

**STATE OF WEST VIRGINIA**

**SUPREME COURT OF APPEALS**

**FILED**

October 7, 2014

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

**DOLLY PENNINGTON,**  
**Claimant Below, Petitioner**

vs.) **No. 13-0662** (BOR Appeal No. 2048070)  
(Claim No. 2011032824)

**HEALTH MANAGEMENT ASSOCIATES,**  
**Employer Below, Respondent**

**MEMORANDUM DECISION**

Petitioner Dolly Pennington, by Anne L. Wandling, her attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. Health Management Associates, by Daniel G. Murdock, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated May 30, 2013, in which the Board affirmed a January 16, 2013, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's March 13, 2012, decision denying authorization for an anterior discectomy with decompression of the spinal cord and nerve roots. 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 that the Board of Review's decision is based upon a material misstatement or mischaracterization of the evidentiary record. This case satisfies the "limited circumstances" requirement of Rule 21(d) of the Rules of Appellate Procedure and is appropriate for a memorandum decision rather than an opinion.

Ms. Pennington worked for Health Management Associates as a housekeeper. On April 2, 2011, she was pushing and pulling a bed when she felt pain in her back and neck. Following the injury, an MRI was taken of her cervical spine which showed a disc protrusion at the C4-5 and C5-6 discs and a disc herniation at the C6-7 disc with a mild degree of spinal stenosis. The claims administrator held the claim compensable for an upper back and neck injury. Ms. Pennington then came under the care of Norman Mayer, M.D., who found that Ms. Pennington

had pain in her neck and numbness radiating into her fingertips. Dr. Mayer found that she had received physical therapy on her cervical spine which did not significantly reduce her pain. Dr. Mayer suggested that Ms. Pennington undergo an anterior cervical discectomy to repair her herniated disc and spinal stenosis. An electromyogram (EMG) was then conducted which showed that she had C7 radiculopathy on her left side. Dr. Mayer's request was submitted to Kenneth Lee, M.D., who reviewed Ms. Pennington's records and found that the requested surgery was not medically necessary. On March 13, 2012, the claims administrator denied a request for an anterior discectomy with decompression of the spinal cord and nerve roots based on Dr. Lee's report. Dr. Mayer then testified by deposition that the requested discectomy and decompression surgery was medically necessary to treat Ms. Pennington's cervical condition. Dr. Mayer also stated that her cervical pain had grown progressively worse since he first began to treat her. Adnan N. Silk, M.D., then evaluated Ms. Pennington. He found that Ms. Pennington had a possible herniated C6-7 disc with nerve root compression. Dr. Silk also believed that these problems were primarily related to the compensable injury. Dr. Silk, however, recommended that she receive conservative treatment, including physical therapy, pain management, and epidural injections prior to undergoing surgical treatment. On January 16, 2013, the Office of Judges affirmed the claims administrator's decision. The Board of Review affirmed the Order of the Office of Judges on May 30, 2013, leading Ms. Pennington to appeal.

The Office of Judges concluded that the request for cervical disc surgery was premature and should not be authorized. The Office of Judges determined that Ms. Pennington had not fully utilized her non-surgical treatment options, including physical therapy and pain management, as directed by West Virginia Code of State Rules § 85-20-36.3(f) (2006). In reaching this conclusion, the Office of Judges relied on the opinion of Dr. Silk. It also found that if these conservative treatment methods were unsuccessful, Ms. Pennington could submit a second request for the surgery. The Board of Review adopted the findings of the Office of Judges and affirmed its Order.

The decision of the Board of Review was based on a material misstatement or mischaracterization of the evidence. Ms. Pennington has demonstrated that the requested cervical anterior discectomy with decompression is medically related and reasonably required to treat her compensable cervical injury. The treatment notes and deposition testimony of Dr. Mayer demonstrate that she had a disc herniation at the C6-7 disc which is related to her compensable injury. His treatment notes further show that Ms. Pennington has cervical radiculopathy and her pain has progressed despite some conservative treatment which included physical therapy. Dr. Mayer's diagnosis of Ms. Pennington's cervical problems is supported by the MRI and EMG evidence in the record. The decision of the Board of Review did not sufficiently consider evidence in both Dr. Mayer and Dr. Silk's reports which showed that Ms. Pennington had already received physical therapy and that this conservative treatment method did not significantly relieve her pain. The opinion of Dr. Mayer and the objective evidence in the record demonstrate that Ms. Pennington is entitled to the requested cervical discectomy under West Virginia Code of State Rules § 85-20-36.3(f).

For the foregoing reasons, we find that the decision of the Board of Review is based on a material misstatement or mischaracterization of particular components of the evidentiary record.

Therefore, the decision of the Board of Review is reversed and remanded with instructions to authorize the requested anterior discectomy with decompression of the spinal cord and nerve roots.

Reversed and Remanded.

**ISSUED: October 7, 2014**

**CONCURRED IN BY:**

Chief Justice Robin J. Davis

Justice Brent D. Benjamin

Justice Margaret L. Workman

Justice Menis E. Ketchum

Justice Allen H. Loughry II