

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

MAHALA KIRBY, Petitioner
vs.) **No. 101268 (BOR Appeal No. 2044329)**
(Claim No. 2009067309)

FILED
June 27, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
GREENBRIER VALLEY MEDICAL CENTER, Respondent

MEMORANDUM DECISION

Petitioner, Mahala Kirby, by Reginald D. Henry, appeals the Board of Review's order holding her claim compensable for right shoulder strain and rotator cuff tendinosis only. Greenbrier Valley Medical Center, by Maureen Kowalski, its attorney, filed a timely response.

This appeal arises from the West Virginia Workers' Compensation Board of Review Final Order dated September 1, 2010, in which the Board affirmed a March 5, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's April 10, 2009, Order holding Ms. Kirby's claim compensable for right shoulder strain and rotator cuff tendinosis only. 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 parties' submissions 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 fo 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.

Ms. Kirby sustained a right shoulder injury on October 2, 2008. The September 1, 2010, Board of Review Order affirmed the March 5, 2010, Office of Judges' Order, which held Ms. Kirby's claim compensable for right shoulder strain and rotator cuff tendinosis only, despite Ms. Kirby's request to add thoracic outlet syndrome as a compensable component. Ms. Kirby argues that a preponderance of the evidence supports the addition of thoracic outlet syndrome to her claim. Ms. Kirby acknowledges that she suffered a serious right shoulder injury on January 22, 2008, prior to the subject October 2, 2008, injury, but she states that her medical records fail to evidence the existence of thoracic outlet syndrome prior to October 2, 2008. Moreover, Dr. J. M. Garlitz, Ms. Kirby's treating physician, has requested that thoracic outlet syndrome be added as a compensable component.

The Office of Judges, however, noted that Ms. Kirby was still receiving treatment for her prior injury at the time she sustained the subject injury. Although Ms. Kirby had been released to sedentary work following this earlier injury, there is no evidence of any improvement in her work restrictions. Dr. Garlitz also failed to relate thoracic outlet syndrome to Ms. Kirby's subject injury. In fact, the medication Dr. Garlitz prescribed for her thoracic outlet syndrome had already been prescribed and was being reimbursed through workers' compensation in Virginia for Ms. Kirby's prior injury. In short, there was no evidence relating thoracic outlet syndrome to the subject compensable injury. The Board of Review reached the same reasoned conclusion in affirming the Office of Judges in its September 1, 2010, decision.

For the foregoing reasons, we find that the decision of the Board of Review is not in clear violation of constitutional or statutory provision, nor is it clearly the result of erroneous conclusions of law, nor is it based upon the Board's material misstatement or mischaracterization of the evidentiary record. Therefore, the denial of Ms. Kirby's request to add thoracic outlet syndrome as a compensable component is affirmed.

Affirmed.

ISSUED: **June 27, 2012**

CONCURRED IN BY:

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