

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

**DEBRA A. FISHER,
Claimant Below, Petitioner**

**August 2, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

**vs.) No. 101128 (BOR Appeal No. 2044045)
(Claim No. 2001002431)**

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

and

**WHEELING HOSPITAL, INC.,
Employer Below, Respondent**

MEMORANDUM DECISION

This appeal arises from the West Virginia Workers' Compensation Board of Review's Final Order dated August 20, 2010, in which the Board affirmed an December 21, 2009, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed in part and reversed in part the Claims Administrator's July 13, 2009 order denying requested medical benefits. 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.

The Office of Judges held that the lumbar MRI was not reasonably necessary for treatment of the compensable injury at the time the authorization was requested. Ms. Fisher argues that under the regulations an MRI is needed to demonstrate further treatment. She maintains the aggravation of symptoms along with the most recent MRI being more than one year prior, necessitates the need to an updated test.

The Office of Judges in affirming the Claims Administrator's denial of the MRI, held the petitioner failed to prove by a preponderance of the evidence that the MRI was reasonably necessary for treatment of the compensable injury. (December 31, 2009 Office of Judges Order, p. 8). The Office of Judges noted that the increased symptoms can reasonably be traced to the April 2008 functional capacity evaluation. *Id.* at p.7. The most recent MRI performed on the petitioner was on May 11, 2008 and the Office of Judges found that Dr. Mills, the treating physician, failed to explain why a second lumbar MRI after the functional capacity evaluation is necessary. *Id.* However, the EMG was deemed reasonable to investigate symptoms of parasthesia. *Id.* The Board of Review reached the same reasoned conclusions in affirming the Office of Judges in its decision of August 20, 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 the MRI is affirmed.

Affirmed.

ISSUED: August 2, 2011

CONCURRED IN BY:

Chief Justice Margaret Workman

Justice Robin Jean Davis

Justice Brent D. Benjamin

Justice Thomas E. McHugh

DISSENTING:

Justice Menis E. Ketchum