

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

**Donald G. Stern,
Claimant Below, Petitioner**

**August 3, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

**vs.) No. 101108 (BOR Appeal No. 2044183)
(Claim No. 2001035999)**

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

and

**McElroy Coal Company,
Employer Below, Respondent**

MEMORANDUM DECISION

This appeal arises from the West Virginia Workers' Compensation Board of Review's Final Order dated August 10, 2010, in which the Board affirmed a February 26, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's September 22, 2009 denial of compensability for depressive disorder, and also affirmed the claims administrator's November 6, 2009 denial of authorization for thirty chiropractic treatments. The appeal was timely filed by the petitioner and a response was filed by the Employer. 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. 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, the Office of Judges held that Mr. Stern's request for thirty chiropractic treatments was not in compliance with W. Va. Code § 85-20-4.1 and § 85-20-46.7 *et. seq.*, and that Mr. Stern failed to establish a causal link between any depression from which he may suffer and his compensable injury of August 4, 2000. Mr. Stern disputes these findings and asserts that, per the opinion of Dr. Kelly Barki, he is entitled to thirty chiropractic treatments, and that, per the opinions of Dr. Patricia Bailey and Dr. Barki, he has provided sufficient evidence to establish that his depression is a direct result of his compensable injury.

The Office of Judges found Mr. Stern's requests to authorize thirty chiropractic treatments to be outside the time limit set forth by W. Va. Code § 85-20-46.7, and that his was not an extraordinary case as defined by W. Va. Code § 85-20-4.1, and therefore the treatments were not medically reasonable. The Office of Judges also found that Dr. Bailey's statement that Mr. Stern's depression was a result of his "numerous health problems" was not a sufficiently definitive statement of causation with regard to the instant claim, that Dr. Bailey's opinion as a psychologist was entitled to greater weight than Dr. Barki's opinion that Mr. Stern's depression was a direct result of his compensable injury, and that Mr. Stern had therefore failed to present sufficient evidence causally linking his compensable injury to his subsequent depression. The Board of Review reached the same reasoned conclusion in its decision of August 10, 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 to add depression as a compensable component and for thirty chiropractic treatments is affirmed.

Affirmed.

ISSUED: August 3, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman

Justice Robin J. Davis

Justice Brent D. Benjamin

Justice Thomas E. McHugh

DISSENTING:
Justice Menis E. Ketchum