

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

July 26, 2012

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

RAY E. DILLON, Petitioner

**vs.) No. 11-0022 (BOR Appeal No. 2044804)
(Claim No. 2006208689)**

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
ROCKSPRING DEVELOPMENT, INC., Respondent**

MEMORANDUM DECISION

Petitioner, Ray E. Dillon, by John C. Blair, his attorney, appeals the Board of Review Order denying authorization for selective nerve blocks, S1 joint blocks, physical therapy, and psychiatric evaluation. Rockspring Development, Inc., by Marion E. Ray, its attorney, filed a timely response.

This appeal arises from the West Virginia Workers' Compensation Board of Review Final Order dated December 15, 2010, in which the Board affirmed a July 15, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's denial of authorization for selective nerve blocks, S1 joint blocks, physical therapy, and psychiatric evaluation. 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, 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 briefs, and the records presented, the Court finds that a memorandum decision is appropriate under Rule 21 of the Revised Rules.

The Board of Review held that the requested medical treatment is not appropriate. Mr. Dillon asserts he continues to suffer from pain related to the compensable injuries and his medical records sufficiently sets forth a basis for authorizing the requested medical treatment.

On February 20, 2006, Mr. Dillon sought treatment with Highlands Regional Medical Center for low back pain and was diagnosed with minimal hypertrophic spurring involving L4 and L5 anteriorly. On March 20, 2009, Mr Dillon sought treatment at Cabell Huntington Hospital Regional

Pain Management Center where he was diagnosed with a small osteophyte at L4-5, mainly right; sacroiliac joint syndrome, bilateral; radiating pain in the lower extremities, not typical for lumbar radiculopathy; and myofascial pain syndrome. A final visit to Pikeville Medical Center on May 26, 2009, showed Mr. Dillon suffers from thoracic spine mild degenerative disc disease and cervical spine mild degenerative disc disease.

Dr. Ralph S. Smith conducted a medical record review and recommendation for Mr. Dillon's claim. It was Dr. Smith's reasoned opinion that Mr. Dillon's requested treatment should be denied based upon West Virginia Code of State Rules § 85-20-1, et seq. guidelines since additional medical treatment is inappropriate in circumstances where a claimant has reached maximum medical improvement and received a permanent partial disability award. Further, Dr. Marsha Lee Bailey also conducted a medical records review and determined Mr. Dillon has reached maximum medical improvement and additional treatment and/or diagnostic studies are not indicated. Dr. Bailey further opined the claims administrator properly denied authorization for the requested medical treatment.

The Office of Judges considered Mr. Dillon's request for medical treatment with the provisions of West Virginia Code of State Rules § 85-20-4.1, which provides for treatment in excess of the guidelines in extraordinary cases. Pursuant to this section, the Office of Judges noted the only evidence supporting continued treatment was Dr. Ozturk's report, however, the report did not contain any evidence correlating Mr. Dillon's current complaints of pain with his compensable injuries. Additionally, the Office of Judges held Mr. Dillon was previously found at maximum medical improvement and awarded a 5% permanent partial disability award. As a result, the Office of Judges affirmed the claims administrator's Order denying the requested medical benefits. The Board of Review reached the same reasoned conclusion in its Order of December 15, 2010.

The Court holds the Board of Review did not err in denying Mr. Dillon's request for selective nerve blocks, S1 joint blocks, and physical therapy. A claimant is found at maximum medical improvement when the condition which resulted in disability is static or stabilized during a period of time sufficient to allow optimal recovery, and one that is unlikely to change in spite of further medical or surgical therapy. W. Va. Code R. § 85-20-3.9. Mr. Dillon previously received an award of 5% permanent partial disability following a finding of maximum medical improvement. At that point, Mr. Dillon's condition was considered static and/or stabilized for purposes of determining his permanent disability. The claims administrator properly determined no further treatment would be necessary following this finding since it was unlikely Mr. Dillon's condition would change with further medical treatment.

Mr. Dillon also requested authorization for a psychiatric evaluation. 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. Dillon 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 this matter shall be remanded for further proceedings consistent with the three-step process set forth in *Hale*.

With respect to the decision denying authorization for selective nerve blocks, S1 joint blocks, and physical therapy, we find that the decision of the Board of Review is not in clear violation of any constitutional or statutory provisions, is not so clearly the result of erroneous conclusions of law, nor is it so clearly wrong based upon the evidentiary record that even when all inferences are resolved in favor of the board's findings, reasoning, and conclusions, there is insufficient support to sustain the decision. However, for the decision denying an initial psychiatric consultation, we find that the decision of the Board of Review is in clear violation of constitutional or statutory provisions, is so clearly the result of erroneous conclusions of law, and is so clearly wrong based upon the evidentiary record that even when all inferences are resolved in favor of the board's findings, reasoning, and conclusions, there is insufficient support to sustain the decision. Therefore, the Court affirms the Board of Review Order denying authorization for selective nerve blocks, S1 joint blocks, and physical therapy and reverses the Board of Review Order denying Mr. Dillon's request for an initial psychiatric consultation. This matter is remanded and the Board of Review is directed to refer Mr. Dillon for an initial psychiatric consultation and a determination of whether the psychiatric condition, if any, should be accepted as a compensable condition in Mr. Dillon's claim.

Affirmed in Part, Reversed in Part.

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