

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

BILLY JACK GREENE, Petitioner

vs.) No. 100872 (BOR Appeal No. 2044042)
(Claim No. 2009076732)

FILED

December 7, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
MAGNUM COAL COMPANY, Respondent

MEMORANDUM DECISION

This appeal arises from the West Virginia Workers' Compensation Board of Review's Final Order dated June 29, 2010, in which the Board affirmed a January 21, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges reversed the claims administrator's June 4, 2009, Order, which denied authorization for a functional capacity evaluation, continued physical therapy, and a pain management consultation. The Office of Judges's January 21, 2010, Order also affirmed the claims administrator's July 22, 2009, Order, which listed neck sprain and lumbar sprain as compensable conditions but listed lumbar disc displacement, lumbar spinal stenosis, cervical degeneration of disc, and spinal stenosis-cervical region as non-compensable. The appeal, challenging only the decision regarding the additional compensable components, was timely filed by the petitioner, and Magnum Coal Company filed a response. 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 parties' submissions 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 affirmed the Office of Judge's Order, which denied authorization for the additional compensable components of lumbar disc displacement, lumbar spinal stenosis, cervical degeneration of disc, and spinal stenosis-cervical region. Mr.

Greene argues that the only report to contradict Mr. Greene's position that the requested additional components resulted from the injury is the report of Dr. Prasadarao Mukkamala, who found that Mr. Greene had preexisting and naturally degenerative cervical disc disease as well as degenerative lumbar disc disease. Dr. Mukkamala felt that Mr. Greene's inability to return to his prior occupation was not entirely due to his compensable injury, but was instead attributable to preexisting and naturally degenerative cervical disc disease and degenerative lumbar disc disease. In evaluating Mr. Greene's level of impairment, however, Dr. Mukkamala failed to apportion any impairment to these preexisting degenerative changes. Mr. Greene argues that this contradicts Dr. Mukkamala's statements that these conditions were preexisting.

Mr. Greene also notes that Dr. Martin Greenberg related the requested additional components to his compensable injury; however, Dr. Greenberg did note that "lumbar disc disease of course is underlying, degenerative[.]" Finally, Mr. Greene submits that the Office of Judges employed the incorrect standard in concluding that "it is not at all clear that the incident on January 26, 2009 caused the [requested additional] conditions."

To begin, the Office of Judges considered more than just Dr. Mukkamala's report in affirming the denial of the addition of the requested compensable components. (Jan. 21, 2010, Office of Judges Order, p.3.) It reviewed MRIs taken less than one month following Mr. Greene's compensable injury. *Id.* These MRIs revealed degenerative changes at the C3-4 and C4-5 levels superimposed on a relatively congenitally small spinal canal at C4-5. *Id.* Moderate to high-grade neural foraminal stenosis in the left C3, C4-5, mild grade spinal stenosis at C3-4, and moderate to high-grade at C4-5 were also observed. *Id.* A lumbar spine MRI similarly indicated degenerative changes in the lumbar spine with a right paramedian disc protrusion with moderate right neural foraminal stenosis at L4-5. *Id.* The Office of Judges concluded that, while it is found that Claimant does suffer from the requested additional compensable components, "it is not at all clear that the [compensable injury] caused the conditions." *Id.* at p. 8. The evidence was also insufficient to determine that the lumbar disc herniation was caused by the compensable injury. *Id.*

The Office of Judges, however, did not employ the incorrect standard in evaluating the evidence. The Office of Judges set forth the appropriate standard at page 7 of its Order. It explained that "[p]reponderance of the evidence means proof that something is more likely so than not so." *Id.* at p. 7. In concluding that "[t]he evidence in this protest is not clear enough to hold any of these conditions compensable in this claim," the Office of Judges was merely concluding that the evidence submitted by Mr. Greene was insufficient to allow it to find that the requested conditions more likely than not resulted from his compensable injury given the degenerative changes noted on MRIs taken less than one month following his compensable injury. The Board of Review reached the same reasoned conclusion in affirming the Office of Judges in its decision dated June 29, 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 based upon the Board's material misstatement or mischaracterization of particular components of the evidentiary record. Therefore, the denial of Mr. Greene's request for the additional compensable components of lumbar disc displacement, lumbar spinal stenosis, cervical degeneration of disc, and spinal stenosis-cervical region is affirmed.

Affirmed.

ISSUED: December 7, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman

Justice Robin Jean Davis

Justice Thomas E. McHugh

DISSENTING:

Justice Brent D. Benjamin

Justice Menis E. Ketchum