

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

**MICHAEL WINEBRIMMER,
Claimant Below, Petitioner**

FILED

November 22, 2017
EDYTHE NASH GAISER, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

vs.) **No. 17-0372** (BOR Appeal No. 2051583)
(Claim No. 2014021212)

**THE PINNACLE GROUP, INC.,
Employer Below, Respondent**

MEMORANDUM DECISION

Petitioner Michael Winebrimmer, by Gregory S. Prudich, his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. The Pinnacle Group, Inc., by Daniel G. Murdock, its attorney, filed a timely response.

There are two issues on appeal. First, whether the diagnoses of brachial neuritis and depression should be added as compensable components in the claim. Second, whether the requested medical treatment should be approved. This appeal arises from the claims administrator's decisions dated January 15, 2015, February 10, 2015, and March 31, 2015, denying the request for a referral to Harry Kornhiser, D.O, for a psychiatric evaluation, denying the request for a referral to a pain clinic for brachial neuritis, denying the request for the authorization of the medication Lyrica, and denying the addition of the diagnoses brachial neuritis and depression as compensable conditions in the claim, respectively. By Order dated September 22, 2016, the Office of Judges affirmed the claims administrator's decisions. The Board of Review affirmed the Order of the Office of Judges on March 21, 2017. 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.

Michael Winebrimmer, a carpenter, sustained an occupational injury on October 8, 2013, when he was carrying a heavy wooden beam up a ladder. The ladder shifted, causing the beam to roll over Mr. Winebrimmer's neck. Mr. Winebrimmer was taken to the emergency room where he underwent a cervical MRI which revealed disc herniations on the right at C5-6 and C6-7. X-rays of the cervical spine revealed degenerative changes and x-rays of the thoracic spine revealed diffuse osteopenia and intervertebral disc space narrowing with osteophytic lipping. The claims administrator held the claim compensable for a right shoulder sprain on October 14, 2013.

Following the injury, Mr. Winebrimmer began seeking treatment from Jennifer Cornelius, M.D. On November 11, 2013, Dr. Cornelius examined Mr. Winebrimmer and diagnosed brachial neuritis. She recommended that a nerve conduction study be performed, which the claims administrator authorized on November 18, 2013. Mr. Winebrimmer presented to Dr. Cornelius on December 11, 2013, complaining of pain in his neck and right shoulder with numbness into his right hand. Mr. Winebrimmer related that he was feeling depressed and attributed it to the compensable injury.

On January 16, 2014, Mr. Winebrimmer underwent an EMG/nerve conduction study which was performed by Celia McLay, D.O. Dr. McLay interpreted the results as being normal and noted that there was no evidence of peripheral nerve injury, brachial plexus injury, or cervical radiculopathy in the right upper extremity. Mr. Winebrimmer was subsequently examined by John Feldenzer, M.D., on January 31, 2014, for complaints of neck pain, arm and hand numbness, tingling, and weakness. Dr. Feldenzer diagnosed acute cervical sprain, cervical radiculitis, and cervical disc prolapse with radiculopathy.

Mr. Winebrimmer underwent an independent medical evaluation performed by A.E. Landis, M.D., on February 26, 2014. Dr. Landis opined that Mr. Winebrimmer sustained soft-tissue injuries involving his neck and right shoulder. Mr. Winebrimmer's symptoms appeared to be related to the cervical spine rather than the right shoulder, although some degree of symptom magnification was noted. Dr. Landis recommended that Mr. Winebrimmer follow up with Dr. Feldenzer and possibly undergo further diagnostic testing of the cervical spine. He also recommended consideration for a neuropsychiatric evaluation given Mr. Winebrimmer's presentation at the time of the examination.

Throughout March and April of 2014, Mr. Winebrimmer continued treating with Dr. Cornelius and complained of issues with anger and depression which he attributed to the compensable injury. Dr. Cornelius diagnosed depression and brachial neuritis. Dr. Cornelius requested authorization for a consultation with a pain clinic for brachial neuritis and for a referral to Dr. Kornhiser for depressive disorder, which was approved by the claims administrator on May 6, 2014. Mr. Winebrimmer subsequently presented to Dr. Kornhiser on July 23, 2014, who described Mr. Winebrimmer as suffering from a mood disorder with depression due to brachial neuritis.

On October 31, 2014, Mr. Winebrimmer was seen by Walid Azzo, M.D., an orthopedic surgeon. Dr. Azzo noted that he reviewed an EMG study which revealed abnormal brachial neuritis. He found that Mr. Winebrimmer had not reached maximum medical improvement and

diagnosed him as suffering from a brachial plexus injury and a herniated disc of the spine. Two months later, Mr. Winebrimmer underwent another independent medical evaluation which was performed by Paul Bachwitt, M.D., on January 7, 2015. Dr. Bachwitt opined that Mr. Winebrimmer's subjective findings were sparse and not credible. He diagnosed Mr. Winebrimmer as having sustained a contusion of the right side of his neck and right shoulder with symptom magnification. Dr. Bachwitt found that Mr. Winebrimmer had reached maximum medical improvement with no impairment and saw no need for further treatment.

On January 8, 2015, Mr. Winebrimmer returned to Dr. Cornelius with complaints of worsening pain and requested a referral to a psychiatrist. Dr. Cornelius diagnosed brachial neuritis and depression and recommended a referral back to Dr. Kornhiser, a referral to a pain specialist, and a prescription of the medication Lyrica. Dr. Cornelius subsequently requested that the diagnoses of brachial neuritis and depression be added as compensable components of the claim. On January 15, 2015, the claims administrator denied the request for a referral to Dr. Kornhiser for a psychiatric evaluation for depression and denied the request for a referral to a pain specialist for brachial neuritis. On February 10, 2015, the claims administrator denied the request for authorization of the medication Lyrica. Finally, the claims administrator denied the request to add brachial neuritis and depression as compensable conditions in the claim on March 31, 2015. The Office of Judges modified the January 15, 2015, claims administrator's decision and authorized the request for a psychiatric evaluation but affirmed the denial of the request for a referral to a pain specialist regarding the diagnosis of brachial neuritis. The Office of Judges subsequently affirmed the denial of the request for authorization of the medication Lyrica. However, the Board of Review noted that these issues are dependent on the decision of whether brachial neuritis and depression are compensable diagnoses, a then-pending issue, and remanded the claim to the Office of Judges.

On December 2, 2015, Mr. Winebrimmer underwent a psychiatric independent medical evaluation performed by Bobby Miller, M.D. Dr. Miller reviewed the medical record and performed a mental status examination of Mr. Winebrimmer together with a battery of psychological tests. Test results were interpreted as revealing suspected malingering and suggested that Mr. Winebrimmer was not a valid reporter of his symptoms. His responses were atypical of persons with genuine psychiatric disorders. Dr. Miller diagnosed undifferentiated somatoform disorder, which he indicated is not compensable under West Virginia Code of State Rules §85-20 (2006), together with malingering and mixed personality traits versus disorder. Dr. Miller specifically disagreed with a diagnosis of depression and opined that it was unlikely that Dr. Cornelius was aware that Mr. Winebrimmer was not a valid reporter of his symptoms.

Mr. Winebrimmer underwent a final independent medical evaluation performed by ChuanFang Jin, M.D., on December 17, 2015. Dr. Jin diagnosed Mr. Winebrimmer as suffering from a history of a right shoulder injury with diagnoses of right shoulder sprain/strain, chronic neck pain with MRI evidence of degenerative disease, and right radiculitis/radiculopathy most likely due to degenerative cervical spine disease. Dr. Jin saw no clinical evidence of brachial neuritis.

On September 22, 2016, the Office of Judges affirmed the January 15, 2015; February 10, 2015; and March 31, 2015, claims administrator's decisions. The Office of Judges first addressed the issue of whether the diagnoses of brachial neuritis and depression should be added as compensable components of the claim. Regarding the diagnosis of brachial neuritis, the Office of Judges noted that Dr. Cornelius was the first and only physician to request that this diagnosis be added to the claim. She referred Mr. Winebrimmer to Dr. Feldenzer, who stated that he could not rule out a diagnosis of brachial neuritis. Dr. Feldenzer recommended an EMG/nerve conduction study be performed. Dr. McLay performed the test and interpreted the results as demonstrating no evidence of a brachial plexus injury. Subsequently, Mr. Winebrimmer underwent several independent medical evaluations and three of the evaluating physicians, Drs. Landis, Bachwitt, and Jin, declined to diagnose brachial neuritis. The Office of Judges noted that aside from Dr. Cornelius, only Dr. Azzo had diagnosed brachial neuritis and it declined to adopt his opinion as he interpreted an EMG study differently than the official examiner, Dr. McLay. Therefore, the Office of Judges concluded that a preponderance of the evidence failed to establish that the diagnosis of brachial neuritis is related to the compensable injury and declined to add it to the claim. Thus, the referral to a pain clinic to address the condition was also denied.

Regarding the diagnosis of depression, the Office of Judges indicated that Dr. Cornelius and Dr. Landis noted symptoms suggesting depression early in the claim. Dr. Kornhiser also confirmed the diagnosis and attributed it to brachial neuritis. However, the Office of Judges determined that the report of Dr. Miller was the most reliable as his was the most complete and comprehensive report regarding Mr. Winebrimmer's psychiatric condition. Dr. Miller diagnosed undifferentiated somatoform disorder, malingering, and mixed personality traits versus disorder and specifically disagreed with a diagnosis of depression. Accordingly, the Office of Judges denied the addition of depression to the claim and denied the request for a referral back to Dr. Kornhiser regarding the diagnosis of depression due to brachial neuritis as it was unrelated to the compensable injury.

Finally, the Office of Judges denied the request for authorization of the medication Lyrica. Lyrica is an anticonvulsant which addresses neuropathic pain and generalized anxiety disorder. There is no evidence in the record that Mr. Winebrimmer suffers from either convulsions or generalized anxiety disorder. The Office of Judges stated that Dr. Cornelius failed to definitively explain why she prescribed Lyrica and noted that in light of all of the pain medication Mr. Winebrimmer is being prescribed, it is unlikely that Lyrica was prescribed as a general pain medication. Rather, the more likely possibility is that Dr. Cornelius prescribed the medication for neuropathic pain due to brachial neuritis, which as mentioned before, was found to not be a compensable condition in the claim. Thus, the Office of Judges denied the request for the medication Lyrica as it had not been demonstrated to be reasonable, necessary, or related to the compensable injury. The Board of Review adopted the findings of fact and conclusions of law of the Office of Judges and affirmed its Order on March 21, 2017.

After review, we agree with the conclusions reached by the Office of Judges and affirmed by the Board of Review. On appeal, Mr. Winebrimmer asserts that the Office of Judges erred in not granting a second extension of the time frame in order to permit him to develop the evidence. This argument is not found to be persuasive. Regarding the merits of the claim, a nerve

conduction study has been performed and demonstrated that Mr. Winebrimmer does not suffer from a brachial plexus injury. Three qualified evaluators have attributed his symptoms to conditions other than brachial neuritis. This condition appears unrelated to the compensable injury and thus, its addition to the claim is denied. Regarding the diagnosis of depression, Dr. Miller performed a battery of psychiatric tests which revealed that Mr. Winebrimmer is not a valid reporter. Dr. Miller declined to diagnose depression and believed that Dr. Cornelius more than likely diagnosed this disorder because she was unaware that Mr. Winebrimmer was not a valid reporter of his symptoms. Thus, the addition of the diagnosis of depression was also properly denied. The requests for a referral to Dr. Kornhiser, a referral to a pain clinic, and authorization of the medication Lyrica are all aimed at treating conditions that have been deemed non-compensable. Accordingly, they were also properly denied.

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: November 22, 2017

CONCURRED IN BY:

Chief Justice Allen H. Loughry II

Justice Robin J. Davis

Justice Margaret L. Workman

Justice Menis E. Ketchum

Justice Elizabeth D. Walker