

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

HARRISON L. EPPERLY, Petitioner

February 22, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

vs.) **No. 11-0442 (BOR Appeal No. 2044982)**
(Claim No. 2006019034)

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER
APOGEE COAL COMPANY, Respondent**

MEMORANDUM DECISION

Petitioner Harrison L. Epperly, by Steven Thorne, his attorney, appeals the West Virginia Workers' Compensation Board of Review's Order denying the requested medical benefits. Apogee Coal Company, by Bradley Crouser, its attorney, filed a timely response.

This appeal arises from the West Virginia Workers' Compensation Board of Review's Final Order dated February 14, 2011, in which the Board affirmed an August 24, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the Claims Administrator's February 5, 2010, Order denying a repeat cervical and lumbar MRI. 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 Board of Review affirmed the holding that the preponderance of the evidence failed to establish the requested repeat cervical and lumbar MRI were medically related and reasonably required to treat the compensable injury. Mr. Epperly disagrees with this

conclusion and asserts that no evidence provided by the employer establishes that the repeat procedure is related to anything other than the compensable injury. Further, he argues that the evidence established that following the compensable injury, his complaints have been consistent and all related to the compensable injury.

In its Order affirming the Claims Administrator's denial of the requested medical benefits, the Office of Judges noted evidence of an intervening event and pre-existing degenerative joint disease. (August 24, 2010, Office of Judges Order, p. 4). The Office of Judges also noted the SelectStreet Grievance Board found that the original injury was a soft tissue injury and any changes noted on the MRI would be related to degenerative changes or an intervening event rather than the compensable injury. *Id.* It found that references to degenerative joint disease appear throughout the record, and thus concluded that the requested MRI was not related to the compensable injury. *Id.* The Board of Review reached the same reasoned conclusions in affirming the Office of Judges in its decision of February 14, 2011.

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 based upon the Board's material misstatement or mischaracterization of particular components of the evidentiary record. Therefore, the Board of Review Order is affirmed.

Affirmed.

ISSUED: : February 22, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum

Justice Robin J. Davis

Justice Margaret L. Workman

Justice Thomas E. McHugh

DISSENTING:

Justice Brent D. Benjamin