

**STATE OF WEST VIRGINIA**

**SUPREME COURT OF APPEALS**

**FILED**

**July 26, 2012**

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

**ATK ALLIANT TECHSYSTEMS, Petitioner**

**vs.) No. 11-0017 (BOR Appeal No. 2044474)  
(Claim No. 2009077889)**

**WEST VIRGINIA OFFICE OF  
INSURANCE COMMISSIONER and  
LYDELLA K. BITTNER, Respondent**

**MEMORANDUM DECISION**

Petitioner, ATK Alliant Techsystems, by Stephen M. Mathias, its attorney, appeals the Board of Review's Order granting the respondent temporary total disability benefits through September 14, 2009, and until such time as Ms. Bittner reaches maximum medical improvement. The respondent, Lydella Bittner, did not file a response.

This appeal arises from the West Virginia Workers' Compensation Board of Review Final Order dated December 3, 2010, in which the Board affirmed a March 24, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges reversed the claims administrator's closure of Ms. Bittner's claim for temporary total disability benefits. The Court has carefully reviewed the records, written arguments, and appendices contained in the petition, and the case is mature for consideration.

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.

On February 3, 2009, Ms. Bittner asserts she suffered a low back injury after pushing a cart across the floor in the course of her employment. Following the injury Ms. Bittner's claim was authorized for lumbar sprain / strain and temporary total disability benefits were authorized starting February 4, 2009.

On April 27, 2009, Dr. Richard S. Kaplan performed an independent medical evaluation and opined Ms. Bittner suffers from unresolved nonspecific low back pain. The report further found Ms.

Bittner's reported mechanism of injury is not consistent with any specific diagnosis, with ongoing symptoms related to factors other than the work incident on February 3, 2009. Further, the continued symptoms appeared to be part of a chronic process and, in part, to nonphysical issues. Following the receipt of Dr. Kaplan's report the claims administrator closed Ms. Bittner's claim for temporary total disability benefits as of May 6, 2009.

Ms. Bittner received a diagnosis of lumbar and cervical spine degenerative disc disease through MetLife functional capacity evaluation and was found unable to return to work in any capacity. Dr. Mohammad Shafiei opined Ms. Bittner suffers from lumbar and cervical paraspinal muscle strain and cervical and lumbar spine degenerative disc disease. Dr. Shafiei recommended that Ms. Bittner remain off work until further notice.

Based upon the medical evidence from Dr. Kaplan and Dr. Shafiei, the Office of Judges held "the weighted evidence of record establishes that [Ms. Bittner] remains temporarily totally disabled." The Office of Judges further held "[o]n September 14, 2009, Dr. Shafiei indicated Ms. Bittner did not have any new complaints and no new development, thus, this finding would indicate that [Ms. Bittner], at this point, could have reached her maximum degree of medical improvement, however, without sufficient medical documentation to reflect that [Ms. Bittner] was at her maximum degree of medical improvement at this time, [Ms. Bittner] would still be entitled to temporary total disability benefits." The Office of Judges further held the functional capacity evaluation presented more persuasive evidence of Ms. Bittner's disability and afforded this report greater weight than Dr. Kaplan's report which found maximum medical improvement. Thus, the Office of Judges authorized Ms. Bittner to continue receiving temporary total disability benefits through September 14, 2009, and until such time as she reaches maximum medical improvement. The Board of Review reached the same reasoned conclusion in affirming the Office of Judges in its decision of December 3, 2010.

For the foregoing reasons, we find that the decision of the Board of Review is not in clear violation of any constitutional or statutory provision, nor is it clearly the result of erroneous conclusions of law, nor is it based upon a material misstatement or mischaracterization of the evidentiary record. Therefore, the Court affirms the Board of Review Order granting Ms. Bittner additional temporary total disability benefits until such time as she reaches maximum medical improvement.

Affirmed.

**ISSUED: July 26, 2012**

CONCURRED IN BY:

Chief Justice Menis E. Ketchum

Justice Robin J. Davis

Justice Brent D. Benjamin

Justice Margaret L. Workman

Justice Thomas E. McHugh