

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

July 21, 2011

**RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

**MARGARET L. MCFARLAND,
Claimant Below, Petitioner**

**vs.) No. 100904 (BOR Appeal No. 2044163)
(Claim No. 2009005392)**

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

and

**WEST VIRGINIA LOTTERY,
Employer Below, Respondent**

MEMORANDUM DECISION

This appeal arises from the West Virginia Workers' Compensation Board of Review Final Order dated July 9, 2010, in which the Board affirmed a February 3, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's denial of approval for a second arthroscopic procedure. The appeal was timely filed by the petitioner and a response was filed by the West Virginia Lottery. 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, response, 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. Upon consideration of the standard of review, the Court determines that there is no prejudicial error. 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.

In its Order denying Ms. McFarland's request for a second arthroscopic procedure the Office of Judges found Ms. McFarland failed to present any evidence that she suffered a reinjury to her knee after the initial compensable arthroscopic procedure. Ms. McFarland asserts the second arthroscopic procedure should be approved as she presented sufficient evidence for a finding of progression and/or reinjury of her original compensable injury. Ms. McFarland further asserts her gardening activities did not cause a new injury to her right knee. In its decision the Office of Judges discussed the findings of Dr. Sushil M. Sethl's independent medical examination, in which Dr. Sethl opined Ms. McFarland had reached maximum medical improvement and noted arthritis and chondromalacia as the continuing cause of Ms. McFarland's knee problems. (February 3, 2010 Office of Judges Order, p. 5). It further noted Dr. ChaunFang Jin's independent medical review also indicated Ms. McFarland suffered a new injury and not a reinjury. Ms. McFarland presented no competing medical evidence indicating a reinjury to her knee and acknowledged to her treating physician that she suffered pain in her right knee after gardening. *Id.* Ms. McFarland's claim of pain three days after removal of her stitches from the first arthroscopic procedure inconsistent with the admission of gardening activities. *Id.* The Office of Judges, too, found no basis for compensability or temporary total benefits, or for disputing the Claims Administrator's findings. The Board of Review reached the same reasoned conclusions in affirming the Office of Judges in its decision of July 9, 2010.

For the foregoing reasons, we find that the decision of the Board of Review is not in clear violation of constitutional or statutory provision, clearly the result of erroneous conclusions of law, or is based upon the Board's material misstatement or mischaracterization of particular components of the evidentiary record. Therefore, the denial of the petitioner's request for a second arthroscopic procedure is affirmed.

Affirmed.

ISSUED: July 21, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman

Justice Robin Jean Davis

Justice Brent D. Benjamin

Justice Menis E. Ketchum

Justice Thomas E. McHugh