

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

April 12, 2012

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

CAROLYN S. DEVITT, Petitioner

**vs.) No. 101609 (BOR Appeal No. 2044538)
(Claim No. 2005027196)**

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
KROGER LIMITED PARTNERSHIP, Respondent**

MEMORANDUM DECISION

Petitioner Carolyn S. Devitt, by Samuel Hanna, her attorney, appeals the decision of the Board of Review. Kroger Limited Partnership, by Sean Harter, its attorney, filed a timely response.

This appeal arises from the West Virginia Workers' Compensation Board of Review's Final Order dated November 22, 2010, in which the Board affirmed an April 16, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's May 13, 2009, decisions denying further treatment because Ms. Devitt's complaints are related to a non-compensable condition, and also denying her request to have additional diagnoses held compensable. The Court has carefully reviewed the records, written arguments, and appendices contained in the petition, and the case is mature for consideration.

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. Devitt's request to add additional compensable conditions was properly denied, and that the treatment requested for these conditions was properly denied. Ms. Devitt disputes this finding and requests authorization for additional medical treatment, and that the following conditions be held compensable: herniated cervical disc, cervical radiculopathy, right shoulder pain, and right arm pain.

The Office of Judges found that on October 10, 2007, EMG indicates that Ms. Devitt does

not have radiculopathy. The Office of Judges also found that Ms. Devitt's right arm and shoulder pain have resolved. Finally, the Office of Judges found that the medical record indicates that any neck problems from which Ms. Devitt is currently suffering are the result of degenerative changes preexisting her injury on December 6, 2004. The Board of Review reached the same reasoned conclusion in its decision of November 22, 2010.

For the foregoing reasons, we find that the decision of the Board of Review is not in clear violation of any constitutional or statutory provision, nor is it clearly the result of erroneous conclusions of law, nor is it based upon a material misstatement or mischaracterization of the evidentiary record. Therefore, the decision of the Board of Review is affirmed.

Affirmed.

ISSUED: April 12, 2012

CONCURRED IN BY:

Justice Robin J. Davis

Justice Brent D. Benjamin

Justice Margaret L. Workman

Justice Thomas E. McHugh

DISSENTING:

Chief Justice Menis E. Ketchum