

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

July 15, 2013

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

EDWARD D. BIRCH,
Claimant Below, Petitioner

vs.) **No. 11-1361** (BOR Appeal No. 2045543)
(Claim No. 2004040678)

SWVA, INC.,
Employer Below, Respondent

MEMORANDUM DECISION

Petitioner Edward D. Birch, by Edwin Pancake, his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. SWVA, Inc., by H. Toney Stroud¹, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated September 1, 2011, in which the Board reversed a January 20, 2011, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges reversed the claims administrator's July 9, 2010, decision denying a request for authorization of the medication Lortab. 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. Birch was working for SWVA, Inc. when he injured his back while at work on March 9, 2004. On July 9, 2010, the claims administrator denied a request from Dr. Caraway for authorization of the medication Lortab. The Office of Judges reversed the claims administrator's decision, and held that the preponderance of the evidence established that the requested medical benefits were medically related and reasonably required treatment for the compensable injury.

¹ On February 11, 2013, this Court received notification that SWVA, Inc. is now represented by Steven Wellman.

The Board of Review reversed the Office of Judges' Order, and reinstated the claims administrator's decision denying authorization for the medication Lortab. On appeal, Mr. Birch argues that West Virginia Code of State Rules § 85-20-53.14 (2006) is only a guideline, and that the evidence he provided including two failed back surgeries, failed spinal injections, and intrathecal pain pump demonstrate that the use of Lortab outside the guidelines is justified. SWVA, Inc. maintains that the evidence provided does not establish that treatment outside of the guidelines is justified.

The Board of Review held that the record lacked the documentation necessary to establish that the medication Lortab was medically necessary and reasonably required in the treatment of the compensable injury of March 9, 2004. Under West Virginia Code of State Rules § 85-20-53.14 "Schedule III drugs should be prescribed on an outpatient basis for no longer than six weeks after initial injury or following a subsequent operative procedure." The Board of Review noted that Mr. Birch last had surgery on his back in 2005. Further, it noted that Dr. Caraway's documentation did not provide specific detailed information to justify treatment outside the guidelines. Thus, the Board of Review concluded that the authorization for the medication Lortab should be denied, and reversed the Office of Judges' Order. We agree with the reasoning and conclusions of the Board of Review.

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: July 15, 2013

CONCURRED IN BY:

Chief Justice Brent D. Benjamin
Justice Robin J. Davis
Justice Allen H. Loughry II

DISSENTING:

Justice Margaret L. Workman
Justice Menis E. Ketchum