

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

December 13, 2012

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

NORMAN COOPER, Petitioner

vs.) No. 11-0346 (BOR Appeal No. 2044817)
(Claim No. 2008014134)

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

MEMORANDUM DECISION

Petitioner Norman Cooper, by M. Jane Glauser, his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. Consolidation Coal Company, by Edward George III, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated January 24, 2011, in which the Board affirmed a June 23, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's May 6, 2009, decision granting Mr. Cooper an 8% permanent partial disability award, and the claims administrator's January 5, 2010, decision denying Mr. Cooper's request for authorization of the medication Vicodin. 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. Cooper is employed as an underground coal miner with Consolidation Coal Company. On September 11, 2007, he injured his cervical spine when he hit his head on the canopy of a mine buggy. The claim was held compensable for cervical sprain/strain and displacement of cervical intervertebral disc without myelopathy. After requests from his treating physician, he was granted authorization for a prescription for Vicodin in conjunction with his

work-related injuries, but the authorization was later terminated. Additionally, he was granted an 8% permanent partial disability award for the injuries to his cervical spine.

In its Order affirming the May 6, 2009, and January 5, 2010, claims administrator's decisions, the Office of Judges held that Mr. Cooper is entitled to an 8% permanent partial disability award for his compensable injuries, and that he is not a candidate for long-term opioid therapy and therefore is not entitled to authorization of the medication Vicodin. Mr. Cooper disputes both the denial of his request for authorization of the medication Vicodin and the 8% permanent partial disability award.

The Office of Judges found that it had previously denied a request from Mr. Cooper to authorize the use of Vicodin on November 25, 2009. In the November 25, 2009, decision, the Office of Judges found that the record did not establish that Mr. Cooper is a candidate for long-term opioid therapy because he failed to meet the guidelines contained in West Virginia Code of State Rules § 85-20-53.14b (2006). In its June 23, 2010, Order, the Office of Judges found that the evidence submitted in the instant claim is virtually identical to the record considered by the Office of Judges in the November 25, 2009, decision, with the single exception of a renewed authorization request from Mr. Cooper's treating physician stating only that he "needs this medication for pain control and functional improvement." The Office of Judges further found that this slight difference in the two records was not significant. The Office of Judges then held that because no new justification for authorizing the use of Vicodin had been presented, the November 25, 2009, decision of the Office of Judges, which was affirmed by the Board of Review and this Court, should stand.

Mr. Cooper was granted an 8% permanent partial disability award for injuries to his cervical spine based on the report of Dr. Grady, and he asserts that this award was premature because he has not undergone a bilateral upper extremity EMG, which was authorized by the Office of Judges on November 25, 2009, to determine whether he is entitled to an increased permanent partial disability award due to radiculopathy. In its June 23, 2010, decision, the Office of Judges found that there is no evidence in the record that the EMG was ever performed, and that no request to extend the time frame for the submission of evidence in order to allow additional time for the performance of the EMG was submitted. The Office of Judges further found that without the EMG results, there is nothing in the record to suggest that the conclusions of Dr. Grady were unreasonable, or that Mr. Cooper is entitled to an increased permanent partial disability award.

The Board of Review reached the same reasoned conclusions regarding both the denial of authorization for Vicodin and the permanent partial disability award in its decision of January 24, 2011. We agree with the reasoning and conclusions 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: December 13, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum

Justice Robin J. Davis

Justice Brent D. Benjamin

Justice Margaret L. Workman

Justice Thomas E. McHugh