

**STATE OF WEST VIRGINIA**

**SUPREME COURT OF APPEALS**

**FILED**

October 17, 2012

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

**LEE H. SYLVESTER, Petitioner**

**vs.) No. 11-0265** (BOR Appeal No. 2044946)  
(Claim No. 2008024974)

**WEST VIRGINIA OFFICE OF  
INSURANCE COMMISSIONER and  
ALLEGHENY ENERGY SERVICE CORP., Respondent**

**MEMORANDUM DECISION**

Petitioner Lee H. Sylvester, by George Zivkovich, his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review.

This appeal arises from the Board of Review's Final Order dated January 18, 2011, in which the Board affirmed an August 17, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's decision to deny authorization for a referral to Dr. Gold for further treatment options. 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.

Mr. Sylvester was injured on December 18, 2007, while picking up some tubing while working as a maintenance mechanic. The injury was held compensable for lumbar strain by the claims administrator on December 28, 2007. He ceased his employment January 7, 2008. Over the next two years, Mr. Sylvester underwent four doctor's examinations, an MRI, and two x-rays to determine treatment options.

On October 15, 2009, the claims administrator denied authorization for a referral to Dr. Gold to assess whether Mr. Sylvester should receive surgery for his injury from October of 2009.

On April 1, 2010, Dr. James Dauphin examined Mr. Sylvester and found that he had achieved maximal medical improvement but recommended that Mr. Sylvester visit Dr. Gold to discuss the need for surgery.

Based on the findings of the claims administrator, Dr. Dauphin, and examinations by three other doctors who did not recommend surgery, the Office of Judges found that the referral was not reasonable and necessary medical treatment. The Board of Review held the Office of Judges was not clearly wrong in its decision and affirmed.

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: October 17, 2012**

**CONCURRED IN BY:**

Justice Robin J. Davis  
Justice Margaret L. Workman  
Justice Thomas E. McHugh

**DISSENTING:**

Chief Justice Menis E. Ketchum  
Justice Brent D. Benjamin