

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

November 19, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

CHARLES G. DELBERT, Petitioner

vs.) **No. 11-0465** (BOR Appeal No. 2044980)
(Claim No. 330051738)

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
CONSOLIDATION COAL CO., Respondent**

MEMORANDUM DECISION

Petitioner Charles G. Delbert, by M. Jane Glauser, his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. Consolidation Coal Co., by Edward M. George, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated February 15, 2011, in which the Board affirmed an August 6, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's Order denying authorization for pain consultation with Dr. Richard Vaglienti. 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. 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. Delbert was injured on February 13, 1999, while bending and shoveling in the coal mine where he worked. He struck his head on a low ceiling. The claims administrator held the injury compensable for neck sprain and cervical disc placement. In August of 2009, Dr. Thomas Wack, Mr. Delbert's treating physician, requested authorization for an MRI of the cervical spine and an appointment with Dr. Julian Bailes, a neurosurgeon. The claims administrator granted the requests on September 14, 2009, and Mr. Delbert went through with the MRI.

Mr. Delbert apparently never visited Dr. Bailes for his neurological consultation, and the reason as to why he did not do so is under dispute. In the meantime, on October 30, 2009, Dr. Wack requested authorization for Mr. Delbert to see Dr. Richard Vaglienti for a pain consultation. On November 2, 2009, the claims administrator denied authorization to consult with Dr. Vaglienti for pain control until it had received the report from Dr. Bailes's consultation.

Mr. Delbert alleges that when Dr. Wack attempted to make an appointment with Dr. Bailes, Dr. Bailes requested Mr. Delbert first visit Dr. Vaglienti for pain management. Mr. Delbert states that he sent an email to the claims administrator to that effect on November 30, 2009, but the Office of Judges did not mention the email in its August 6, 2010, Order.

The Office of Judges considered Mr. Delbert's protest and not only affirmed the denial of authorization for consultation with Dr. Vaglienti, but also concluded in its August 6, 2010, Order that Mr. Delbert had refused to schedule or attend an appointment with Dr. Bailes. Mr. Delbert appealed the decision, arguing that the claim should be remanded to consider the email, which he argued directly disputed the finding that Mr. Delbert refused to schedule an appointment with Dr. Bailes. The Board of Review affirmed the Office of Judges in its February 15, 2011, Order without mentioning the request for remand or the email. The Office of Judges erred by not making a finding as to whether Dr. Bailes recommended that Mr. Delbert visit Dr. Vaglienti before consulting with Dr. Bailes.

For the foregoing reasons, we find that the decision of the Board of Review is clearly the result of erroneous conclusions of law. Therefore, the decision of the Board of Review is reversed and remanded with instructions to order the Office of Judges to reconsider Mr. Delbert's protest of the claims administrator's order, and make a finding of fact as to whether it was Dr. Bailes's medical opinion that Mr. Delbert to receive pain consultation in advance of his neurological consultation.

Reversed and remanded.

ISSUED: November 19, 2012

CONCURRED IN BY:

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

DISSENTING:

Justice Robin J. Davis