

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

July 26, 2012

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

WILLIAM T. BURCHFIELD, Petitioner

**vs.) No. 11-0025 (BOR Appeal No. 2044587)
(Claim No. 2004040410)**

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
WHEELING-PITTSBURGH STEEL
CORPORATION, Respondent**

MEMORANDUM DECISION

Petitioner, William T. Burchfield, by William C. Gallagher, his attorney, appeals the Board of Review's Order denying his request for vocational rehabilitation. Wheeling-Pittsburgh Steel Corporation, by Lucinda Fluharty, its attorney, filed a timely response.

This appeal arises from the West Virginia Workers' Compensation Board of Review Final Order dated December 7, 2010, in which the Board reversed an April 23, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges reversed the claims administrator's denial of Mr. Burchfield's request for vocational rehabilitation. 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. 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.

Mr. Burchfield suffered a lumbar spine and left leg injury after his left foot became stuck between the rail and track of a coke plant and he was struck with the door machine. Thereafter, Mr. Burchfield's injuries were found compensable and he received temporary total disability benefits and was authorized to participate in vocational rehabilitation services. Mr. Burchfield acknowledged he failed to participate in the vocational rehabilitation program because he had transportation

difficulties and also could not miss work to participate in services. The claims administrator ultimately closed Mr. Burchfield's claim for services on May 5, 2006, upon a finding that Mr. Burchfield failed to fully cooperate in the vocational rehabilitation services. Mr. Burchfield then filed a subsequent application for the authorization of vocational rehabilitation services.

The Office of Judges considered Mr. Burchfield's request and held "[Mr. Burchfield's] testimony is sufficient to establish that [Mr. Burchfield] has had treatment within the five year period and has a vocational rehabilitation plan established for him within the five year limitation under West Virginia Code § 23-4-16." Thereafter, the Office of Judges held that the regulations do not mandate that the employer provide vocational rehabilitation services after benefits are closed; however, the regulations also do not provide that additional requests for benefits shall be barred after the termination of benefits. Thus, the Office of Judges granted Mr. Burchfield's request for vocational rehabilitation based upon his expressed willingness to participate in the program and the evidence establishing Mr. Burchfield is still entitled to a vocational rehabilitation program.

This authorization of vocational rehabilitation services was reversed by the Board of Review which held "[t]he self-insured employer denied services finding the claim had been closed in 2006 as a result of [Mr. Burchfield's] non-compliance with an approved vocational rehabilitation program." A protest to the May 5, 2006 Order closing the claim for vocational rehabilitation services was not provided. There is no evidence outside Mr. Burchfield's 2007 deposition testimony supporting the request for vocational rehabilitation and Mr. Burchfield's assertion that he was misled about the original rehabilitation plan. The Board of Review further found the Office of Judges reliance on West Virginia Code § 23-4-16 is not supported by the record and denied Mr. Burchfield's request for vocational rehabilitation services.

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 Court affirms the Board of Review Order denying Mr. Burchfield's request for vocational rehabilitation services.

Affirmed.

ISSUED: July 26, 2012

CONCURRED IN BY:

Justice Robin J. Davis

Justice Brent D. Benjamin

Justice Thomas E. McHugh

DISSENTING:

Chief Justice Menis E. Ketchum

Justice Margaret L. Workman