

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

November 19, 2012

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

CHARLES G. DELBERT, Petitioner

vs.) **No. 12-0486** (BOR Appeal No. 2046513)
(Claim No. 2001056879)

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

MEMORANDUM DECISION

Petitioner Charles G. Delbert, by M. Jane Glauser, his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. Consolidation Coal Co., by Edward M. George, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated March 22, 2012, in which the Board affirmed a September 22, 2011, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges denied authorization for attorney's fees sought for the reversal of a claim denying compensability for depression and chronic pain. 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. Delbert was injured on June 12, 2001, while hanging heavy cables in the coal mine where he worked. The claims administrator held the injury compensable. In May of 2010, Dr. Thomas Wack, diagnosed thoracic sprain, as well as chronic pain and mild depression. The claims administrator denied compensability for chronic pain and mild depression on September 3, 2010.

Mr. Delbert protested the September 3, 2010, Order. Mr. Delbert presented to the Office of Judges additional reporting by Dr. Wack that Mr. Delbert's depression and chronic pain were attributable to the compensable injury. The Office of Judges agreed with Mr. Delbert that the diagnoses were compensable.

In April of 2011, Mr. Delbert petitioned for attorney's fees for successful litigation protesting the September 3, 2010, Order. Attorney's fees are available to a claimant who is unreasonably denied authorization for medical benefits. West Virginia Code § 23-2C-21(c). A denial is unreasonable if "the private carrier or self-insured employer is unable to demonstrate that it had evidence or a legal basis supported by legal authority at the time of denial which is relevant and probative and supports the denial of the . . . authorization." *Id.*

The Office of Judges considered Mr. Delbert's petition for attorney's fees and denied the petition in its September, 28, 2011, Order. The Office of Judges stated that typically a finder of fact relies upon a psychiatric opinion and not a family practitioner when determining depression. The Office of Judges stated that because Dr. Wack was a family practitioner, denying adding depression and chronic pain syndrome was not unreasonable at the time the claims administrator entered it. Additionally, the Office of Judges reasoned that Mr. Delbert's history of spinal injuries further complicated determining causation for the chronic pain and depression. On appeal, the Board of Review affirmed, and agreed with the Office of Judges's findings of fact and conclusions of law.

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: November 19, 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