

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

DANNY R. WARD, Petitioner

November 15, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

vs.) No. 101233 (BOR Appeal No. 2044129)
(Claim No. 2005042769)

WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
IRON GATE, INC., Respondent

MEMORANDUM DECISION

This appeal arises from the West Virginia Workers' Compensation Board of Review's Final Order dated September 2, 2010, in which the Board affirmed a January 27, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's October 9, 2008, decision denying Mr. Ward's request for a neurological consultation and physical therapy for both knees; the claims administrator's November 17, 2008, decision to close the claim for temporary total disability benefits because Mr. Ward is no longer eligible to receive temporary total disability benefits; and the claims administrator's February 11, 2009, decision to award Mr. Ward an additional \$2,205.84 in underpaid temporary total disability benefits. The appeal was timely filed by the petitioner. The Court has carefully reviewed the records, written arguments, and appendices contained in the petition, and the case is mature for consideration.

Pursuant to Rule 1(d) of the Revised Rules of Appellate Procedure, this Court is of the opinion that this matter is appropriate for consideration under the Revised Rules. 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.

In its Order, the Office of Judges held that Mr. Ward failed to prove that physical therapy of both knees and a neurological consultation were medically necessary and

reasonably required in the instant claim. Specifically, the Office of Judges found that Mr. Ward is not entitled to physical therapy for both knees because a knee injury is not a compensable component of the instant claim, and, therefore, the treatment cannot be authorized. In making its decision, the Office of Judges noted that Mr. Ward had suffered two previous knee injuries, one of which required surgery. The record indicates that neither of these prior knee injuries are related to the instant claim. The Office of Judges found that Mr. Ward is not entitled to a neurological consultation because his physician, Dr. Serfontein, failed to explain how this request was related to Mr. Ward's compensable injuries.

The Office of Judges found that Mr. Ward is not entitled to a continuation of temporary total disability benefits, and relied upon W. Va. Code § 23-4-6(c), which provides that a claimant is not entitled to more than 104 weeks of temporary total disability benefits. The Office of Judges found that the claims administrator held that Mr. Ward had received 104 weeks of temporary total disability benefits in the instant claim, and that Mr. Ward had introduced no evidence to refute that holding.

Finally, the Office of Judges found that Mr. Ward is not entitled to any additional back wages in the instant claim. The Office of Judges relied on W. Va. Code § 23-4-6(b), which provides that an injured employee is entitled to a maximum of sixty-six and two-thirds percent of his average weekly wage earnings, wherever earned, at the date of injury and that this award cannot exceed one hundred percent of the average weekly wage in West Virginia. The Office of Judges noted that based upon the evidence of record, Mr. Ward asserts that his employer had under reported his wages, and the claims administrator awarded him an additional \$2,205.84 in temporary total disability benefits. The Office of Judges found no evidence to support Mr. Ward's contention that he is entitled to additional compensation beyond that granted by the claims administrator. The Board of Review reached the same reasoned conclusion in its decision of September 2, 2010.

For the foregoing reasons, we find that the decision of the Board of Review is not in clear violation of constitutional or statutory provision, clearly the result of erroneous conclusions of law, or is based upon the Board's material misstatement or mischaracterization of particular components of the evidentiary record. Therefore, the decision of the Board of Review is affirmed.

Affirmed.

ISSUED: November 15, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman

Justice Robin J. Davis

Justice Brent D. Benjamin
Justice Menis E. Ketchum
Justice Thomas E. McHugh