

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

FILED

October 2, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

PATRICIA L. GARRETT, Petitioner

vs.) No. 11-0340 (BOR Appeal No. 2044746)
(Claim No. 2008013212)

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
J. C. PENNEY COMPANY, Respondent**

MEMORANDUM DECISION

Petitioner Patricia L. Garrett, by Michael Froble, her attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. J. C. Penny Company, by H. Toney Stroud, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated January 18, 2011, in which the Board affirmed a May 28, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's February 27, 2009, decision denying Ms. Garrett's request to reopen the claim for consideration of temporary total disability benefits. 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.

Ms. Garrett was employed as a hairstylist at J. C. Penny Company when she fell and sustained multiple contusions to her left side on September 23, 2007. The claim was held compensable for contusion of the left buttock, hip, and knee. While receiving treatment for her compensable injuries, Ms. Garrett intermittently complained of low back pain, although on examination there was no tenderness in her lower back. On December 11, 2008, Dr. Bachwitt performed an independent medical evaluation and diagnosed Ms. Garrett with a left hip contusion and a left knee contusion. He found that she was at maximum medical improvement

and recommended a 0% permanent partial disability award. He also found that she could continue to work without restriction. Ms. Garrett's treating physician diagnosed her with a low back strain for the first time on January 9, 2009, fifteen months after the compensable injury. On February 17, 2009, Dr. Thaxton performed a medical record review and found that it was not clear how Ms. Garrett's current pain was related to the compensable injuries. A September 28, 2009, lumbar spine MRI revealed multilevel facet degenerative changes and circumferential disc bulging at L4-5, which resulted in contact with the exiting right L4 nerve root. A November 30, 2009, lumbar spine MRI also revealed mild disc bulging and degenerative changes.

In its Order affirming the claims administrator's February 27, 2009, decision, the Office of Judges held that based upon the preponderance of the evidence, the claim should not be reopened for the consideration of temporary total disability benefits. Ms. Garrett disputes this finding and asserts that the claim should be reopened, per her treating physician's request.

West Virginia Code §§ 23-5-2 (2005) and 23-5-3 (2009) provide that in order to obtain a reopening of a claim, the claimant must show in a written application that she has suffered a progression or aggravation of a compensable condition, or show some other fact or facts that were not previously considered and would entitle the claimant to greater benefits than she has already received.

The Office of Judges found that there was no indication that Ms. Garrett suffered an aggravation or progression of any of her compensable conditions. The Office of Judges also found that no new compensable conditions have been added to the claim that would require further consideration. Additionally, it appears that there is no previously unconsidered evidence presented in the current claim that would require further consideration. Finally, the Office of Judges found that the record indicates that Ms. Garrett's symptoms are due to osteoarthritis. The Board of Review reached the same reasoned conclusion in its Order of January 18, 2011. We agree with both the reasoning and conclusion of the Board of Review.

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 2, 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