

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

December 5, 2012

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

JOHNNY R. HALL, Petitioner

vs.) No. 11-0003 (BOR Appeal No. 2044116)
(Claim No. 2000018782)

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
MARFORK COAL COMPANY, Respondent**

MEMORANDUM DECISION

Petitioner Johnny R. Hall, by John C. Blair, his attorney, appeals the West Virginia Workers' Compensation Board of Review's Order denying the petitioner's request for authorization for three sessions of lumbar facet joint injections and granting no additional permanent partial disability award. The West Virginia Office of Insurance Commissioner, by David L. Stuart, its attorney, filed a timely response.

This appeal arises from the West Virginia Workers' Compensation Board of Review Final Order dated December 10, 2010, in which the Board affirmed, in part, and reversed, in part, a February 11, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's Order dated February 20, 2009, which denied claimant's request for an additional permanent partial disability award. The Office of Judges, however, reversed the claims administrator's October 1, 2009, Order and granted authorization for three additional lumbar facet joint injections. 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, response, 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. 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 held that the preponderance of the evidence did not support granting Mr. Hall an additional award of permanent partial disability or authorizing lumbar facet

joint injections. Mr. Hall asserts he is entitled to the requested permanent partial disability award and lumbar facet joint injections.

The claim administrator found Mr. Hall's injuries compensable and granted an initial 37% permanent partial disability award. Thereafter, Mr. Hall sought an additional permanent partial disability award based upon a subsequent independent medical evaluation performed by Dr. Clifford Carlson. In this report, Dr. Carlson opined that Mr. Hall has a 42% impairment for his compensable injuries pursuant to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993). Dr. Prasadarao B. Mukkamala initially evaluated Mr. Hall and opined 37% impairment related to the compensable injuries; however, this evaluation was conducted prior to the 2003 amendments. Dr. Paul Bachwitt also conducted an evaluation and opined 35% impairment in accordance with West Virginia Code of State Rules § 85-20-1, *et seq.*

The Office of Judges considered Mr. Hall's request for permanent partial disability and held that Dr. Carlson ignored the Rule 20 requirements when determining Mr. Hall's lumbar spine impairment. As a result, Dr. Carlson's report was found unreliable. Dr. Bachwitt's evaluation was conducted in accordance with Rule 20, with a finding of 35% impairment; thus, Dr. Bachwitt opined Mr. Hall was previously fully compensated for his compensable injuries. As a result, the Office of Judges adopted the findings contained in Dr. Bachwitt's report, finding the report credible, reliable, and persuasive, in apportioning Mr. Hall's impairment. The Board of Review reached the same conclusion in its order affirming the Office of Judges on December 10, 2010. We disagree with the Board's decision. Dr. Carlson's recommendation was well reasoned and clearly demonstrates a rating of 42% impairment.

Mr. Hall also requested authorization for three sessions of lumbar facet joint injections through his treating physician, Dr. Francis Saldanha. Prior lumbar facet joint injections were 50 - 60% effective, with a pain relief duration of 7 to 8 days. Dr. Robert B. Walker conducted a physician's review and opined the lumbar facet joint injections were not an appropriate medical treatment since there is limited benefit from the treatment and Mr. Hall is at maximum medical improvement.

The Office of Judges held that Mr. Hall is entitled to the additional lumbar facet joint injection sessions. It held the fact that Mr. Hall is at maximum medical improvement does not necessarily mean Mr. Hall is not entitled to the additional medical treatment. Dr. Saldanha found the injections helpful and Mr. Hall appeared pleased with the prior injection results. Dr. Bachwitt's report finding the injections are not reasonably necessary medical treatment, seemingly based upon Mr. Hall being at maximum medical improvement was granted less evidentiary weight. As a result, the Office of Judges reversed the claim administrator's order and authorized the requested lumbar facet joint injections.

On review, the Board of Review reversed the Office of Judges and found that the lumbar facet joint injections are not reasonably necessary medical treatment, relying on Dr. Walker's opinion that the approximate 50 - 60% effectiveness and 7 to 8 day effectiveness are insufficient

to recommend the additional treatment. Further, Dr. Bachwitt found Mr. Hall was at maximum medical improvement with no further specific treatment and/or diagnostic testing reasonably expected to improve Mr. Hall's condition. We disagree with the Board's decision.

For the foregoing reasons, we find that the decision of the Board of Review is clearly the result of erroneous conclusions of law. Therefore, the Court reverses the Board of Review Order which denied Mr. Hall's request for an additional award of permanent partial disability. Mr. Hall is entitled to a 42% award based upon the recommendation of Dr. Carlson. We also reinstate the decision of the Office of Judges to authorize the requested lumbar facet joint injections.

Reversed and remanded.

ISSUED: December 5, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Margaret L. Workman
Justice Thomas E. McHugh

DISSENTING:

Justice Robin J. Davis

Justice Brent D. Benjamin, Disqualified