

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 12-1127

JENNIFER MOORE,)	
)	
Petitioner,)	
)	
v.)	BOR NO.: 2046853
)	JCN: 2008046357
)	DOI: 04/17/2008
K-MART CORPORATION,)	OOJ CASE ID: OOJ-A308-001939
)	OOJ Order: 01/12/2012
Respondent.)	

**SUPPLEMENTAL BRIEF ON BEHALF OF RESPONDENT
K-MART CORPORATION**

STATEMENT OF THE CASE

Petitioner and claimant, Jennifer Moore, has sought review of the final order of the West Virginia Workers' Compensation Board of Review, dated August 29, 2012. That order reversed the Administrative Law Judge's decision of January 12, 2012, which reversed the Claims Administrator's order of July 15, 2010, denying payment of medical bills for IV chelation therapy from May 1, 2008 to October 15, 2010. Respondent is K-Mart Corporation.¹

¹ The employer named in this claim is K-Mart Corporation, which is a wholly owned subsidiary of Sears Holding Corporation.

On May 6, 2014, this Court ordered the parties to file supplemental briefs addressing whether the denial of reimbursement for the medical treatment at issue is arbitrary and capricious. The Court further opined that this claim should be scheduled for oral argument.

STATEMENT OF FACTS

The claimant worked for Sears for thirty-three years performing duties in a number of departments. July 14, 2009 Deposition of Claimant at 5. In March 2006, she began working as a performance maintenance technician, repairing and refurbishing merchandise so that it may be re-sold as such. *Id.* at 10. In April 2008, the claimant began to complain that she was exposed to heavy metal particles as a result of the repairing and refurbishing duties, such as sanding and grinding. *Id.* at 11. She filed this claim for the same, alleging that she felt burning and tingling in her feet. *Id.* at 23-24. By order of July 3, 2008, compensability was denied.

The claimant protested the denial of compensability. Her deposition was taken on July 14, 2009. *Id.* The claimant testified that she first saw her family doctor, Dr. Terry Cook in September 2006, and then a Dr. Downer in Marietta, Ohio, who believed the claimant's foot pain was related to orthopedic problems. *Id.* at 28. The claimant testified that she then saw something on television about burning and tingling sensations in feet, so she then went to see a chiropractor, Dr. Byron Folwell. *Id.* at 27. Dr. Folwell suggested she undergo chelation therapy. *Id.* at 28. She was referred to Dr. Jonathan Murphy to administer the chelation therapy. *Id.*

The claimant submitted records of Dr. Murphy. Dr. Murphy reviewed records that indicated pulmonary testing was negative. September 11, 2009 Deposition of Dr. Jonathan Murphy at 29. A review of Dr. Murphy's entire records indicate that the claimant suffered from a condition that could have been caused by any number of exposures or reasons. *Id., passim*. Dr. Murphy admitted as much during his deposition. *Id.* at 24-29. He acknowledged that the number of causations of peripheral neuropathy are many, although he did not explore most of them. *Id.* All of the claimant's chelation therapy was administered in Dr. Murphy's office. *Id.* at 33.

Dr. Folwell also testified by deposition on August 11, 2009. He confirmed that he had no clinical evidence of nerve damage in the claimant. August 11, 2009 Deposition of Dr. Byron Folwell at 44. At that point, Dr. Folwell had done nothing with the metals he collected that were allegedly in the room where the claimant worked. *Id.* at 44-46. Dr. Folwell acknowledged that this type of therapy (chelation) is mired in controversy in the medical community. *Id.* at 50-51.

By decision of April 29, 2010, the Administrative Law Judge reversed the order of July 3, 2008, thus holding this claim compensable. The Board of Review, by order of December 15, 2010, affirmed compensability.

By order of July 15, 2010, the claims administrator denied payment for bills submitted by Dr. Murphy from May 1, 2008, to October 15, 2010, on the grounds that pursuant to *W. Va. Code C.S.R. § 85-20-62.2*, reimbursement for IV chelation therapy may not be made if such procedure was done in office.

The claimant protested the order of July 15, 2010. In support of her protest, the claimant submitted a two-page report of Dr. Murphy, dated July 26, 2011. In that report,

Dr. Murphy outlined why he believes he is qualified to render toxicological opinions. In that report, he also complains that *W. Va. C.S.R. § 85-20-62.2* runs afoul of the freedom to practice medicine. The employer had no need to respond to such “evidence,” as it was nothing more than a political screed.

On January 12, 2012, the Administrative Law Judge reversed the order of July 15, 2010. The employer appealed the decision of the Administrative Law Judge, and the Board of Review, by final order dated August 29, 2012, reversed.

The claimant petitioned this Court, seeking review of the Board of Review’s final order. On May 6, 2014, this Court ordered the parties to file supplemental briefs addressing whether the denial of reimbursement for the medical treatment at issue is arbitrary and capricious. The Court further opined that this claim should be scheduled for oral argument.

IT IS NOT ARBITRARY AND CAPRICIOUS TO DENY REIMBURSEMENT FOR INTRAVENOUS CHELATION THERAPY UNDER W.VA. CODE OF STATE RULES §85-20-62.2, EVEN IF SUCH THERAPY IS DEEMED MEDICALLY NECESSARY.

THE BOARD OF REVIEW CORRECTLY REVERSED THE DECISION OF THE ADMINISTRATIVE LAW JUDGE BECAUSE THE ADMINISTRATIVE LAW JUDGE’S DECISION OF JANUARY 12, 2012, WAS IN VIOLATION OF STATUTORY PROVISIONS; IT WAS AFFECTED BY ERROR OF LAW; IT WAS CLEARLY WRONG IN VIEW OF THE RELIABLE, PROBATIVE AND SUBSTANTIAL EVIDENCE ON THE WHOLE RECORD; AND THE DECISION WAS ARBITRARY.

POINTS AND AUTHORITIES

1. A decision by an Administrative Law Judge should not be reversed on appeal unless the findings upon which that decision is based are in violation of statutory provisions; in excess of the statutory authority or jurisdiction of the administrative law judge; made upon unlawful procedures; affected by other error of law; clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. The Workers' Compensation Appeal Board is required to review rulings of the Office of Judges under this standard, and failure to do so constitutes reversible error.

W. Va. Code § 23-5-12;

Syl. pt. 6, *Conley v. Workers' Compensation Division*, 483 S.E.2d 542 (W.Va. 1997).

2. All chelation therapy (oral and IV) requires prior authorization and consultation with a Board Certified Medical Toxicologist, an occupational medicine specialist, or general internist familiar with principals of toxicology, prior to initiation of the therapy. In the rare incident, in which acute encephalopathy occurs as the result of heavy metal toxicity, a consultation with the Poison Control Center will serve as confirmation of the need for such chelation therapy. The Commission, Insurance Commissioner, private carrier or self-insured employer, whichever is applicable, will not reimburse for IV chelation therapy performed in office.

W.Va. C.S.R. § 85-20-62.2.

ARGUMENT

The West Virginia Legislature has established and this Court has affirmed a standard by which decisions of the Workers' Compensation Office of Judges are to be reviewed. A decision by an Administrative Law Judge should not be reversed on appeal unless the findings upon which that decision is based are in violation of statutory provisions; in excess of the statutory authority or jurisdiction of the administrative law judge; made upon unlawful procedures; affected by other error of law; clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. The Workers' Compensation Appeal Board is required to review rulings of the Office of Judges under this standard, and failure to do so constitutes reversible error. *W. Va. Code* § 23-5-12; syl. pt. 6, *Conley v. Workers' Compensation Division*, 483 S.E.2d 542 (W.Va. 1997).

In this claim, the Administrative Law Judge's decision violated no less than four of the factors set forth in this standard. Specifically, her decision violated statutory provisions; it was affected by error of law; it was clearly wrong in view of the reliable, probative, and substantial evidence on the whole record. It is also the employer's contention that the decision was arbitrary. Therefore the Workers' Compensation Board of Review was correct to reverse it.

The regulatory provision at issue is clear.

All chelation therapy (oral and IV) requires prior authorization and consultation with a Board Certified Medical Toxicologist, an occupational medicine specialist, or general internist familiar with principals of toxicology, prior to initiation of the therapy. In the rare incident, in which acute

encephalopathy occurs as the result of heavy metal toxicity, a consultation with the Poison Control Center will serve as confirmation of the need for such chelation therapy. The Commission, Insurance Commissioner, private carrier or self-insured employer, whichever is applicable, *will not reimburse for IV chelation therapy performed in office.*

W.Va. C.S.R. § 85-20-62.2 (emphasis supplied).

In her supplemental brief, the claimant points to the provisions of *W.Va. Code* §§ 23-4-7a and 23-5-13, specifically, those sections' admonitions that workers' compensation claims are to be decided as expeditiously as possible and that just claims should not be denied. It is doubtful that anyone would disagree with that contention. However, this claim *has been ruled compensable* and the claimant *has received* benefits to which she has been entitled as well as reasonable medical care. The issue in this case is not about expeditious decisions and just claims. Rather, it is about the legislature having concerns with particular treatment and requiring an employer to pay for the same.

The claimant correctly notes that a regulation must be promulgated to carry out the legislative intent of its governing statutes. *See Hale v. West Virginia Office of the Insurance Commissioner*, 228 W.Va. 781, 724 S.E. 2d 752 (2012). The claimant also points out that the provisions of Rule 20 "are not intended to strictly dictate results and it is recognized that there may be extraordinary cases that require treatments in addition to the treatments set forth in this Rule." *W.Va. C.S.R. § 85-20-4.1*. This argument misses the point of the regulatory provision at issue in this case. This case is *not* extraordinary, nor does it involve "additional" treatment not contemplated by the Rule. On the contrary, the treatment at issue is very much contemplated by the Rule—so much contemplated that it is specifically singled out as a treatment that is not authorized for reimbursement.

Lamentably, West Virginia has no legislative record upon which one may determine the legislative history of a particular statute or regulation. The regulation at issue in this case is no exception. However, some regulations are the result of a rationale that is self-evident. This regulation is based on common medical views toward chelation therapy as an accepted practice in treating various conditions, including heavy metal poisoning. *See, e.g.*, National Health Council Policy Statement on Health Fraud Policy Statement on Chelation Therapy, <http://www.ncahf.org/policy/chelation.html>.

The issue in this claim is the specific provision concerning *where* chelation therapy is performed. There is no question and no dispute that the claimant received this therapy in Dr. Murphy's office. The only evidence submitted by the claimant in support of her protest to the order of July 15, 2010, is Dr. Murphy's letter complaining about the pertinent regulatory provision, *W. Va. C.S.R. § 85-20-62.2*. In his letter, Dr. Murphy asks a series of rhetorical questions (which even he deems "rhetorical") concerning the propriety of this provision. Whether this provision is a good idea or not, is not an appropriate basis for reversing the Claims Administrator's order. The Claims Administrator, in its order of July 15, 2010, was following the law. *W. Va. C.S.R. § 85-20-62.2* could not be more clear that an employer will not reimburse for this type of chelation therapy where it is performed in the doctor's office. That Dr. Murphy does not agree with this provision is not reason to reverse the Claims Administrator's order.²

W. Va. C.S.R. § 85-20-62.2 is not arbitrary, but rather, the Administrative Law Judge's decision in this claim was arbitrary. While the Administrative Law Judge restated the employer's position that the Claims Administrator's order was based on chelation therapy being performed in Dr. Murphy's office, her holding in no way

² Dr. Murphy has as much access and opportunity to change the law as any citizen.

addressed those grounds. Rather, the Administrative Law Judge merely repeated Dr. Murphy's explanation that he offers chelation therapy services at a rate significantly less expensive than the market rate. Just as the claimant does in her original petition for appeal, the Administrative Law Judge devoted an inordinate amount of decision-space to reciting the claimant's need for chelation therapy and Dr. Murphy's qualifications to perform it. These are simply not issues in the claim. Following the Board of Review's decision of December 15, 2010, affirming compensability, the employer recognized its obligation to pay for reasonable medical services. However, such services must be within the regulatory bounds of the workers' compensation system.

In his letter of July 26, 2011, Dr. Murphy complains that patients in need of chelation therapy "are not welcome in hospitals[.]" Interestingly, *W. Va. C.S.R. § 85-20-62.2* does not require that such therapy take place *in a hospital*. Rather, it merely permits a claims administrator to deny reimbursement where such therapy is performed in the doctor's office. Clearly, this is a regulatory provision of *discouragement*. It is designed to prohibit precisely what Dr. Murphy has done, which is to perform the chelation therapy in his office. The provision does not offer a better suggestion for any particular medical reason as to where the chelation therapy must be performed. Rather, it is written to simply proscribe a doctor from performing it in his or her office. The controversial nature of the acceptance of chelation therapy is apparently what drove the regulation to be promulgated. Nevertheless, it is not for the claimant, the Administrative Law Judge, the Board of Review, Dr. Murphy, or even this Court to re-write the regulation to suit Dr. Murphy's desire to be reimbursed for practicing a therapy, apparently controversial

enough in the medical community, that the regulatory process, in its wisdom, saw fit to require some form of check-and-balance.

As noted in the employer's original response, the Administrative Law Judge's decision was also in violation of statutory provisions to the extent that this regulatory provision, part of "Rule 20," is authorized under *W. Va. Code* § 23-4-3b(b). This provision exists to aid *W. Va. Code* § 23-4-3, which authorizes reasonable medical treatment for claimant's who have suffered workers' compensation injuries.

The Administrative Law Judge's decision also was obviously affected by error of law as well. The provision itself makes no exceptions for *where* chelation therapy is to be performed. While the Administrative Law Judge addressed the employer's position in this regard, she did not explain why Dr. Murphy and the claimant are entitled to an exception under this provision.

Finally, the Administrative Law Judge's decision was clearly wrong in view of the reliable, probative and substantial evidence on the whole record. While much of the evidence submitted on this issue was evidence previously submitted on the issue of compensability, the only new evidence submitted to support a protest to the order of July 15, 2010, was the July 26, 2011 letter of Dr. Murphy. As stated *supra*, there is simply no exception to the requirement that chelation therapy, to be reimbursed, must be performed away from the doctor's office.

CONCLUSION

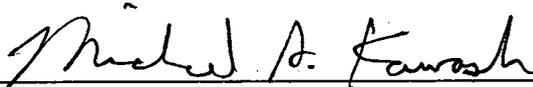
Based upon the foregoing, the Administrative Law Judge's decision was appropriately reversed by the Board of Review in its order of August 29, 2012. Consequently, the final order of the Board of Review, dated August 29, 2012, must be affirmed and the claimant's petition for appeal should be refused.

Respectfully submitted,

K-MART CORPORATION

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