

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

LARRY DENNIS, Petitioner

vs.) No. 101129 (BOR Appeal No. 2044167)
(Claim No. 2007212843)

FILED

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

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

MEMORANDUM DECISION

This appeal arises from the West Virginia Workers' Compensation Board of Review Final Order dated August 20, 2010, in which the Board affirmed a January 29, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's September 29, 2009, Order, which denied authorization for Lortab. The Order also affirmed the reversal of authorization for Ambien, but this decision was not appealed. The appeal was timely filed by the petitioner, and McElroy 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 medication Lortab. Mr. Dennis argues that his need for Lortab is documented by his treating physician, Dr. Michael Shramowiat. Dr. Vaglianti, an independent examiner, also purportedly found that continued opioids were appropriate for Mr. Dennis; however, Dr. Vaglianti's report was not provided by Mr. Dennis. Finally, Mr. Dennis notes that, despite the fact that continued Lortab authorization would exceed Rule 20 guidelines, the Rule provides for deviation in extraordinary cases. Mr. Dennis argues that his situation is extraordinary.

The Office of Judges, however, relied upon the report of Dr. Charles C. Weise in denying authorization for Lortab. (Jan. 29, 2010, Office of Judges Order, p. 7.) Dr. Weise found that Mr. Dennis is not a candidate for long-term opiate maintenance analgesia due to his inability to take his medications as prescribed. *Id.* Candidates for long-term opiate use need be “reliable claimants who are known to the physician and are expected to be compliant with the treatment protocol.” W. Va. Code R. § 85-20-53.4. Furthermore, Mr. Dennis’s treating physician requested the medication three years following Mr. Dennis’s compensable injury, despite the fact that Lortab should not be prescribed more than six weeks after an initial injury. *Id.* at § 53.14. Finally, although Rule 20 provides for deviation from this treatment standard in extraordinary cases upon submission of certain documentation by a treating physician, no such documentation was submitted by Dr. Shramowiat. Accordingly, the Office of Judges declined to authorize Lortab, and the Board of Review reached the same reasoned conclusion in affirming the Office of Judges in its August 20, 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 based upon the Board’s material misstatement or mischaracterization of particular components of the evidentiary record. Therefore, the denial of authorization for Lortab is affirmed.

Affirmed.

ISSUED: December 7, 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