

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

January 14, 2014

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

**NANCY J. COST,
Claimant Below, Petitioner**

vs.) **No. 12-0607** (BOR Appeal No. 2046573)
(Claim No. 2002022338)

**WHEELING-PITTSBURGH STEEL CORPORATION,
Employer Below, Respondent**

MEMORANDUM DECISION

Petitioner Nancy J. Cost, by M. Jane Glauser, her attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review.

This appeal arises from the Board of Review's Final Order dated April 20, 2012, in which the Board affirmed an October 13, 2011, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges denied Ms. Cost's request for attorney's fees and costs arising from the litigation of the claims administrator's July 31, 2009, decision denying Ms. Cost's request to add anxiety and depression as compensable components of her claim. 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. Cost injured her back while operating a jackhammer on October 3, 2001, and the claim was held compensable for lumbar sprain. On May 13, 2005, Dr. Bailey found that Ms. Cost was suffering from major depressive disorder. However, on April 29, 2005, the claims administrator denied a request to add depression as a compensable component of the claim. On October 7, 2005, the Office of Judges affirmed the April 29, 2005, claims administrator's decision, and on May 18, 2006, the Board of Review affirmed the October 7, 2005, Office of Judges' Order. On January 26, 2009, this Court reversed the May 18, 2006, Order of the Board

of Review and remanded the claim for a referral to an appropriate medical professional for an evaluation of whether depression and anxiety are compensable components of the claim, and for further consideration of Ms. Cost's request to add depression and anxiety as compensable components of the claim upon receipt of said report. Following an evaluation by Dr. Burstein, a Board-certified psychiatrist, who found that Ms. Cost did not have a work-related psychiatric disorder, the claims administrator denied Ms. Cost's request to add depression and anxiety as compensable components of the claim on July 31, 2009. Following the Office of Judges' April 28, 2011, reversal of the July 31, 2009, claims administrator's decision, Ms. Cost filed a petition for attorney's fees and costs arising from the litigation of the July 31, 2009, decision. In its Order of October 13, 2011, the Office of Judges held that Ms. Cost is not entitled to an award of attorney's fees and costs stemming from the litigation of the July 31, 2009, claims administrator's decision.

West Virginia Code § 23-2C-21(c) (2009) states:

Upon a determination by the Office of Judges that a denial of compensability, a denial of an award of temporary total disability or a denial of an authorization for medical benefits was unreasonable, reasonable attorney's fees and the costs actually incurred in the process of obtaining a reversal of the denial shall be awarded to the claimant and paid by the private carrier or self-insured employer which issued the unreasonable denial. A denial is unreasonable if, after submission by or on behalf of the claimant, of evidence of the compensability of the claim, the entitlement to temporary total disability benefits or medical benefits, the private carrier or self-insured employer is unable to demonstrate that it had evidence or a legal basis supported by legal authority at the time of the denial which is relevant and probative and supports the denial of the award or authorization.

The Office of Judges found that in its July 31, 2009, denial of Ms. Cost's request to add additional compensable components to the claim, the claims administrator relied on the opinion of Dr. Burstein. The Office of Judges then found that its April 28, 2011, reversal of the July 31, 2009, claims administrator's decision was based in part on documents not in existence at the time of the claims administrator's decision. Further, the Office of Judges found that the claims administrator had a legal basis for denying Ms. Cost's request to add additional compensable components to the claim because it relied on the opinion of a Board-certified psychiatrist in making its decision. The Office of Judges concluded that the claims administrator's denial of Ms. Cost's request to add anxiety and depression as compensable components of the claim was not unreasonable. Therefore, the Office of Judges further concluded that an award of attorney's fees and costs is not warranted in the instant claim. The Board of Review reached the same reasoned conclusions in its decision of April 20, 2012. We agree with the reasoning and conclusions of the Board of Review.

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 Allen H. Loughry II

DISSENTING:

Justice Menis E. Ketchum

Justice Brent D. Benjamin, not participating