

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

FILED
January 14, 2014
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

DORIS N. FOSTER,
Claimant Below, Petitioner

vs.) **No. 11-1760** (BOR Appeal No. 2046015)
(Claim No. 2009092635)

CITY OF CHARLESTON,
Employer Below, Respondent

MEMORANDUM DECISION

Petitioner Doris N. Foster, by Patrick Kevin Maroney, her attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. The City of Charleston, by Marion E. Ray, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated December 2, 2011, in which the Board affirmed a May 16, 2011, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's October 8, 2010, decision, denying Ms. Foster's application for reopening her claim on a temporary total disability basis. The Court has carefully reviewed the records, written arguments, and appendices contained in the briefs, and the case is mature for consideration.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Rules of Appellate Procedure.

Ms. Foster worked as a cashier for the City of Charleston. She was injured on May 20, 2009, when her chair rolled out from under her and she fell on the floor. The claim was held compensable for a lumbar strain on a no lost time basis. On December 24, 2009, Dr. Mukkamala found that Ms. Foster had reached her maximum degree of medical improvement. He found that Ms. Foster's subjective complaints were partially related to underlying degenerative conditions. He also found that Ms. Foster could return to sedentary work. Following this determination, Dr.

Bowden submitted a request to reopen Ms. Foster's claim on a temporary total disability basis. Dr. Bowden alleged that Ms. Foster's condition had aggravated or progressed. The claims administrator denied Dr. Bowden's request because the application contained no evidence of an aggravation or progression. The claims administrator also relied on the fact that Dr. Mukkamala had attributed Ms. Foster's symptoms to some extent to underlying degenerative conditions. The Office of Judges affirmed the claims administrator's decision on May 16, 2011. The Board of Review then affirmed the Order of the Office of Judges on December 2, 2011, leading Ms. Foster to appeal.

The Office of Judges concluded that Ms. Foster had not suffered an aggravation or progression of her compensable injury and affirmed the claims administrator's decision. The Office of Judges based its decision on the requirement of West Virginia Code §§ 23-5-2 (2005) and 23-5-3 (2009) that an application for reopening disclose a progression or aggravation of the condition, or disclose some facts that were not previously considered and would entitle Ms. Foster to additional benefits. The Office of Judges determined that there was no persuasive evidence that Ms. Foster's current condition is due to her compensable injury. The Office of Judges found that several pieces of evidence supported a finding that Ms. Foster's pain was caused by non-compensable degenerative disc disease. The Office of Judges found that Dr. Bowden's application for reopening even attributed Ms. Foster's current pain to lumbar radiculitis and lumbar disc disease, which were not compensable conditions of this claim. The Board of Review adopted the finding of the Office of Judges and affirmed its Order.

We agree with the conclusions of the Board of Review and the findings of the Office of Judges. The only evidence Ms. Foster included in her application for reopening was the report of Dr. Bowden. But Dr. Bowden's report related Ms. Foster's current symptoms to non-compensable conditions instead of her compensable lumbar strain. Ms. Foster's application for reopening her claim on a temporary total disability basis did not disclose a progression or aggravation of her compensable condition. Her application did not include new facts which had not previously been considered and would entitle her to greater benefits. The claims administrator correctly refused her request for reopening.

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 decision of the Board of Review is affirmed.

Affirmed.

ISSUED: January 14, 2014

CONCURRED IN BY:

Justice Margaret L. Workman

Justice Menis E. Ketchum

Justice Allen H. Loughry II

DISSENTING:

Chief Justice Robin J. Davis

Justice Brent D. Benjamin, not participating