

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

FILED
September 12, 2013
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MARGARET R. PIERCE,
Claimant Below, Petitioner

vs.) No. 11-1629 (BOR Appeal No. 2046210)
(Claim No. 780010912)

WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER
Commissioner Below, Respondent

and

OWENS-ILLINOIS, INC.,
Employer Below, Respondent

MEMORANDUM DECISION

Petitioner Margaret R. Pierce, pro se, appeals the decision of the West Virginia Workers' Compensation Board of Review. The West Virginia Office of Insurance Commissioner, by Gary M. Mazezka, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated November 14, 2011, in which the Board affirmed a June 29, 2011, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's September 20, 2010, decision denying authorization for bilateral lower extremities electromyography (EMG) studies. The Court has carefully reviewed the records, written arguments, and appendices contained in the briefs, and the case is mature for consideration.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Rules of Appellate Procedure.

Ms. Pierce sustained a low back injury on August 17, 1977, unloading pallets while working for Owens-Illinois, Inc. Initially, she received conservative treatment but on October 11, 1979, Dr. Wang performed surgery at the L4-L5 disc of Ms. Pierce's lumbar spine. Following her surgery, Ms. Pierce went several years without receiving any treatment based on this claim. But on April 28, 2010, Ms. Pierce was examined by Dr. France, for complaints of radiating pain. Dr. France requested an EMG of Ms. Pierce's bilateral lower extremity to assess L4 nerve root damage in light of her difficulty walking and her right quadriceps numbness. Ms. Pierce was then referred to Dr. Kaplan, who could not find a causal connection between Ms. Pierce's compensable injury and her current condition. Dr. Kaplan noted that Ms. Pierce suffered from substantial neurological and musculoskeletal impairment but he did not attribute this condition to her August 17, 1977, injury. Dr. Kaplan stated that Ms. Pierce should not receive any further treatment, medications, or studies on the basis of this claim. Based on Dr. Kaplan's findings, the claims administrator denied authorization for a bilateral lower extremity EMG study on September 20, 2010. The Office of Judges affirmed the claims administrator's decision on June 29, 2011. The Board of Review affirmed the Office of Judges' Order on November 14, 2011, leading Ms. Pierce to appeal.

In its Order, the Office of Judges concluded that Ms. Pierce was not entitled to authorization for bilateral lower extremity EMG studies in connection to her compensable injury of August 17, 1977. The Office of Judges concluded that it was not reasonably required medical treatment in the context of her injury. According to the Office of Judges, Ms. Pierce did not meet her burden in showing that the requested studies were reasonably required medical treatment of her compensable injury. In making this determination, the Office of Judges relied on the report of Dr. Kaplan because he provided a greater explanation of Ms. Pierce's current symptoms and convincingly contrasted it with the symptoms of her compensable injury. The Office of Judges also found that Dr. Kaplan's report more directly related to the questions posed by the current litigation. The Board of Review adopted the findings of the Office of Judges and affirmed its Order.

We agree with the conclusion of the Board of Review and the findings of the Office of Judges. Ms. Pierce has not presented sufficient evidence to show that the requested bilateral lower extremity EMG studies are reasonably necessary and medically related to a compensable condition that she received more than thirty years ago. There is no evidence in the record which demonstrates a causal connection between the requested studies and her compensable injury. The Office of Judges had specific and credible reasons to rely on the report of Dr. Kaplan and the remaining evidence in the record supports its conclusion.

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: September 12, 2013

CONCURRED IN BY:

Chief Justice Brent D. Benjamin

Justice Robin J. Davis

Justice Margaret L. Workman

Justice Menis E. Ketchum

Justice Allen H. Loughry II