

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

FILED
October 7, 2015
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MARVIN PELFREY,
Claimant Below, Petitioner

vs.) No. 15-0045 (BOR Appeal No. 2049694)
(Claim No. 870053689)

SWVA, INC.,
Employer Below, Respondent

MEMORANDUM DECISION

Petitioner Marvin Pelfrey, by Edwin H. Pancake, his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. SWVA, Inc., by Steven K. Wellman, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated December 19, 2014, in which the Board affirmed a July 23, 2014, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's February 19, 2014, decision denying authorization for replacement hearing aids. 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.

Mr. Pelfrey worked in the steel plant for SWVA, Inc., and was exposed to occupational noise throughout his employment. On May 22, 1987, Mr. Pelfrey filed an application for workers' compensation benefits based on occupational noise induced hearing loss. His application included an evaluation by Gregory Wagner, M.D. Dr. Wagner noted that Mr. Pelfrey had a four frequency hearing loss based on an audiogram of good reliability. The claims administrator held the claim compensable. It also granted Mr. Pelfrey a 14% permanent partial

disability award based on a report by Charles Abraham, M.D. The claims administrator also granted Mr. Pelfrey hearing aids based on Dr. Abraham's evaluation.

Several years later, in 2001, Kathryn Seymour Monk, M.S., submitted a letter to the claims administrator indicating that the most recent audiogram revealed further reduction in hearing sensitivity. Based on this letter, the claims administrator granted Mr. Pelfrey authorization for standard binaural quality replacement hearing aids. Ms. Monk continued to treat Mr. Pelfrey following this authorization and found that he had ongoing deterioration of his hearing. On January 24, 2003, Mr. Pelfrey voluntarily retired from his employment with SWVA, Inc. Mr. Pelfrey, however, indicated that he had not worked since December 21, 2001.

Several years after his retirement, on February 12, 2014, Mr. Pelfrey was examined by Linda S. Blankenship at LSG Hearing Aid Centers, Inc. Ms. Blankenship's professional credentials were not clearly stated in the record, but she found that Mr. Pelfrey's current hearing aids were no longer suited to his needs. She found that he had further hearing loss in all four frequencies and recommended that he receive two digital vertex hearing aids. On February 19, 2014, the claims administrator denied the request from LSG Hearing Aid Centers because it was not based on an evaluation by an otologist or otolaryngologist as required under West Virginia Code of State Rules § 85-20-47.11 (2006). In a separate decision, however, the claims administrator granted authorization for LSG Hearing Aid Centers to repair Mr. Pelfrey's current hearing aids. On July 23, 2014, the Office of Judges affirmed the claims administrator's February 19, 2014, decision. The Board of Review affirmed the Order of the Office of Judges on December 19, 2014, leading Mr. Pelfrey to appeal.

The Office of Judges concluded that a preponderance of the evidence in the record did not establish that Mr. Pelfrey's request for replacement digital hearing aids is medically related and reasonably required to treat his compensable injury. The Office of Judges determined that the request for replacement hearing aids did not originate from the recommendation of an otologist or otolaryngologist as required under West Virginia Code of State Rules § 85-20-47.11. The Office of Judges noted that the request was made by Ms. Blankenship, whose professional qualifications were not included in the evidence in the record. It also found that it was not clear whether the audiogram upon which she based her recommendation was reliable. The Office of Judges determined that Mr. Pelfrey did not show that he needed replacement hearing aids and that his current aids were unrepairable. The Board of Review adopted the findings of the Office of Judges and affirmed its Order.

We agree with the conclusions of the Board of Review and the findings of the Office of Judges. Mr. Pelfrey has not demonstrated that his request for replacement hearing aids is medically related and reasonably required to treat his compensable occupational noise induced hearing loss. The recommendation for replacement hearing aids was not properly submitted to the claims administrator. West Virginia Code of State Rules § 85-20-47.11 requires that a "recommendation for the hearing aid must be based on the evaluation of an otologist or . . . otolaryngologist for reimbursement." The record does not show that Ms. Blankenship was an otologist or otolaryngologist, and the Office of Judges, therefore, properly disregarded her opinion. Mr. Pelfrey has also not demonstrated that his need for replacement hearing aids is

related to his employment, especially considering the record indicates that he has not been exposed to occupational noise since December 21, 2001, when he last worked for SWVA, Inc. The evidence in the record does not create a sufficient causal connection between any deterioration in Mr. Pelfrey's hearing and his compensable injury to justify authorizing the requested replacement hearing aids.

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 7, 2015

CONCURRED IN BY:

Chief Justice Margaret L. Workman
Justice Robin J. Davis
Justice Brent D. Benjamin
Justice Menis E. Ketchum
Justice Allen H. Loughry II