

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

January 14, 2014

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

**DAVID MYERS,
Claimant Below, Petitioner**

vs.) **No. 12-0759** (BOR Appeal No. 2046728)
(Claim No. 2007216191)

**MCELROY COAL COMPANY,
Employer Below, Respondent**

MEMORANDUM DECISION

Petitioner David Myers, by Jonathan C. Bowman, his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. McElroy Coal Company, by Edward M. George III, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated May 25, 2012, in which the Board affirmed a December 6, 2011, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's February 1, 2011, decision denying requests to add cervical disc displacement as a compensable condition, authorize a bilateral EMG of the upper extremities, and authorize physical therapy three times a week for four weeks. 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. Myers was injured on January 9, 2007, when a piece of rock fell on him. His claim was held compensable for a rotator cuff sprain; neck sprain; contusion of the shoulder region; and contusion of the face, scalp, and neck. An MRI was taken two days after the injury. It showed tiny anterior extradural impressions from C2-C7. An x-ray taken the same day showed degenerative changes of the cervical spine. No herniated discs were noted on either test. An MRI taken four years later, on January 21, 2011, showed that Mr. Myers was suffering from a disc

herniation at C2-C3. He requested that the diagnosis of cervical herniated disc be added to the claim. He also requested authorization for a bilateral EMG of the upper extremities and physical therapy. All three of his requests were denied by the claims administrator on February 1, 2011.

The Office of Judges affirmed the claims administrator's decision on December 6, 2011. The Office of Judges found that Mr. Myers failed to demonstrate by a preponderance of the evidence that the condition was the result of the work-related injury. The Office of Judges based its decision on the fact that an MRI taken shortly after the injury showed no indication of a herniated cervical disc. An MRI taken four years later showed a herniated cervical disc. Because the MRI taken two days after the injury did not show a disc herniation, the Office of Judges concluded that it was not a compensable component of the claim. Since the requested testing and treatment arose from the herniated cervical disc, the Office of Judges found that it was properly denied.

The Board of Review adopted the findings of fact and conclusions of law of the Office of Judges in its May 25, 2012, decision. This Court agrees with the reasoning and conclusions of the Board of Review. Mr. Myers's first MRI, taken two days after the injury, showed no indication of a herniated disc in his cervical spine. The MRI taken four years later shows that he has a herniated disc, but the evidence of record does not establish that the herniated disc is the result of the work-related injury. Since the requested testing and treatment are necessitated by the herniated disc, it must be denied. Accordingly, the decision of the Board of Review is clearly supported by the evidentiary record.

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: January 14, 2014

CONCURRED IN BY:

Chief Justice Robin J. Davis
Justice Margaret L. Workman
Justice Menis E. Ketchum
Justice Allen H. Loughry II

Justice Brent D. Benjamin, Not Participating