

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

January 14, 2014

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

ROBERT L. NOON,
Claimant Below, Petitioner

vs.) **No. 12-0553** (BOR Appeal No. 2046464)
(Claim No. 2010135998)

MEDFORD TRUCKING, LLC,
Employer Below, Respondent

MEMORANDUM DECISION

Petitioner Robert L. Noon, by Patrick Kevin Maroney, his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. Medford Trucking, LLC, by Daniel G. Murdock, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated April 4, 2012, in which the Board affirmed a September 8, 2011, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's April 25, 2011, decision denying Mr. Noon's application for reopening of his claim on a temporary total disability benefits basis. 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.

Mr. Noon was a truck driver for Medford Trucking, LLC. On May 19, 2010, Mr. Noon sustained a low back injury while trying to avoid a motor vehicle accident. X-rays taken after the injury revealed anterior and lateral osteophytosis and facet joint degenerative disease in the lumbar spine. But the claims administrator held his injury compensable. On October 19, 2010, Dr. Bachwitt performed an independent medical evaluation of Mr. Noon's injuries. He found that Mr. Noon had a lumbar strain but that he had reached the maximum degree of medical improvement and required no additional treatment. Dr. Bachwitt noted that an MRI of Mr.

Noon's lumbar spine revealed mild degenerative disc disease and facet arthropathy. Mr. Noon then sought treatment from Dr. Cottrell, who found that Mr. Noon had degenerative disc disease and had experienced an increase in his symptoms. Dr. Cottrell also found that Mr. Noon's condition was not improving with treatment. Mr. Noon then submitted an application to the claims administrator requesting that his claim be reopened for additional temporary total disability benefits. In his application, Mr. Noon alleged that his right leg had given out causing him to fall and land on his back. The physician's section of the application was completed by Dr. Cottrell, who indicated that Mr. Noon continued to suffer from constant pain and weakness in his right leg. Dr. Cottrell also stated that he considered Mr. Noon to be temporarily and totally disabled from February 2, 2011, through March 21, 2011. On April 25, 2011, the claims administrator denied Mr. Noon's application. On September 8, 2011, the Office of Judges affirmed the claims administrator's decision. The Board of Review then affirmed the Order of the Office of Judges on April 4, 2012, leading Mr. Noon to appeal.

The Office of Judges concluded that a preponderance of the evidence failed to establish that Mr. Noon sustained an aggravation or a progression of his compensable injury. The Office of Judges concluded that Mr. Noon was not entitled to a reopening of his claim for temporary total disability benefits. The Office of Judges found that the incident in which Mr. Noon's right leg gave out and he fell on his back was related to his non-compensable degenerative condition. The Office of Judges found that Mr. Noon sustained a lumbar strain as a result of the May 19, 2010, incident and that Dr. Bachwitt found that he had reached the maximum degree of medical improvement relating to this condition. The Office of Judges found that even Dr. Cottrell, Mr. Noon's treating physician, indicated that his current symptoms were more related to his non-compensable degenerative disc disease. The Board of Review adopted the findings of the Office of Judges and affirmed its Order.

We agree with the conclusions of the Board of Review and the findings of the Office of Judges. Mr. Noon has not presented any evidence which tends to justify an inference that he has experienced a progression or aggravation of his compensable lumbar strain. *Harper v. State Workmen's Comp. Comm'r*, 160 W. Va. 364, 234 S.E.2d 779 (1977). Mr. Noon's application alleged that he has experienced an increase in symptoms including weakness in his right leg which caused him to fall on his back. But Mr. Noon has a history of degenerative disc disease and the treatment notes of Mr. Noon's own treating physician, Dr. Cottrell, relate his current symptoms to this non-compensable condition. The evidence in the record shows that Mr. Noon's complaints are related to pre-existing degenerative disc disease and not the compensable condition of this claim.

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 Menis E. Ketchum

Justice Allen H. Loughry II

Justice Brent D. Benjamin, not participating