

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

DANIEL C. LYDICK,
Claimant Below, Petitioner

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

vs.) **No. 12-0753** (BOR Appeal No. 2046681)
(Claim No. 2007220450)

CONSOLIDATION COAL COMPANY,
Employer Below, Respondent

MEMORANDUM DECISION

Petitioner Daniel C. Lydick, by M. Jane Glauser, his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. Consolidation Coal Company, by Edward M. George, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated May 25, 2012, in which the Board affirmed a November 14, 2011, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges denied Mr. Lydick's request for attorney's fees and costs, finding that the claims administrator's January 24, 2012, decision denying massage therapy was not unreasonable. 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.

Mr. Lydick worked as a coal miner for Consolidation Coal Company. On March 29, 2007, he was riding in a transport vehicle when it jumped the track and he was thrown around inside the vehicle. The claim was held compensable for contusion of the shoulder and upper arm, thoracic sprain, neck sprain, cervical disc displacement, displacement of lumbar intervertebral disc without myelopathy, lumbar sprain, right vocal cord paralysis, and depression. The claims administrator denied Mr. Lydick's request for massage therapy because Dr. Wayt found Mr. Lydick had reached maximum medical improvement and West Virginia Code of State Rules § 85-20-19.3(o) (2006) states that massage therapy is allowed up to three sessions if it is not the sole means of treatment. The Office of Judges reversed the claims administrator's decision dated

January 4, 2011, and held that massage therapy is medically related and reasonably required for the treatment of Mr. Lydick's compensable injury and authorized massage therapy. Mr. Lydick then petitioned for attorney's fees and costs for the litigation of his successful reversal.

The Office of Judges denied Mr. Lydick's petition for attorney's fees and costs and held that Mr. Lydick had not met his burden of establishing that the claims administrator's decision was unreasonable. On appeal, Mr. Lydick disagrees and asserts that he is entitled to attorney's fees and costs for the reversal of the claims administrator's decision. He argues that the denial of medical treatment was unreasonable since West Virginia Code of State Rules § 85-20-19.3(o) authorizes massage therapy as approved treatment and there is no statutory authority that requires terminating medical care upon a claimant reaching maximum medical improvement. He further argues that his claim can exceed the guidelines because it is "extraordinary" within the meaning of West Virginia Code of State Rules § 85-20-4.1 (2006) since he has multiple compensable conditions and chronic pain. Consolidation Coal Company maintains that the requested massage therapy far exceeds the three sessions permitted by West Virginia Code of State Rules § 85-20-19.3(o) and that Mr. Lydick failed to submit evidence that proved his injury was extraordinary. It further asserts that Mr. Lydick provided more medical evidence to the Office of Judges than to the claims administrator.

The Office of Judges determined that Mr. Lydick's argument that the requested treatment was denied because he had reached maximum medical improvement was not persuasive. West Virginia Code § 23-2C-21(c) (2009) states that if the Office of Judges finds a denial of medical benefits was unreasonable, then reasonable attorney's fees and costs incurred in the process of obtaining a reversal of the denial shall be awarded to the claimant. The claims administrator's decision dated January 4, 2011, denied Mr. Lydick's request for massage therapy based upon West Virginia Code of State Rules § 85-20-19.3(o). Then, the Office of Judges reversed the claims administrator's decision dated January 4, 2011, and found this case was extraordinary within the meaning of West Virginia Code of State Rules § 85-20-4.1 and therefore, allowing deviation from the guidelines and authorized the request for massage therapy. The Office of Judges concluded that the claims administrator relied upon West Virginia Code of State Rules § 85-20-19.3(o) in denying massage therapy and that the Office of Judges relied upon evidence that was not presented to the claims administrator at the time of the request. The Office of Judges held that Mr. Lydick had not met his burden of establishing that the claims administrator's decision was unreasonable and therefore, is not entitled to attorney's fees and costs. The Board of Review reached the same reasoned conclusions in its decision of May 25, 2012. We agree with the reasoning and conclusions of the Board of Review.

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:

Chief Justice Robin J. Davis
Justice Margaret L. Workman
Justice Menis E. Ketchum
Justice Allen H. Loughry II

Justice Brent D. Benjamin, Not Participating