

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON

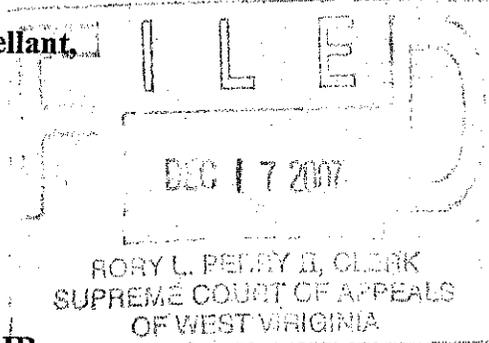
SWVA, INC.,

Appellant,

v.

ELMER ADKINS, JR.,

Appellee.



Claim No.: 2004-009712

DLE: 08-28-03

Appeal No.: 33708

BRIEF OF APPELLANT
SWVA, INC.

H. TONEY STROUD
MORGAN PALMER GRIFFITH
STEPTOE & JOHNSON PLLC
7TH FLOOR, CHASE TOWER
707 VIRGINIA STREET EAST
CHARLESTON, WEST VIRGINIA 25301

ATTORNEY FOR APPELLANT
SWVA, INC.

STEPTOE & JOHNSON PLLC
Charleston, West Virginia

Of Counsel

TABLE OF CONTENTS

	<u>Page</u>
NATURE OF THE CASE AND RULINGS BELOW.....	1
STATEMENT OF FACTS.....	2
STANDARD OF REVIEW.....	3
POINTS OF AUTHORITY.....	4
DISCUSSION.....	4

THE BOARD OF REVIEW WAS PLAINLY WRONG IN
AUTHORIZING DIGITAL HEARING AIDS BECAUSE THE
EVIDENCE FAILS TO ESTABLISH THAT DIGITAL
HEARING AIDS ARE REASONABLY REQUIRED
TREATMENT IN THIS CLAIM.

PRAYER FOR RELIEF.....	8
------------------------	---

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON

SWVA, INC.,

Appellant,

v.

Claim No.: 2004-009712

DLE: 08-28-03

Appeal No.: 33708

ELMER ADKINS, JR.,

Appellee.

BRIEF OF APPELLANT
SWVA, INC.

NATURE OF THE CASE AND RULINGS BELOW

Appellant, SWVA, Inc. ("SWVA"), appeals from the Workers' Compensation Board of Review's April 7, 2006 order, which reversed the Office of Judges' January 20, 2005 decision. The Office of Judges' decision had affirmed a September 15, 2003 order, granting authorization for standard hearing aids. The Board ordered that digital hearing aids be authorized. SWVA asserts that the Board's decision was plainly wrong as there had been no showing that standard hearing aids were insufficient; or conversely, that digital hearing aids were reasonably required to treat the compensable injury. SWVA requests that this Honorable Court reverse the Board's April 7, 2006 decision.

STATEMENT OF FACTS

The claimant was born in 1945. In 1984, he began working at SWVA. On May 29, 2003, the claimant had his hearing tested. His audiogram pattern was unusual for an occupational noise induced hearing loss claim in that it showed hearing loss in the low and mid frequencies—even as low as 500Hz.

On that date, the claimant completed a report of occupational hearing loss. Dr. Charles Abraham completed the physician's portion of the application. Dr. Abraham noted that the claimant had mild to moderate hearing loss from 500 to 6000Hz. Dr. Abraham diagnosed sensorineural hearing loss and suggested that the claimant had a 10.27% impairment. Dr. Abraham requested authorization for hearing aids, but did not specify a type or model.

By order dated September 15, 2003, the Commission held the claim compensable. By separate order dated September 15, 2003, the claimant received authorization for standard binaural hearing aids. The claimant protested the latter order, as he desired digital hearing aids.

In support of his protest, the claimant submitted Dr. Abraham's October 9, 2003 letter. Dr. Abraham discussed the claimant's audiogram's "odd configuration" (sloping loss in the mid frequencies with an upward slope in the higher frequencies). He opined that the best treatment for this claimant was digital hearing aids. Dr. Abraham went on to expound upon the conveniences of digital hearing aids.

By order dated January 20, 2005, the Office of Judges affirmed the authorization of standard binaural hearing aids. The administrative law judge recognized that the digital hearing aids might give "more satisfaction" and provide "good benefit" in the words of Dr. Abraham, as compared to the conventional hearing aids. Dr. Abraham failed to state

why standard hearing aids would not work for this claim and the administrative law judge found that the fact that the digital aids were “better” was not a medical justification for their authorization—particularly when it was not shown that standard hearing aids would be ineffective.

On April 7, 2006, the Board of Review reversed the administrative law judge’s decision and authorized digital hearing aids based upon Dr. Abraham’s report.

Following the Board’s order, SWVA authorized #V5259 programmable digital hearing aids.¹ On July 7, 2006, the self-insured employer paid \$3,500.00 to Dr. Abraham for these hearing aids.

Thereafter, on November 7, 2007, this Court accepted SWVA’s petition for appeal.

STANDARD OF REVIEW

This Court has held that an order of the Appeal Board affirming the finding of the Commission will not as a general rule be set aside *if there is substantial evidence and circumstances to support it. McGeary vs. State Comp. Dir.*, 148 W. Va. 436, 135 S.E.2d 345 (1964) (emphasis added). More recently, this Honorable Court reiterated its position that it “will not reverse a finding of fact made by the Workers’ Compensation Board of Review unless it appears from the proof upon which the appeal board acted that the finding is plainly wrong.” *Conley v. Workers’ Compensation Division*, 199 W. Va. 196, 483 S.E.2d 542 (1997). “Moreover, the plainly wrong standard of review is a deferential one, which presumes an administrative tribunal’s actions are valid as long as the decision is supported by substantial evidence.” *Id.*

¹ ITC (in the canal) type digital hearing aid. This hearing aid is custom-made to fit the ear canal. There are no wires or tubes and it is not visible.

POINTS OF AUTHORITY

West Virginia Code § 23-4-3.

West Virginia CSR § 85-20-1.

West Virginia CSR § 85-20-4.1.

West Virginia CSR § 85-20-47.11.

West Virginia Code § 23-5-15.

Bilbrey v. Workers' Compensation Commissioner, 186 W.Va. 319,
412 S.E.2d 513 (1991)

DISCUSSION

THE BOARD OF REVIEW WAS PLAINLY WRONG IN AUTHORIZING DIGITAL HEARING AIDS BECAUSE THE EVIDENCE FAILS TO ESTABLISH THAT DIGITAL HEARING AIDS ARE REASONABLY REQUIRED TREATMENT IN THIS CLAIM.

West Virginia Code § 23-4-3 requires the Commission and self-insured employers to disburse and pay for personal injuries to employees who are entitled to benefits under this chapter including: sums for health care services, rehabilitation services, durable medical and other goods and other supplies and medically related items as may be reasonably required to treat the compensable injury. While the Commission and the Office of Judges refused digital hearing aids—instead authorizing standard (conventional) aids—the Board of Review authorized the digital hearing aids. SWVA asserts that the Board members were clearly wrong in authorizing digital hearing aids.

By way of background, all hearing aids include a microphone, an amplifier, a receiver, and a volume control. However, digital hearing aids offer additional features including multi-channels, frequency specific control of amplification, multi-microphones, better response for low-pitched sounds and remote control, and are programable via a

computer. These additional features are expensive as digital aids cost approximately three times as much as conventional aids.²

Digital hearing aids are no doubt desirable, given their convenience, features, and cosmetic appeal as they are discreetly worn inside the ear. However, the evidence shows that standard hearing aids work well and provide quality amplification. Standard hearing aids might not have all the features and might need manual adjustment, but they are effective.

While digital hearing aids offer desirable features, such does not make them "reasonably required" under W.Va. Code §23-4-3. Prior to 2004, there was little guidance on what constituted "reasonably required" treatment. Fortunately, since June 14, 2004, when West Virginia Code of State Regulations §85-20-1 *et seq.* (known as Rule 20) became effective, there has been substantial guidance.³ Even though the order authorizing standard hearing aids in this claim pre-dates Rule 20, the Rule is instructive on the administrative process of medical cost management.

Rule 20 represents our State's comprehensive effort of medical management, addressing the roles of employers, claimants, physicians and other professionals, and describing detailed norms of care for many occupational injuries and diseases. Section 47 of Rule 20 specifically addresses treatment guidelines for workers' compensation claims for noise-induced hearing loss. W.Va. C.S.R. §85-20-47.11 states that the Commission shall

² Digital hearing aid cost between \$3,500 and \$5,000 per pair. SWVA paid \$3,500 to Dr. Abraham for the claimant's digital hearing aids in this claim in July, 2006. Conversely, standard hearing aids cost approximately \$1,200-\$1,500 per pair - approximately a third of cost of digital aids.

³ West Virginia CSR §85-20-1 states that its purpose is to establish a process for the medical management of claims and awards of disability which include, but is not limited to, reasonable and standardized guidelines and parameters for appropriate treatment . . .for common injuries or diseases.

retain the sole discretion to select the hearing aid most appropriate for treatment. As this is a self-insured employer, the self-insured employer retains the sole discretion. The self-insured employer is now clearly vested with the authority and responsibility of determining whether the doctor-recommended hearing amplification is "reasonably required."

Moreover, under W.Va. C.S.R. §85-20-4.1, the treatment chosen by the self-insured employer is *presumed* to be medically reasonable. To receive treatment in excess of the guidelines of Rule 20, the claimant must establish, by a preponderance of the evidence, including detailed and documented medical findings, that the additional treatment is medically reasonable and, further, that causes not directly related to the compensable injury or disease have been eliminated.

In the instant claim, and as determined by the administrative law judge, Dr. Abraham described how the claimant may benefit from digital hearing aids, but failed to state why standard hearing aids are not appropriate. Dr. Abraham simply stated why programable hearing aids are better. The administrative law judge properly concluded that the medical evidence of record failed to establish that standard binaural hearing aids are unacceptable. Clearly, as the administrative law judge apparently recognized, unless the generally accepted treatment is shown to be ineffective or inappropriate, the more costly treatment is *not* "reasonably required." To accept Dr. Abraham's contention would be to accept the proposition that a claimant be sent to the best facility in the United States for treatment as opposed to receiving reasonable treatment at one of the fine medical facilities in this state.

Moreover, the administrative law judge apparently understood, but the Board overlooked, that the prevailing reason that digital aids are "better" in Dr. Abraham's view is

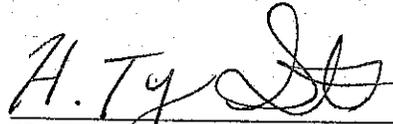
the better function of the digital aids in the *lower* frequencies, which are *not* generally affected by occupational noise exposure. As stated in *Bilbrey v. Workers' Compensation Commissioner*, 186 W.Va. 319, 412 S.E.2d 513 (1991) and in the hearing loss evaluation rules in effect at the time of the instant claim (W.Va. C.S.R. §85-13-14.8) (1996)), noise exposure usually does not affect hearing in the low frequencies. Furthermore, if the audiogram is "atypical of a noise-induced" pattern, the physician should consider that other non-occupational etiologies are affecting the loss. Here, Dr. Abraham clearly explained that the claimant's audiogram is an "odd configuration," with loss in lower frequencies, as well as the high, and that digital aids may be the "best fit." Thus, to the extent digital aids are "better," such is due to the treatment of the non-occupational component that is not the responsibility of this employer.

Lastly, Dr. Abraham fairly asserted that the medical literature which fails to support digital aids is becoming dated and that "true comparative research can also take months or years to complete." Instead, he offered his own opinions of the advancement of medical technology, and reminded us that, at one time, MRI's were unnecessary and/or too expensive. He also argued that the federal government, through the Veterans Administration, had recently contracted for the provision of digital hearing aids. Dr. Abraham's opinions, while well meaning and intended to provide his patient the best product on the market, must not be confused with the important medical management standard of W.Va. Code §23-4-3 and, now, comprehensively applied in Rule 20. "Reasonably required" does not, and must not mean the newest or even the best product on the market, or keeping pace with federally-funded contracts. The West Virginia Workers' Compensation system charges the Commission and the self-insured employer with the authority and responsibility of managing workers'

compensation treatment and costs. Such management must be done not only with the individual patient in mind, but also in consideration of fiscal responsibility and the fair distribution of benefits for all workers. Neither Dr. Abraham's laudable efforts nor the opinions of the judiciary should be substituted for the comprehensive and discretionary role of medical treatment oversight and medical cost management.

PRAYER FOR RELIEF

SWVA respectfully prays that this Honorable Court reverse the Board of Review's April 7, 2006 decision.



H. Toney Stroud [WVSB #7800]
Morgan Palmer Griffith [WVSB #7721]
Steptoe & Johnson PLLC
7th Floor, Chase Tower
707 Virginia Street East
Charleston, West Virginia 25301

STEPTOE & JOHNSON PLLC
Charleston, West Virginia
Of Counsel

Attorney for Appellant
SWVA, Inc.

8675.00165

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON

SWVA, INC.,

Appellant,

v.

Claim No.: 2004-009712

DLE: 08-28-03

Appeal No.: 33708

ELMER ADKINS, JR.,

Appellee.

CERTIFICATE OF SERVICE

I hereby certify that I have this 17th day of December, 2007, served the foregoing "**Brief of Appellant, SWVA Inc.,**" upon all counsel of record by depositing a true copy thereof in the United States mail, postage prepaid, in an envelope addressed as follows:

Edwin Pancake, Esquire
Post Office Box 3709
Charleston, WV 25337

A. Ty Ste

867500/00165