

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

BETTY J. NEASE, Petitioner

February 24, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

vs.) No. 101312 (BOR Appeal No. 2044274)
(Claim No. 2008027701)

WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
MORGANS RESTAURANTS OF WEST VIRGINIA, INC.,
Respondent

MEMORANDUM DECISION

Petitioner Betty J. Nease, by William Gallagher, her attorney, appeals the decision of the Board of Review. Morgans Restaurants of West Virginia, by T. Jonathan Cook, its attorney, filed a timely response.

This appeal arises from the West Virginia Workers' Compensation Board of Review's Final Order dated September 9, 2010, in which the Board reversed a March 9, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges reversed the claims administrator's March 26, 2009, decision denying the compensability of radiculopathy and denying authorization for the medication Lyrica, and granted Ms. Nease a neurosurgical consultation to determine the compensability of radiculopathy and the necessity of the medication Lyrica. 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 a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

The issues before this Court on appeal are the compensability of radiculopathy and the necessity of the medication Lyrica. In its Order, the Office of Judges held that the record

failed to establish a credible evidentiary foundation for either the affirmation or reversal of the claims administrator's March 26, 2009, decision denying authorization for the medication Lyrica and denying the inclusion of radiculopathy as a compensable component of the claim. Therefore, the Office of Judges reversed the claims administrator's denial of authorization for the medication Lyrica and the denial of the inclusion of radiculopathy as a compensable component of the claim, and ordered that the claims administrator refer Ms. Nease for a neurosurgical consultation to determine whether Lyrica is a reasonable medical treatment secondary to the compensable injury and whether radiculopathy should be included as a compensable component of the claim.

However, on September 9, 2010, the Board of Review found that the diagnosis of radiculopathy is not causally related to the compensable injury, based on the opinion of Dr. Mukkamala, and that the medication Lyrica is not medically necessary and reasonably required for the treatment of Ms. Nease's compensable injury. The Board of Review reversed the Office of Judges' Order and reinstated the March 26, 2009, claims administrator's decision.

The Office of Judges found that Ms. Nease's testimony presents inferences of radiculopathy contemporaneous with her injury. The Office of Judges then found that Dr. Mukkamala's report was less credible than the other evidence of record because he merely reviewed Ms. Nease's medical record and did not conduct a physical examination. The Office of Judges also found that although Dr. Mukkamala found that Ms. Nease's EMG did not reveal evidence of radiculopathy, the exact language from the EMG report states that the testing revealed "...mild neurogenic change in both lower extremities in L5 and S1 distribution with the left being affected somewhat more than the right. Please correlate clinically." The Office of Judges found that Dr. Mukkamala failed to discuss why he dismissed the neurogenic changes revealed in the EMG report. Finally, the Office of Judges found that the record does not reveal whether Dr. Amores, who conducted a record review and recommended that the medication Lyrica not be authorized and that radiculopathy not be added as a compensable component of the claim, had access to Ms. Nease's EMG results. The Office of Judges then held that the record requires further evidentiary development.

For the foregoing reasons, we find that the decision of the Board of Review is based upon the Board's material misstatement or mischaracterization of particular components of the evidentiary record. Therefore, the claim is remanded to the Board of Review with instructions that Ms. Nease be granted a neurosurgical consultation to determine whether the medication Lyrica constitutes reasonable medical treatment in light of her compensable injury and to determine whether radiculopathy should be added as a compensable component of the claim.

Reverse and Remand.

ISSUED: February 24, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum

Justice Robin J. Davis

Justice Brent D. Benjamin

Justice Margaret L. Workman

Justice Thomas E. McHugh