

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

June 29, 2012

**RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

CHARLES A. MCNABB JR., Petitioner

**vs.) No. 10-4030 (BOR Appeal No. 2044626)
(Claim No. 2006027999)**

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
POCAHONTAS COAL COMPANY, LLC, Respondent**

MEMORANDUM DECISION

Petitioner, Charles A. McNabb Jr. by Reginald D. Henry, his attorney, appeals the Board of Review order denying the addition of Diagnosis Code 722.10, displaced lumbar intervertebral disc, as a compensable component of this claim. Pocahontas Coal Company (hereinafter "Pocahontas"), by Timothy E. Huffman, its attorney, filed a timely response.

This appeal arises from the West Virginia Workers' Compensation Board of Review Final Order dated December 3, 2010, in which the Board affirmed a May 25, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's denial of Mr. McNabb's request to add Diagnosis Code 722.10 as a compensable component. The appeal was timely filed by the petitioner and a response was filed by Pocahontas Coal Company, LLC. 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 held Mr. McNabb's request for the addition of Diagnosis Code 722.10 - displaced lumbar intervertebral disc, as a compensable component, was not supported by the relevant medical evidence. Mr. McNabb asserts Diagnosis Code 722.10 should be added as a compensable component to the claim based upon Dr. Zahir's diagnosis. Further, Dr. Othman's EMG

studies show right L5-S1 radiculopathy, with evidence of mild right L4-5 radiculopathy, which is much less than the right L5-S1 radiculopathy. Dr. Kropac also opined Petitioner suffers from disc protrusion with spinal stenosis with right lower extremity radiculopathy, secondary to the compensable injury. Mr. McNabb suffered a prior work-related back injury. Diagnostic studies conducted at the time of the previous injury shows Mr. McNabb suffered from spinal stenosis at L4-5 and L5-S1.

The Office of Judges held “[a]n examination of the record leads to the conclusion that [Mr. McNabb’s] request for the inclusion of Diagnosis Code 722.10 should not be granted.” Mr. McNabb underwent MRI studies to the lower back prior to the compensable injuries, and this MRI study revealed a small left midline herniated disc at L5-S1. As a result of this MRI report, Mr. McNabb received further diagnostic testing which revealed central disc protrusion and moderate facet arthropathy at L4-5 and spondylotic disc protrusion at L5-S1.

For this claim, Mr. McNabb received three independent medical evaluations. Dr. Orphanos opined Mr. McNabb suffers from a soft tissue injury, superimposed on pre-existent spondylotic changes and spinal stenosis at L4-5 and L5-S1. Dr. Luis Loimil found herniated disc at L4-5 and L5-S1, which would support the addition of Diagnosis Code 722.10. Dr. Kropac found lumbosacral musculoligamentous strain, superimposed on degenerative disc disease and degenerative joint disease, with associated disc protrusion with spinal stenosis, and right lower extremity radiculopathy secondary to the compensable injury. Dr. Mir conducted the final independent medical evaluation and opined Diagnosis Code 722.10 should not be added as a compensable component since the right side radiculopathy results from the L4-5 spinal stenosis and pre-existing residuals from left lumbar radiculopathy found after the prior injuries.

The Office of Judges noted “A herniated disc is more than a disc protrusion. The diagnostic testing when considering the plain language contained in these reports fails to demonstrate an L4-5 disc herniation. The Office of Judges further held without explanation from Dr. Zahir supporting the conclusion that Mr. McNabb sustained a herniated disc resulting from the injury, the preponderance of the evidence does not support the conclusion that Mr. McNabb sustained a herniated disc as a result of his injury. The Office of Judges, too, found no basis for granting the request to add Diagnosis Code 722.10 or for disputing the Claims Administrator’s findings. The Board of Review reached the same reasoned conclusion in affirming the Office of Judges in its decision of December 3, 2010.

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 is based upon the Board’s material misstatement or mischaracterization of particular components of the evidentiary record. Therefore, the Court affirms the Board of Review order denying the addition of Diagnosis Code 722.10 as a compensable component in this claim.

Affirmed.

ISSUED: June 29, 2012

CONCURRED IN BY:

Justice Robin J. Davis

Justice Brent D. Benjamin

Justice Margaret L. Workman

Justice Thomas E. McHugh

DISSENTING:

Chief Justice Menis E. Ketchum