

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

PATTY FOX, Petitioner

October 28, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

vs.) No. 100972 (BOR Appeal No. 2044169)
(Claim No. 2006061274)

WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
COMMUNITY RESOURCES, INC., Respondent

MEMORANDUM DECISION

This appeal arises from the West Virginia Workers' Compensation Board of Review's Final Order dated July 10, 2010, in which the Board affirmed a February 9, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's June 9, 2008, denial of Ms. Fox's request to authorize surgery and a post-operative brace, and the claims administrator's July 13, 2008, decision closing Ms. Fox's claim for total temporary disability benefits. The appeal was timely filed by the petitioner and a response was filed by the Employer. 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 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.

In its Order, the Office of Judges held that Ms. Fox failed to demonstrate that back surgery was reasonably required and medically necessary, that a postoperative stabilization brace was medically necessary and reasonably required, and that she has not provided sufficient evidence to establish that she is entitled to temporary total disability benefits

during her surgical recovery period for her November 2, 2006, injury. Ms. Fox disputes this finding and asserts that, per the opinion of Dr. Houman Khosrovi, she is entitled to authorization for back surgery, a post-operative brace, and temporary total disability benefits during her surgical recovery period.

The Office of Judges noted that the only compensable conditions in the claim were knee sprain/strain and lumbar sprain/strain per a July 17, 2006, claims administrator's order, and not "for any serious conditions requiring surgery". (February 9, 2010, Office of Judges Order, p. 9). The Office of Judges found that the medical record indicated Ms. Fox has an extensive history of spinal problems, that a physician review by Dr. ChuanFang Jin refutes the report of Dr. Khosrovi, and that Dr. Jin found that the condition for which Ms. Fox required surgery is consistent with degenerative changes. *Id.* The Office of Judges also found that because surgery was not authorized for Ms. Fox's claim, a postoperative stabilization brace is not reasonably required and medically necessary; it further noted that, since Ms. Fox's surgical procedures did not treat injuries sustained on November 2, 2006, she has not proven her entitlement to total temporary disability benefits during her surgical recovery period. *Id.* at 10-11. The Board of Review reached the same reasoned conclusion in its July 10, 2010, decision.

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 authorization for back surgery, authorization for a post-operative brace, and temporary total disability benefits from February 27, 2008, to October 1, 2008, is affirmed.

Affirmed.

ISSUED: October 28, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman

Justice Robin J. Davis

Justice Brent D. Benjamin

Justice Thomas E. McHugh

DISSENTING:

Justice Menis E. Ketchum