to note, however, Dr. Aranas treated the claimant pre- and post-injury, and in effect, Dr. Aranas was the claimant’s treating physician in the claim. After treating the claimant for some time for psychiatric issues, it became clear the claimant’s psychiatric problems

were distinctly different from his prior problems. Such facts are evidenced by the Claims Administrator's own Diagnosis Update form dated October 14, 2008, which was completed by Dr. Aranas. As such, the claimant's treating physician who previously treated him for psychiatric problems stated, in his medical opinion, the claimant's more recent psychiatric problems were, at least in some part, caused by his compensable injury in this claim.

Thus, these circumstances make clear, in accordance with sections 9.10 and 12.4 of Rule 20, Claims Administrators are to send the claimant for an initial psychiatric evaluation before ruling on the compensability of a psychiatric condition.

2. WHETHER THE CLAIMS ADMINISTRATOR ERRED IN ITS APPLICATION OF RULE 20 BY DENYING COMPENSABILITY ON THE BASIS THAT THE CLAIMANT'S PSYCHIATRIC SYMPTOMS AROSE BEYOND THE SIX-MONTH PERIOD CONTEMPLATED BY THE RULE?

The Claims Administrator erred in its application of Rule 20 by denying compensability on the basis that the claimant's psychiatric symptoms arose beyond the six-month period contemplated by the Rule.

By its order of November 4, 2008, the Claims Administrator denied the compensability of the psychiatric condition, and one of its primary bases was that the claimant's psychiatric symptoms did not manifest within six months of the compensable injury in this claim.

As is provided by W. Va. Code Section 23-4-16, a claimant may make adjustments in his claim. On that premise, the claimant, supported by his treating physician, sought to add his depressive disorder to the claim. The means Dr. Aranas used was his October 14, 2008, Diagnosis Update form. It is significant to note that one will not find any applicable statute or rule limiting the ability to make such an adjustment by a Diagnosis Update. Rather, pursuant to Rule 20-6.6 (2005), physicians are required to complete a diagnosis update, but the section imposes no time limitation within which a diagnosis must be made. Also, in Kincannon v. State Comp. Comm'r, this Honorable Court recognized that the full extent of a claimant's injury may not be immediately apparent. 107 W. Va. 533, 149 S.E. 665 (1929). Accordingly, whether the claimant seeks to add a component six days or six years after a compensable injury, he or she may do so.

However, this Honorable Court in Bowers v. WVOIC, determined that such a time limitation set forth by the Claims Administrator was arbitrary and capricious, as it differentiated between physical and psychiatric symptoms and conditions. 686 S.E.2d 49 (2009). The claimant would not necessarily expect the Claims Administrator in 2008 to make a determination in accord with this Honorable Court's 2009 Bowers Decision. However, it is noteworthy and disheartening that once the claimant protested the Claims Administrator's Order, the following adjudicatory and reviewing bodies failed to acknowledge and give effect to the Decision in Bowers.

Here, the Office of Judges appears to "gloss" over the effect of Bowers, never genuinely addressing the issue that the Claims Administrator did, in fact, use the six-month rule as a basis for denying the claim. Clearly, based on Bowers, the usage of the "six-month rule" was clearly

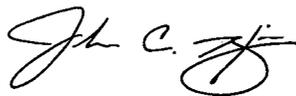
wrong, and the Office of Judges failed to properly demonstrate that in its Decision. Similarly, the Board of Review put forth no sort of meaningful reasoning and also did not address the six-month rule used as a basis for the Claims Administrator to deny the compensability of the claimant's psychiatric conditions.

As such, the claimant/petitioner appealed the claim, as it appears the lower adjudicating and reviewing bodies are not giving effect to this Honorable Court's Decision in Bowers. Moreover, it is significant to note that Rule 20 itself has not been rewritten to account for the Decision in Bowers. As such, the blame should not be placed with the claimant because the rule was never rewritten and put into effect by the applicable adjudicator and reviewing body.

WHEREFORE, the claimant prays this Honorable Court REMAND the claim to the Claims Administrator for an initial psychiatric evaluation, pursuant to the aforementioned sections of Rule 20.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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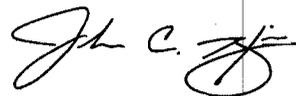
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Respondent

Title of Document: Supplemental Brief for Review on John P. Hale, Jr.

This is to certify that I mailed a copy of the foregoing document to the following parties by United States Mail, with sufficient postage attached thereto on the 7th day of December 2011.

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