STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

ELIJAH P. MORRIS,
Claimant Below, Appellant

FILED
May 12, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

vs:) No. 35726 (BOR 2043602)
(Claim No. 2003039712)

WEST VIRGINIA OFFICE INSURANCE COMMISSION, PECHINEY ROLLED PRODUCTS, LLC, Appellees

MEMORANDUM DECISION

This appeal arises from the West Virginia Workers' Compensation Board of Review Final Order dated March 29, 2010, in which the Board affirmed a September 9, 2009, Order of the Workers' Compensation's Office of Judges. In its Order, the Office of Judges affirmed the Claims Administrator's order of June 11, 2009, that denied the appellant's request for physical therapy. Herein, appellant asserts that the physical therapy is reasonably required to treat his compensable injury and should be authorized.

The appeal was timely filed by the appellant, and response was filed by the West Virginia Office Insurance Commission. The Court has carefully reviewed the records, written arguments and appendices contained in the record, and the case is mature for consideration. Pursuant to Revised Rule 1(d), this matter should be, and hereby is, set for consideration under the Revised Rules of Appellate Procedure. Having considered the parties' submissions and the relevant decisions of the lower tribunals, the Court is of the opinion that the decisional process would not be significantly aided by oral argument. 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.

The underlying facts of this appeal are as follows: The appellant suffered an injury to his low back in the course of his employment on December 26, 2002, when a co-worker pulled a chair out from under him. The appellant struck the ground on his buttocks which caused him to suffer a low back injury. The appellant filed an application for workers' compensation benefits and the claim was held compensable for a contusion of the low back.

The appellant received medical treatment but alleges that he has continued to have periodic ongoing symptoms.

By request dated May 28, 2009, the appellant's treating physician, Dr. Michael Shramowiat, requested authorization for physical therapy. Initially, by order dated June 5, 2009, the self-insured employer denied the request on the grounds that physical therapy had previously been provided pursuant to an Administrative Law Judge decision and that the physical therapy notes were never received by the Administrator for review to determine if the appellant benefitted from the treatment. By subsequent order of June 11, 2009, this denial was again issued by a corrected decision, which the appellant protested.

In support of his protest the appellant tendered the July 16, 2009, medical statement completed by his physician, Dr. Shramowiat. In this medical statement, the doctor indicated that the appellant's condition was causally related to his work injury and that physical therapy evaluation and treatment should be authorized. Dr. Shramowiat indicated that the appellant's low back symptoms radiated into his left lower extremity with intermittent numbness and tingling and that he would benefit from a course of physical therapy.

In response, the employer submitted an order dated December 18, 2008, which stated that a request had been received for physical therapy and this had been approved by the Administrative Law Judge with the authorized dates from December 9, 2008, through January 26, 2009, and was for three times a week. The employer also submitted a June 29, 2007, report of Dr. Mukkamala which noted that the appellant had reached MMI from his injury occurring on December 26, 2002, and that physical therapy is at the discretion of the claims administrator and no extensive physical therapy is needed. Appellant was given 5% whole person impairment. The report noted that the appellant had received an injury in 1999 when he fell off of a stepladder at home and suffered a compression fracture of L1. He had some flare-ups of this problem off and on, but had done fairly well. He noted a March 18, 2004, MRI which showed approximately 60% anterior and central collapse in the body of L1 with resultant mild kyphosis. An MRI of March 17, 2006, showed a deformed appearance of L1 most likely the result of old trauma. There was no evidence of disc herniation, spinal or foraminal stenosis and no other abnormalities. He stated that the claim was accepted for thoracic or lumbosacral neuritis or radiculitis, sprain of the sacram, lumbago and lumbosacral sprain, as well as a contusion to the back.

The employer also submitted into evidence an Administrative Law Judge decision dated March 20, 2006, which affirmed a denial of a lumbar MRI in an order dated April 25, 2005. Additionally, the employer submitted various reports from Dr. Bachwitt pertaining to appellant's previous injury, along with a June 6, 2000, radiology report which showed minor spondylopathy of the lumbar spine with chronic degenerative disc disease of L5 and S1. There was spondylosis on L5 and an old anterior compression fracture of L1. Dr. Bachwitt's reports indicated that appellant sustained an L1 compression fracture on October 20, 1999,

which became slightly greater than 50%. He eventually allowed the appellant to return to work.

On September 9, 2009, the Office of Judges affirmed the Claims Administrator's order dated June 11, 2009, which denied the appellant's request for physical therapy. The OOJ reasoned that "the issue is whether or not the appellant is entitled to the requested medical treatment. The claims administrator must provide medically related and reasonably required medical treatment, healthcare or healthcare goods and services under W. Va. Code 23-4-3 and 85 CSR 20. . . Dr. Shramowiat's report of July 16, 2009 is not sufficient to rebut the evidence to grant the claimant additional physical therapy. . . There is no indication that the physical therapy in the past had helped him. . .it is found that the claimant's current problems are more likely a result of non-work related injury. . .the preponderance of the evidence indicates that the non-compensable injury in 1999, in which he suffered a compression fracture at L1, was more serious than the compensable injury of December 26, 2002. The claimant has already been granted physical therapy in this claim and there is no indication that it was helpful. . . there is no indication that the claimant's current problems are associated with his relatively minor injuries in this claim, which is now six and a half years old." Therefore, the Office of Judges determined that the Claims Administrator properly ruled by denying the appellant's request for additional physical therapy.

On March 29, 2010, the Board of Review affirmed the Office of Judges order of September 9, 2009, denying the appellant's request for physical therapy and adopted the findings of fact and conclusions of law found therein.

Herein, appellant maintains that the Administrative Law Judge has given excessive weight to the reports of Drs. Bachwitt and Mukkamala. Appellant asserts that while he did have a prior back injury, he also had an intervening injury to his back in the course of his employment, and that his physician's request verified that his need for physical therapy was causally related to his compensable injury.

Conversely, the employer asserts that the Board of Review correctly affirmed the Office of Judges by denying the request for physical therapy. The employer notes that the reliable evidence of record establishes that the appellant has reached a maximum degree of medical improvement, and that the record is clear that the appellant suffered a noncompensable injury in 1999, resulting in a compression fracture. This injury was much more serious than the lumbar strain the appellant sustained. The appellant was previously granted physical therapy in this claim which was not helpful. There is simply no reliable evidence to establish the appellant's current need for treatment. The only evidence submitted by the appellant was a one sentence request by Dr. Shramowiat, which failed to explain how the current symptoms are related to the compensable injury.

Pursuant to W. Va. Code §23-4-3 and 85 CSR 20, the claims administrator must provide medically related and reasonably required medical treatment, health care or healthcare goods and services. In making this determination, the treatment must be for an injury or disease received in the course of or as a result of employment. West Virginia Code §23-4-1 provides that the resolution of any issue shall be based on a weighing of all evidence pertaining to the issue and a finding that a preponderance of the evidence supports the chosen manner of resolution. The process of weighing credibility shall include, but not be limited to, an assessment of the relevance, credibility, materiality and reliability that the evidence possesses in the context of the issue presented. No issue may be resolved by allowing certain evidence to be dispositive simply because it is reliable and is most favorable to a party's interests or position. The resolution of issues in claims for compensation must be decided on the merits and not according to any principle that requires statutes governing workers' compensation to be liberally construed because they are remedial in nature.

CSR §85-20-21 provides that the Commission, Insurance Commissioner, private carrier or self-insured employer, whichever is applicable, may pay for treatment of a condition which was not caused by the injury only if the Commission, Insurance Commissioner, private carrier or self-insured employer, whichever is applicable, determines, in its sole discretion, that the unrelated condition is preventing recovery by aggravating the occupational injury. Any unrelated condition must be reported before payment is considered. Pre-existing conditions which prevent recovery but do not aggravate the compensable injury shall not be covered.

After carefully reviewing the briefs of the parties and the evidence of record, we find that the Board of Review's order dated March 29, 2010, is not in clear violation of constitutional or statutory provisions, clearly the result of erroneous conclusions of law, or 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. The evidence demonstrates that the injury which is the subject of this appeal occurred on December 26, 2002. The appellant has already been given some physical therapy as a result of the incident, but now, several years later, he is again requesting more. The Dr. Shramowiat's report of July 16, 2009, is not sufficient to rebut the evidence that the appellant has already received physical therapy and no progress notes were ever submitted. There is no indication that physical therapy helped him in the past. Also, the appellant suffered a more serious injury in 1999, and thus, it is reasonable to infer that appellant's current problems are more likely the result of the 1999 injury rather than the less serious contusion and sprain he received in 2002.

Accordingly, for the foregoing reasons, the decision of the Board of Review dated March 29, 2010, affirming the Office of Judges' order dated September 9, 2009, denying appellant's request for physical therapy is affirmed.

Affirmed.

ISSUED: May 12, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman
Justice Robin J. Davis
Justice Brent D. Benjamin
Justice Menis E. Ketchum II
Justice Thomas E. McHugh