

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

October 17, 2012

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

LOU ANN ELSWICK, Petitioner

vs.) No. 11-0380 (BOR Appeal No. 2044724)
(Claim No. 990037369)

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
CHARLESTON AREA MEDICAL CENTER, Respondent**

MEMORANDUM DECISION

Petitioner Lou Ann Elswick, by William B. Gerwig, her attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. Charleston Area Medical Center, by H. Dill Battle, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated February 2, 2011, in which the Board reversed a May 25, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges reversed the claims administrator's denial of authorization for a series of three cervical epidural 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 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.

In 1998, Ms. Elswick received an operation, a cervical discectomy and bone graft, on her neck that was compensable for a work-related injury. After the operation, including after being diagnosed as having achieved maximal medical improvement, she received treatment for pain at the Center for Pain Relief between September of 2002 and July of 2009. Her treatment consisted of various combinations of medications, physical therapy, spinal cord stimulation, and injections to her neck. During this period – on six occasions – doctors recommended Ms. Elswick discontinue injections because any pain relief from the treatments would likely be temporary.

In 2009, Ms. Elswick submitted a request for epidural injection treatment that did not include any request for physical therapy or active therapy. The claims administrator denied authorization for the claim, stating that claimant stated that past injections had only helped for a while, and that according to the American College of Occupational and Environmental Medicine (“ACOEM”) Guidelines, the requested treatments are “of questionable merit.” The West Virginia Worker’s Compensation Office of Judges reversed, based in large part upon the testimony of Ms. Elswick’s treating physician, Dr. Deer.

The West Virginia Worker’s Compensation Board of Review, in reversing the Office of Judges, relied upon two reports by doctors Korevaar and Bachwitt that found that continuing the epidural injections was not reasonable or medically necessary medical treatment. The Board of Review noted that the treatments were in excess of Rule 20 guidelines for Interventional Management of Chronic Pain at West Virginia Code of State Rules section 85-20-50.

On appeal, Ms. Elswick asserts only that the Office of Judges was not clearly wrong in its findings but did not give reasons for seeking treatment in excess of Rule 20, which makes treatment presumptively unreasonable. West Virginia Code of State Rules section 85-20-4.

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 so clearly wrong based upon the evidentiary record that even when all inferences are resolved in favor of the board’s findings, reasoning, and conclusions, there is insufficient support to sustain the decision. Therefore, the decision of the Board of Review is affirmed.

Affirmed.

ISSUED: October 17, 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