

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

FILED
October 7, 2015
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

RITA H. JONES,
Claimant Below, Petitioner

vs.) **No. 14-1241** (BOR Appeal No. 2049488)
(Claim No. 2003052220)

WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER,
Commissioner Below, Respondent

and

TRUMBULL CORPORATION,
Employer Below, Respondent

MEMORANDUM DECISION

Petitioner Rita H. Jones, by M. Jane Glauser, her attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. The West Virginia Office of the Insurance Commissioner, by David L. Stuart, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated October 29, 2014, in which the Board affirmed a May 9, 2014, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's September 23, 2013; July 26, 2012; and April 18, 2012, decisions denying the addition of depression to the claim, authorization of psychotherapy treatment, and authorization of the medication Escitalopram. 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.

Ms. Jones, a flagger, was injured in the course of her employment on May 14, 2003, when she was struck by a motor vehicle. The claim was held compensable for headache; dizziness; closed fracture of the sacrum/coccyx; closed fracture of the tibia; bulging lumbar disc; coccydynia; head injury; post-concussion syndrome; migraine headache; injury to lumbosacral plexus nerve root; ataxia; constipation; sprain/strain of the neck; diplopia; abnormal involuntary movements; and contusions to the head, left shoulder, hip, knee, and left leg. A psychiatric independent medical evaluation was performed by Bobby Miller, M.D., in April of 2006 to determine what, if any, psychological conditions Ms. Jones developed as a result of the compensable injury. Dr. Miller found that she met the description for malingering. He diagnosed factitious disorder and somatization disorder or conversion disorder. He concluded she was not a valid reporter of her symptoms and her reported disability far exceeded the objective evidence.

Marietta Babayev, M.D., Ms. Jones's treating physician, requested a psychiatric evaluation and treatment for depression in June of 2009. She continued to request an evaluation and treatment and noted symptoms of depression through May of 2010. Ms. Jones was then treated by Russell Voltin, M.D., who diagnosed dysthymic disorder and prescribed Escitalopram. In a psychiatric/psychological statement, he opined that Ms. Jones suffers from depression due to the compensable injury. He noted she has a diagnosis of dysthymic disorder, which is treated with Escitalopram.

The claims administrator denied requests for Escitalopram on April 18, 2012, and July 26, 2012. The Office of Judges reversed the decisions and authorized Escitalopram for six months in its June 5, 2013, Order. It found that the medication is for the treatment of depression and/or generalized anxiety disorder, and the claims administrator denied the request for the medication based on a finding that depression and anxiety are not compensable components of the claim. The Office of Judges noted that this Court reversed January 11, 2011, and May 5, 2011, Board of Review decisions denying requests for a psychiatric consultation and treatment for depression. *Jones v. W.Va. Office of the Ins. Comm'r*, No. 11-0293 (Sept. 14, 2012) (memorandum decision). However, the Office of Judges found that we did not add depression as a compensable component of the claim. It determined that our decision did not negate the necessity of an analysis of whether or not the medication is medically related and reasonably necessary to treat the compensable injury. The Office of Judges found no evidence in the record demonstrating if the claims administrator issued an Order stating whether depression was a compensable component of the claim. The Office of Judges ultimately concluded that depression was a symptom of post-concussion syndrome, a compensable diagnosis, and authorized the requested medication. It specifically noted that its decision did not rule on whether depression was a separate compensable component of the claim.

The Board of Review reversed the Office of Judges' decision on January 30, 2014. It found that the Office of Judges' Order was characterized by an abuse of discretion because the requested treatment cannot be addressed until it is determined whether the diagnosis for which the treatment was requested is a compensable component of the claim. The Board of Review determined that on June 6, 2012, Dr. Voltin reported that Ms. Jones suffers from depression and memory impairment due to the compensable injury. He prescribed Lexapro for the diagnosis of

dysthymic disorder. The Board of Review found that the issue of whether or not a psychiatric condition will be included as a compensable component of the claim has not been resolved. In *Jones v. West Virginia Office of the Insurance Commissioner*, No. 11-0293 (Sept. 14, 2012) (memorandum decision), this Court remanded the claim for psychiatric evaluation. Ms. Jones was evaluated by Bobby Miller, M.D., a psychiatrist, on October 16, 2012. Dr. Miller opined that she had an undifferentiated somatoform disorder, malingering, and mixed personality disorder. He recommended no psychiatric treatment. The Board of Review found no indication in the record that the claims administrator entered an Order addressing the compensability of a psychiatric condition after it received Dr. Miller's report. The Board of Review concluded that Dr. Voltin's request for Lexapro was based on the diagnosis of dysthymic disorder, which is not currently a compensable condition in the claim. The Board of Review therefore remanded the case to the claims administrator with instructions to issue an Order determining whether dysthymic disorder and/or another psychiatric condition are compensable components of the claim and to issue a new ruling on the requests for Lexapro.

On February 25, 2014, the Board of Review vacated its January 30, 2014, decision. It reversed the Office of Judges' June 5, 2013, Order and remanded the case to the Office of Judges for a ruling on the claims administrator's April 18, 2012; July 26, 2012; and September 23, 2013, decisions. The Office of Judges ultimately affirmed the claims administrator's decisions in its May 9, 2014, Order. The Office of Judges concluded that depression was not a compensable component of the claim. It found that Dr. Voltin examined Ms. Jones on December 21, 2010, and diagnosed dysthymic disorder for which he prescribed Escitalopram. In his June 6, 2012, psychiatric/psychological statement, he opined that she suffered from depression due to the injury. He again noted a diagnosis of dysthymic disorder. The Office of Judges found that Dr. Miller's 2006 psychiatric independent medical evaluation found evidence of malingering. He diagnosed factitious disorder, somatoform disorder, or conversion disorder. He did not think these conditions were compensable. Dr. Miller conducted a second psychiatric independent medical evaluation in October of 2012 in which he diagnosed somatoform disorder and malingering. He again opined that the conditions were not compensable and recommended no psychiatric treatment. The Office of Judges concluded that the only psychiatric independent medical evaluations of record are those of Dr. Miller. In both reports he determined Ms. Jones suffered from somatoform disorder and malingering, which are not compensable conditions. The Office of Judges determined that Dr. Voltin's reports could not be given greater weight than the more detailed and extensive 2012 report of Dr. Miller. Because depression was determined not to be a compensable component of the claim, the Office of Judges concluded that treatment for the condition could not be authorized. The Board of Review adopted the findings of fact and conclusions of law of the Office of Judges and affirmed its Order on October 29, 2014.

On appeal, Ms. Jones argues that the Office of Judges placed great weight on Dr. Miller's 2006 independent medical evaluation, which was determined by this Court to be premature. She also argues that post-concussion syndrome, chronic pain, and concussion are compensable components of the claim and depression is a recognized symptom of all three diagnoses. She asserts that treatment for depression should therefore be authorized.

After review, we agree with the reasoning of the Office of Judges and the conclusions of the Board of Review. A preponderance of the evidence indicates that Ms. Jones's depression is not related to her compensable injury. Dr. Miller performed two psychiatric independent medical evaluations in this case. Though this Court found that his 2006 evaluation was premature, his 2012 evaluation is reliable. He determined that Ms. Jones suffers from non-compensable psychiatric conditions and that she requires no psychiatric treatment. Dr. Babayev repeatedly requested evaluation for depression and indicated that Ms. Jones had been displaying symptoms of depression since the compensable injury. However, there is no indication in the evidentiary record that she reported symptoms of depression prior to 2009. Dr. Voltin also noted that Ms. Jones suffered from depression; however, the Office of Judges was not clearly wrong in its determination that Dr. Miller's independent medical evaluation merited more evidentiary weight than Dr. Voltin's reports. Since depression is not a compensable component of the claim, the requested medication to treat depression cannot be authorized.

Ms. Jones argues before this Court that depression is an element of post-concussion syndrome and chronic pain syndrome, which are compensable conditions in the claim, and therefore the requested medication to treat depression should be authorized. As noted above, the Office of Judges concluded that her depression is unrelated to the compensable injury. Additionally, there was no evidence presented indicating that Ms. Jones's post-concussion syndrome, concussion, or chronic pain syndrome caused her to develop depression.

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: October 7, 2015

CONCURRED IN BY:

Chief Justice Margaret L. Workman
Justice Robin J. Davis
Justice Brent D. Benjamin
Justice Allen H. Loughry II

DISSENTING:

Justice Menis E. Ketchum