

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

November 16, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

RICHARD J. BROUSSEAU, Petitioner

vs.) **No. 11-0227** (BOR Appeal No. 2044698)
(Claim No. 2002017086)

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
WHEELING-PITTSBURGH STEEL
CORPORATION, Respondent**

MEMORANDUM DECISION

Petitioner Richard J. Brousseau, by Patrick K. Maroney, appeals the decision of the West Virginia Workers' Compensation Board of Review denying certain medical benefits. Wheeling-Pittsburgh Steel Corporation, by Lucinda Fluharty, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated January 6, 2011, in which the Board affirmed a May 25, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's March 31, 2009, order denying authorization for treatment of CMT, extremity manipulation, EMS, in office left shoulder strengthening exercise, C3 x-ray, internal and external rotation, and left shoulder x-rays from February 25, 2009 to March 31, 2009. 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. Brousseau suffered a compensable neck and left shoulder injury on August 25, 2001, while shoveling coke for approximately two hours. He underwent three surgical procedures to his left shoulder, with the last one taking place on February 12, 2008. Mr. Brousseau has

participated in physical therapy following each surgery. His claim has been held compensable for a left shoulder sprain / strain, cervical sprain / strain, and chronic subluxation of his left shoulder.

During the course of his treatment, Mr. Brousseau was referred to Dr. Perzanowski, a chiropractor. Dr. Perzanowski rendered no treatment and only saw Mr. Brousseau once. Dr. Perzanowski requested authorization for the above-listed treatments. These treatments were denied, however, following a file review of Mr. Brousseau's medical records by Robert A. Blank, D.C.

Dr. Blank's review included records related to a prior cervical spine fusion surgery at C3-C6 in 1983 following an automobile accident. Dr. Blank found that the symptoms of which Mr. Brousseau continues to complain, nearly eight years post compensable injury, are inconsistent with a sprain / strain and are more suggestive of non-allowed conditions. In short, Dr. Blank stated that the evidence does not substantiate the medical necessity or appropriateness of the requested treatment as it relates to Mr. Brousseau's compensable injury. With specific respect to the requested left shoulder manipulation, Dr. Blank found such treatment to be contraindicated by Mr. Brousseau's genetic laxity of joints. Dr. Blank also found no new or changed circumstances to reasonably support left shoulder x-rays, and he opined that a left shoulder strengthening exercise program would be redundant because Mr. Brousseau participated in extensive post-operation physical therapy following his shoulder injuries. Dr. Blank stated that Mr. Brousseau should be well versed in a home exercise program.

Mr. Brousseau was also evaluated by Ira J. Ungar, M.D. Mr. Brousseau reported to Dr. Ungar that he has had no change in cervical symptoms from before his compensable injury, following his prior fusion surgery, to after his compensable injury. Dr. Ungar found that Mr. Brousseau had reached maximum medical improvement.

In affirming the denial of Mr. Brousseau's requested medical benefits, the Board of Review, by reference to the Office of Judges, noted that Mr. Brousseau has failed to establish that the requested treatments are medically related or reasonably required to treat his compensable injury. The Board of Review relied on Dr. Blank's record review, which included records from Mr. Brousseau's prior cervical spine fusion surgery in addition to records related to his subject claim. Ultimately, the Board of Review found insufficient evidence that the treatment requested is medically related and reasonably necessary.

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 16, 2012

CONCURRED IN BY:

Justice Robin Jean Davis
Justice Margaret L. Workman
Justice Thomas E. McHugh

DISSENTING:

Chief Justice Menis E. Ketchum
Justice Brent D. Benjamin