

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

BEVERLY J. ANNON, Petitioner

July 20, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

vs.) **No. 11-0149 (BOR Appeal No. 2044773)**
(Claim No. 2010097859)

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
WAL-MART ASSOCIATES, INC., Respondent**

MEMORANDUM DECISION

Petitioner, Beverly J. Annon, by Robert L. Stultz, her attorney, appeals the Board of Review Order denying compensability for a shoulder and back injury. Wal-Mart Associates, 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 22, 2010, in which the Board affirmed a June 29, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's denial of compensability. 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 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 Board of Review denied Ms. Annon's request for compensability for her shoulder and back injury, finding Ms. Annon failed to file an application for benefits within the applicable statute of limitations set forth in West Virginia Code § 23-4-15(a). Ms. Annon asserts she suffered a work-related shoulder and back injury on October 27, 2008. However, Ms. Annon did not complete an Associates Application - Workers' Compensation until July 8, 2009. Ms. Annon testified during deposition that she does not recall an actual date of injury but that she saw Dr. Shawn Long on October 27, 2008, for an annual examination during which she mentioned her shoulder and back

symptoms. Additionally, Ms. Annon acknowledged her treatment notes sets forth her symptom complaints for August of 2008 and October of 2008. Dr. Chris Vasilakis, M.D., also completed a Certification of Health Care Provider for Associate's Serious Health Condition (FMLA), listing an injury date of November of 2008.

The Office of Judges held Ms. Annon protested the claims administrator's findings regarding compensability, however, no evidence was produced to contradict those findings. Based upon Ms. Annon's testimony regarding her injury date and the documentation submitted, the Office of Judges held the evidence favors the employer's position regarding compensability. "[I]t is evident, in looking at [Ms. Annon's] evidence in the above referenced claim, that she is unsure of just when the injury, if there was one, occurred." Thus, the Office of Judges affirmed the claims administrator's Order denying compensability. The Board of Review reached the same reasoned conclusion in its Order of December 22, 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 denying compensability for Ms. Annon's shoulder and back injuries.

Affirmed.

ISSUED: July 20, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum

Justice Robin J. Davis

Justice Margaret L. Workman

Justice Thomas E. McHugh

Justice Brent D. Benjamin not participating