

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

THERESA M. RODRIGUEZ,
Claimant Below, Petitioner

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

vs.) **No. 12-1157** (BOR Appeal No. 2046986)
(Claim No. 2011037002)

KROGER LIMITED PARTNERSHIP 1,
Employer Below, Respondent

MEMORANDUM DECISION

Petitioner Theresa M. Rodriguez, by Raymond A. Hinerman and Christopher J. Wallace, her attorneys, appeals the decision of the West Virginia Workers' Compensation Board of Review. Kroger Limited Partnership 1, by Sean Harter, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated September 14, 2012, in which the Board affirmed a February 27, 2012, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's October 13, 2011, decision closing Ms. Rodriguez's claim for temporary total disability benefits. 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. Rodriguez was working as a bagger for Kroger Limited Partnership 1 on May 3, 2011, when she was pushing a shopping cart and felt a pull in her groin area. The claim was held compensable for left groin and upper leg strain/sprain. Dr. Bailey concluded on June 10, 2011, that there was no medical justification for Ms. Rodriguez to remain off work. Dr. Hennessey determined that Ms. Rodriguez had reached maximum medical improvement and had a 0% whole person impairment for the compensable components of the May 3, 2011, injury. Dr. Lynch opined that Ms. Rodriguez should be off work and would be temporary totally disabled from September 8, 2011, until December 1, 2011. The claims administrator closed the claim for

temporary total disability benefits based on the independent medical examination of Dr. Hennessey dated August 11, 2011.

The Office of Judges affirmed the claims administrator's decision and held that the evidence supported closing the claim for temporary total disability benefits and that Ms. Rodriguez has reached maximum medical improvement for the current components of the injury. Ms. Rodriguez disagrees and asserts that Dr. Lynch found she was disabled from June 22, 2011, through September 8, 2011, and therefore, she is eligible for temporary total disability benefits for this time regardless of the findings regarding the hip and low back strains. Kroger Limited Partnership 1 maintains that Dr. Bailey and Dr. Hennessey both concluded that Ms. Rodriguez was able to return to work. It further maintains that the only doctor who found Ms. Rodriguez was temporary and totally disabled was Dr. Lynch, which he based on her need for treatment of the lower back condition that has been deemed not compensable.

The Office of Judges closed the claim for temporary total disability benefits. On June 10, 2011, Dr. Bailey reviewed the records and concluded that no medical justifications existed to support Ms. Rodriguez's continued absence from work and that she could return to work with restrictions. Dr. Hennessey determined that Ms. Rodriguez had reached maximum medical improvement from the left groin strain that occurred on May 3, 2011, and she had no whole person impairment for the incident. The claims administrator suspended Ms. Rodriguez's temporary total disability benefits based upon Dr. Hennessey's report dated August 11, 2011, and gave her thirty days to present evidence to establish that her temporary total disability benefits should not be suspended. The only evidence that Ms. Rodriguez submitted in support of the protest was Dr. Lynch's report that stated she was temporary totally disabled from September 8, 2011, to December 1, 2011, but the diagnosis section on Dr. Lynch's report was illegible. The components of the left hip strain and lumbar strain have been denied at this point, and the only compensable components are the left groin and upper leg sprain/strain. The Office of Judges concluded that there is no medical evidence to support continued temporary total disability benefits for the current compensable component in this claim. The Office of Judges held that the claim was closed for temporary total disability benefits and that Ms. Rodriguez had reached maximum medical improvement for the current compensable components of the injury. The Board of Review reached the same reasoned conclusions in its decision of September 14, 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 Allen H. Loughry II

DISSENTING:

Justice Menis E. Ketchum

Justice Brent D. Benjamin, Not Participating