

SUPREME COURT OF APPEALS OF WEST VIRGINIA

George F. Butcher v. W. Va. Ofc. of Ins. Comm./A.C. Dellovade, Inc.

Butcher · No. No. 16-0161 · Decided February 3, 2017

SUMMARY

The Supreme Court of Appeals of West Virginia affirmed the denial of authorization for the medications Vyvanse and Ketamine in a workers' compensation claim. The court concluded that Vyvanse was primarily prescribed for attention deficit hyperactivity disorder, which was not a compensable condition, and that the request for Ketamine was unsupported by the evidentiary record. The decision was issued as a memorandum decision under Rule 21 of the West Virginia Rules of Appellate Procedure, with one justice dissenting.

CASE DETAILS

COURT	Supreme Court of Appeals of West Virginia
WRITING FOR THE COURT	Chief Justice Allen H. Loughry II; Justice Robin J. Davis; Justice Menis E. Ketchum; Justice Elizabeth D. Walker; Justice Margaret L. Workman
JURISDICTION	West Virginia
DECIDED	February 3, 2017
DOCKET	No. 16-0161
DISPOSITION	affirmed
PROCEDURAL POSTURE	Petitioner's appeal from the West Virginia Workers' Compensation Board of Review's affirmance of the denial of authorization for the medications Vyvanse and Ketamine.
STANDARD OF REVIEW	The Board of Review's decision would be reversed only if it clearly violated a constitutional or statutory provision, clearly resulted from erroneous conclusions of law, or was based on a material misstatement or mischaracterization of the evidentiary record. The Court also considered whether there was a substantial question of law or prejudicial error.
PRECEDENTIAL VALUE	Published memorandum decision; the opinion states that it is issued under Rule 21 as a memorandum decision.
PARTIES	George F. Butcher v. West Virginia Office of the Insurance Commissioner, A.C. Dellovade, Inc.

TOPICS

workers compensation

judicial review of agency action

standard of review

appellate procedure

PRACTICE AREAS

workers compensation

administrative law

appellate procedure

QUESTIONS PRESENTED

1. Whether the Workers' Compensation Board of Review properly affirmed the denial of authorization for Vyvanse.
2. Whether the Workers' Compensation Board of Review properly affirmed the denial of authorization for Ketamine.
3. Whether the Board of Review's decision clearly violated a constitutional or statutory provision, resulted from erroneous conclusions of law, or rested on a material misstatement or mischaracterization of the evidentiary record.

HOLDINGS

1. The denial of authorization for Vyvanse was proper because the evidence indicated that it was primarily prescribed to treat attention deficit hyperactivity disorder, which was not a compensable condition in the claim.
2. The denial of authorization for Ketamine was proper because the evidentiary record did not adequately support the request.
3. The Board of Review's decision did not clearly violate a constitutional or statutory provision, result from erroneous conclusions of law, or rely on a material misstatement or mischaracterization of the evidentiary record.

KEY QUOTATIONS

“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.” (at 2)

FACTUAL BACKGROUND

George F. Butcher suffered a work-related injury on October 3, 1979, requiring a below-the-knee amputation. His treating physician prescribed or recommended Ketamine for phantom limb pain and Vyvanse for attention deficit hyperactivity disorder, depression, energy, and focus. The claims administrator denied authorization for both medications. The administrative tribunals concluded that the evidence did not support Ketamine and that attention deficit hyperactivity disorder was not a compensable condition supporting Vyvanse.

PROCEDURAL HISTORY

The claims administrator denied authorization for Vyvanse and Ketamine on January 16, 2014. The Workers' Compensation Office of Judges affirmed the denial on May 29, 2015, and the Workers' Compensation Board of Review affirmed that decision in a Final Order dated January 29, 2016. The Supreme Court of Appeals of West Virginia affirmed the Board's decision in a memorandum decision.

DISPOSITION

affirmed

OPINION

George F. Butcher v. W. Va. Ofc. of Ins. Comm./A.C. Dellovade, Inc.

PER CURIAM.

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

GEORGE F. BUTCHER, FILED

February 3, 2017 Claimant Below, Petitioner RORY L. PERRY II, CLERK

SUPREME COURT OF APPEALS

OF WEST VIRGINIA

vs.) No. 16-0161 (BOR Appeal No. 2050582) (Claim No. 800025170)

WEST VIRGINIA OFFICE OF THE INSURANCE COMMISSIONER,

Commission Below, Respondent and

A.C. DELLOVADE, INC.,

Employer Below, Respondent

MEMORANDUM DECISION

Petitioner George F. Butcher, by Patrick K. Maroney, his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. West Virginia Office of the Insurance Commissioner, by Noah Barnes, its attorney, filed a timely response. This appeal arises from the Board of Review's Final Order dated January 29, 2016, in which the Board affirmed a May 29, 2015, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's January 16, 2014, decision to deny a request for authorization of the medications Vyvanse and Ketamine. 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 1 reasons, a memorandum decision is appropriate under Rule 21 of the Rules of Appellate Procedure. Mr. Butcher, an iron worker for A.C Dellovade, Inc., suffered injury in the course of and as a result of his employment on October 3, 1979, which required a below the knee amputation of one of his

legs. A treatment note from Dr. Upshaw dated October 8, 2013, indicated that the use of the medication Ketamine should be approved because it helps the phantom pain associated with Mr. Butcher's leg amputation. Records from Thomas Upshaw, M.D., Mr. Butcher's treating physician, dated December 2, 2013, indicated that Mr. Butcher was seen for continued leg pain and phantom limb pain. Mr. Butcher reported stress, low mood, and low concentration. Dr. Upshaw noted that Mr. Butcher was easily distracted, prone to mistakes, and had low focus. He suggested a trial of the attention deficit hyperactivity disorder medication Vyvanse. He diagnosed depressive disorder, anxiety disorder, and phantom pain. Another record from Dr. Upshaw indicated that the medication Lyrica seemed to be helping the phantom limb pain and the Vyvanse was helping with the depression and attention deficit hyperactivity disorder. On January 16, 2014, the claims administrator denied the medications Vyvanse and Ketamine. Notes from Dr. Upshaw dated April 11, 2014, stated that the Vyvanse gave Mr. Butcher energy and focus to engage effectively in recovery activities including preventative application of an antibiotic cream, which the claimant would forget to apply due to attention deficit hyperactivity disorder impairing his planning and executing. The Office of Judges denied both of the requested medications because it determined that the evidence of record did not support their use. The Office of Judges found that Mr. Butcher did not submit any evidence concerning the denial of the medication Ketamine. The Office of Judges found that the authorization of the medication Vyvanse appeared to be requested for the treatment of attention deficit hyperactivity disorder. Because no evidence was submitted demonstrating that attention deficit hyperactivity disorder was a compensable condition, the Office of Judges denied the request. The Board of Review adopted the findings of the Office of Judges and affirmed its Order. After review, we agree with agree with the consistent decisions of Office of Judges and Board of Review. The evidence of record indicates that the medication Vyvanse was primarily prescribed for the treatment of attention deficit hyperactivity disorder, which is not a compensable condition. The request for the medication Ketamine was not supported by the evidence of record. Mr. Butcher's only evidence regarding the medication Ketamine is a slip from Dr. Upshaw prescribing it for phantom pain. According to the treatment notes from Dr. Upshaw, Mr. Butcher was already taking Lyrica and Vicodin for the phantom pain. Because the evidence of record did not support approving the request for either medication, it was proper for the Office of Judges and Board of Review to deny them. 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 2 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: February 3, 2017 CONCURRED IN BY: Chief Justice Allen H. Loughry II Justice Robin J. Davis Justice Menis E. Ketchum Justice Elizabeth D. Walker DISSENTING: Justice Margaret L. Workman 3

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