

**STATE OF WEST VIRGINIA**  
**SUPREME COURT OF APPEALS**

**FILED**

July 21, 2011

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

**OCAL R. SMITH,**  
**Claimant Below, Petitioner**

**vs.) No. 100804 (BOR Appeal No. 20044040)**  
**(Claim No. 2006206442)**

**WEST VIRGINIA OFFICE OF**  
**INSURANCE COMMISSIONER,**  
**Commissioner Below, Respondent**

**and**

**APPALACHIAN POWER COMPANY,**  
**Employer Below, Respondent**

**MEMORANDUM DECISION**

This appeal arises from the West Virginia Workers' Compensation Board of Review Final Order dated June 1, 2010, in which the Board affirmed in part and reversed in part a December 2, 2009, Order of the Workers' Compensation Office of Judges and denied authorization for the medication, Ambien. In its Order, the Office of Judges reversed the claims administrator's Order denying approval of the medications, Neurontin, Ultram, Robaxin, Motrin, and Ambien. The appeal was timely filed by the petitioner and a response was filed by Appalachian Power Company. 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, 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.

Mr. Smith asserts the medication, Ambien, is a reasonably necessary medication in light of his continued complaints of pain related to the work-related injury and resultant sleep disturbances. In its holding the Office of Judges relied upon the medical reports of Drs. Paul Bachwitt and Robert Kropac to determine the appropriateness of the medications. The Office of Judges opined the Claims Administrator failed to take into consideration W.Va. C.S.R. § 85-20-53, *et. seq.*, supporting the denial of the instant medications, including the medication, Ambien. *Id.*, p. 5. It further concluded that the use of the opioid medicines were appropriate for chronic non-malignant pain...persisting beyond the expected normal healing time for an injury, [and] for which traditional medical approaches have been unsuccessful.” *Id.* Additionally, it held that Dr. Kropac’s opinion in light of his extensive treatment history of Mr. Smith was more persuasive than the opinions of Drs. Mukkamala and Bachwitt’s single examination of Mr. Smith. *Id.*, p. 6. On the other hand, the Board of Review opined that the medication, Ambien was not an appropriate medication. It noted that Ambien is a “controlled substance which falls under the requirements of 85 C.S.R. 20 § 53 and Special Rules on Drugs and Medications (V) requiring certain documentation when certain controlled substances are prescribed outside of (or “beyond”) limited time periods after the initial injury or subsequent surgery.” June 2, 2010 Board of Review Order, p. 2. It then further concluded that Ambien is not a medically necessary and reasonably required medication in the course of Mr. Smith’s treatment for the compensable injury. *Id.*

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 denial of the petitioner’s request for the medication, Ambien, is affirmed.

Affirmed.

ISSUED: July 21, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman

Justice Robin Jean Davis

Justice Brent D. Benjamin

Justice Thomas E. McHugh

DISSENTING:

Justice Menis E. Ketchum