

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

FILED
October 2, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

KARL BIERMANN, Petitioner

vs.) **No. 100918** (BOR Appeal No. 2044003)
(Claim No. 2006206316)

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
GREER INDUSTRIES, INC., Respondent**

MEMORANDUM DECISION

Petitioner, Karl Biermann, by M. Jane Glauser, his attorney, appeals the West Virginia Workers' Compensation Board of Review's Final Order dated June 28, 2010, in which the Board denied the addition of depression and anxiety as compensable components of the claim and denied authorization for the medications Asacol and Allegra. Greer Industries, Inc., by George E. Roeder, its attorney, filed a timely response.

The Board of Review's order affirmed a December 11, 2009, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's denial of authorization of depression and anxiety as compensable components of the claim and denial of the medications Asacol and Allegra. The Court has carefully reviewed the records, written arguments, and appendices contained in the petition, and the case is mature for consideration.

Pursuant to Rule 1(d) of the Revised Rules of Appellate Procedure, this Court is of the opinion that this matter is appropriate for consideration under the Revised Rules. Having considered the petition and the relevant decision of the lower tribunal, the Court is of the opinion that the decisional process would not be significantly aided by oral argument. This case does not present a new or significant question of law. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

The Board of Review held that the preponderance of the evidence does not support the adding of depression and anxiety as compensable components of the claim, nor does the record support authorization for the requested medications. Mr. Biermann asserts that the relevant medical records indicate a diagnosis of depression and anxiety is directly related to the compensable injury in this claim. Dr. Richard Vaglianti, Dr. Joseph Grady, and Dr. Lorn Wolfe all opined Mr. Biermann suffers from depression and anxiety due to his compensable injury. Mr.

Biermann also argues that the denials for the requested medications resulted in gaps in authorization for the medications. Further, Mr. Biermann asserts his compensable back injury aggravated his pre-existing ulcerative colitis and Asacol and Allegra should be authorized.

For the requested addition of depression and anxiety to Mr. Biermann's claim, the Office of Judges believed that the evidentiary record was murky. The Office of Judges further held there is no indication that West Virginia Code § 85-20-12.4 received substantial compliance such that the diagnoses of depression and anxiety can be added as compensable components of the claim. Indeed, the Office of Judges noted the only psychiatric evidence consisted of Dr. Berry's report where Mr. Biermann was evaluated for a spinal cord stimulator. In regards to Mr. Biermann's treating physician's request for a psychiatric evaluation, the Office of Judges found insufficient evidence to support depression and anxiety to be included as compensable components of this claim. The Board of Review reached the same conclusion in its Order of June 28, 2010.

The Office of Judges also considered Mr. Biermann's request for authorization of Asacol and Allegra. Dr. P. Van Swearingen's report on September 5, 2008, documenting Mr. Biermann has ulcerative colitis which flares on and off when Mr. Biermann changes his medications or when he is not taking his medications, is the only support for authorizing the Asacol. Mr. Biermann acknowledged the ulcerative colitis pre-existed his compensable injuries. The Office of Judges held there is no evidence of record suggesting Mr. Biermann's ulcerative colitis is aggravated by stress or by his pain medications. As a result, the Office of Judges held there is nothing in the record supporting authorization of Asacol. Further, the Office of Judges held the request for Allegra is not otherwise explained upon the record, either through evidentiary presentation or closing argument. Therefore, the Office of Judges affirmed the claims administrator's order denying authorization for the medications Asacol and Allegra. The Board of Review reached the same reasoned conclusion in its Order of June 28, 2010. We agree with the Board of Review's decision to deny authorization for both medications.

This Court recently held in *Hale v. West Virginia Office of Ins. Comm'r*, 228 W.Va. 781, 724 S.E.2d 752 (2012), that a three-step process must be undertaken when a claimant is seeking to add a psychiatric condition as a compensable injury to his/her claim. The claimant's treating physician refers the claimant to a psychiatrist for an initial consultation; following the initial consultation, the psychiatrist is to make a detailed report consistent with the procedure described in West Virginia Code of State Rules § 85-20-12.4; and the claims administrator, aided by the psychiatrist report, is to determine whether the psychiatric condition should be added as a compensable injury in the claim. Syllabus Point 2, *Hale*. Mr. Biermann was not afforded an initial psychiatric consultation as provided in West Virginia Code of State Rules § 85-20-9.10(g). Therefore, the Court holds that the issue of the claimant's possible depression and anxiety is remanded for further proceedings consistent with the three-step process set forth in *Hale*.

The Court affirms the portion of the Board of Review Order which denied the authorization for the medications Asacol and Allegra. However, we find that the Board's denial of the request for consideration of depression and anxiety as additional compensable components of the claim to be a clear violation of statutory provision. Therefore, the Board's denial is reversed and the issue is remanded for further proceedings consistent with this Court's holding in

Hale.

Affirmed in part, reversed in part; and remanded

ISSUED: October 2, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum

Justice Robin Jean Davis

Justice Brent D. Benjamin

Justice Margaret L. Workman

Justice Thomas E. McHugh